

**DIGEST OF
UNITED STATES PRACTICE
IN INTERNATIONAL LAW
2017**

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Editor

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Introduction

It is my pleasure to introduce the 2017 edition of the *Digest of United States Practice in International Law*. This volume reflects the work of the Office of the Legal Adviser during calendar year 2017, including the final weeks of the Obama Administration and the beginning of the Trump Administration. The State Department publishes the on-line *Digest* to make U.S. views on international law 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. During most of this year, the Office was fortunate to be led by Principal Deputy Legal Adviser Richard Visek, and a number of excerpts from his remarks and presentations over the course of 2017 are included in this edition.

This volume features explanations of U.S. international legal views in 2017 delivered by representatives of the U.S. government. Secretary of State Rex Tillerson announced the conclusion that ISIS is responsible for genocide against Yezidis, Christians, and Shia Muslims in areas it controls or has controlled, as well as crimes against humanity and ethnic cleansing directed at these and other minority groups. Secretary Tillerson also spoke in 2017 on the crisis in Burma's Rakhine State, conveying the U.S. view that the situation in northern Rakhine state constitutes ethnic cleansing against Rohingya. U.S. Special Adviser Carlos Trujillo at the UN General Assembly's Sixth Committee expressed the U.S. commitment to accountability for atrocity crimes, and support for international, regional, hybrid, and domestic mechanisms that pursue this goal. And, Acting Legal Adviser Rich Visek also commemorated the closure of the International Criminal Tribunal for the former Yugoslavia. Mr. Visek spoke at the Assembly of States Parties of the International Criminal Court, reiterating the United States' long-standing and continuing objection to any ICC assertion of jurisdiction over nationals of States that are not parties to the Rome Statute, absent a UN Security Council referral or the consent of that State. Mr. Visek and Mark Simonoff, Minister Counselor for the U.S. Mission to the United Nations, expressed U.S. views on the work of the International Law Commission in 2017, including the topics of crimes against humanity, provisional application of treaties, general principles of law, evidence before international courts and tribunals, immunity of state officials, protection of the atmosphere, peremptory norms of general international law, succession of states in respect of state responsibility, and protection of the environment in relation to armed conflicts. The administration's views were also conveyed in Congressional communications, including several regarding the domestic and international legal bases for the campaign against al-Qa'ida and associated forces, including against the Islamic State of Iraq and Syria.

There were numerous developments in 2017 relating to U.S. international agreements, treaties and other arrangements. The President notified Congress of his intent to renegotiate the North American Free Trade Agreement ("NAFTA"). President Trump also announced the U.S. intent to withdraw from the Paris Agreement on climate change but to begin negotiations to reenter either the Paris Agreement or a new arrangement.

Additionally, the Administration pursued entry into new international obligations in a variety of areas. For example, Mr. Vissek testified before the U.S. Senate on five treaties under consideration that had previously been transmitted: extradition treaties with Kosovo and Serbia; maritime boundary delimitation treaties with Kiribati and the Federated States of Micronesia; and the UN Convention on the Assignment of Receivables in International Trade. The United States entered into new arrangements, including Minute No. 323 to the 1944 Water Treaty with Mexico, outlining joint measures to address water shortages. Four agreements on preventing and combating serious crime entered into force in 2017, with Chile, Romania, New Zealand, and Cyprus. The United States signed new air transport agreements in 2017 with St. Vincent and the Grenadines and with the Kingdom of the Netherlands, in respect of Sint Maarten, and amended air transport agreements with Benin and Sri Lanka. The Minamata Convention on Mercury surpassed the requirement of 50 Parties for entry into force, and the Secretary of State signed the instrument of acceptance to join the 2012 amendments to the Gothenburg Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution. The United States deposited its instrument of ratification for three regional fisheries conventions. The Republic of Cabo Verde concluded a new Status of Forces Agreement (“SOFA”) with the United States. And, the United States ratified the protocol for Montenegro to join NATO.

The United States was very active in its relations with Cuba, concluding a bilateral Joint Statement on Migration that ended the so-called Wet Foot-Dry Foot policy for Cuban migrants; a bilateral treaty to delimit the maritime boundary in the eastern Gulf of Mexico; a bilateral search and rescue agreement; a bilateral agreement to prepare for and respond to oil spills and hazardous substance pollution in the Gulf of Mexico and the Straits of Florida; a bilateral Law Enforcement Memorandum of Understanding; and also convening the sixth meeting of the Bilateral Commission. Later in the year, the United States ordered the departure of non-emergency personnel assigned to the U.S. Embassy in Havana, Cuba, due to health-related attacks on embassy employees, and President Trump signed the National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba (“NSPM”). With respect to the Democratic People’s Republic of Korea (“DPRK”), the Secretary of State designated the DPRK as a State Sponsor of Terrorism in November. In its relations with Russia, the State Department announced that it would require the closure of specified facilities in New York, Washington, D.C., and San Francisco in response to Russia’s invocation of parity to reduce the size of the United States presence in Russia. Several provisions in the Countering America’s Adversaries through Sanctions Act of 2017 (“CAATSA”) relate to, and provide for mandatory sanctions in connection with, Russia. In December, the President issued Proclamation 9683, “Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United State Embassy to Israel to Jerusalem.” The United States condemned the government of Venezuela in several ways including Executive Order 13808, “Imposing Additional Sanctions With Respect to the Situation in Venezuela.” And, recognizing the progress made by the government of Sudan under the Five Track Engagement Plan, including the cessation of aerial bombings and military offensives in Darfur, the United States revoked certain longstanding economic sanctions on Sudan.

In the area of human rights, the United States appeared before the UN Committee on the Rights of the Child in Geneva in May to answer the Committee’s questions with respect to the 2016 U.S. periodic report on its implementation of the two Optional Protocols to the Convention on the Rights of the Child to which the United States is a party. The United States made two submissions to the Committee Against Torture on the Draft Revised General Comment on the implementation of Article 3 of the Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, including a joint submission with the governments of the United Kingdom, Canada, and Denmark. The United States government issued its fifth annual report on implementation of the Magnitsky Act, cumulatively listing the 49 persons sanctioned for their involvement in gross violation of human rights or in the conspiracy that led to the death of Sergei Magnitsky. The first report under the Global Magnitsky Human Rights Accountability Act, authorizing the President to impose financial sanctions and visa restrictions on foreign persons in response to certain gross human rights violations and acts of corruption was released in June of 2017 and in December, the President issued E.O. 13818, to further implement the Global Magnitsky Act.

The U.S. government also participated in litigation and arbitration involving issues related to foreign policy and international law in 2017. The United States filed a brief in the Supreme Court of the United States in *Water Splash, Inc. v. Menon*, asserting that the Hague Service Convention authorizes service of process by mail—and, the Supreme Court agreed in its decision later in the year. The United States successfully opposed the petition for certiorari in *Morfin v. Tillerson*, concerning the reviewability of a consular officer’s decision to deny an immigrant visa to an alien believed to have been “an illicit trafficker in any controlled substance.” The Supreme Court held in *Morales-Santana* that the differing requirements for unwed mothers and fathers to transmit citizenship to their child violate the equal protection clause, but did not apply the shorter one-year period to fathers. The Supreme Court also held that the provisions of Executive Order 13780, “Protecting the Nation From Foreign Terrorist Entry Into the United States,” could be implemented to a large extent. The United States filed a brief in the U.S. Supreme Court in *Jesner v. Arab Bank*, asserting that a corporation can be a defendant in an action under the Alien Tort Statute. The U.S. brief in *Ali v. Warfaa* recommended that certiorari be denied because both the Fourth Circuit and the Executive Branch had concluded that Ali was not entitled to immunity. In *Hernandez v. Mesa*, a damages action for the death of a Mexican national in a shooting across the U.S. border with Mexico by a U.S. Border Patrol Agent, the U.S. brief was filed in the Supreme Court in January and the Supreme Court decided to remand for further proceedings in light of an opinion the Supreme Court had recently rendered on the availability of a tort remedies under *Bivens* (*Ziglar v. Abbasi*). The Supreme Court also decided *Venezuela v. Helmerich & Payne*, addressing the jurisdictional standard under the Foreign Sovereign Immunity Act (“FSIA”) in a case involving the expropriation exception to immunity. The U.S. briefs in *Bennett* and *Rubin* recommended the Court deny certiorari in *Bennett* but grant it in *Rubin* to determine whether §1610(g) of the FSIA creates a freestanding exception to attachment immunity. In the world of arbitration, in August, the United States filed its Response to Iran’s Brief and Evidence in Case A/11 before the Iran-U.S. Claims Tribunal. The United States also participated in an International Civil Aviation Organization dispute settlement proceeding with Brazil under Article 84 of the Chicago

Convention. The United States made non-disputing party submissions in dispute settlement proceedings in several cases in 2017 under NAFTA as well as the United States-Panama Trade Promotion Agreement, and the U.S.-Uruguay Bilateral Investment Treaty (“BIT”).

The *Digest* also discusses U.S. participation in international organizations, institutions, and initiatives. In the UN Security Council, the United States joined in ratcheting up sanctions on the DPRK in response to its nuclear activities, via Resolutions 2371, 2375 and 2397. The United States withdrew from the UN Educational, Scientific, and Cultural Organization (UNESCO) in 2017; it continued its active participation in the Organization of American States’ Inter-American Commission on Human Rights through written submissions and participation in a number of hearings. The United States acted both unilaterally and multilaterally to protect cultural heritage, imposing emergency import restrictions on certain archaeological and ethnological materials from Libya, joining in a G7 ministerial on culture, and joining in adopting UN Security Council Resolution 2347 on the destruction and trafficking of cultural heritage by terrorist groups and in situations of armed conflict.

It is my hope that this collection will contribute to the codification and development of international law, and in particular that it will show that the United States continues to play a leading role in promoting, protecting, and respecting international law around the world.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2017 volume, attorneys whose voluntary contributions to the *Digest* were particularly significant include Henry Azar, James Bischoff, Julianna Bentes, Paul Dean, Steve Fabry, Brian Finucane, Monica Jacobsen, Michael Jacobsohn, Meredith Johnston, Emily Kimball, Jeffrey Kovar, Oliver Lewis, Lorie Nierenberg, Megan O’Neill, Cassie Peters, Shana Rogers, Tim Schnabel, Gabriel Swiney, Charles Trumbull, Thomas Weatherall, Niels von Deuten, and Vanessa Yorke. 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 and Rickita Smith 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*.

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Note from the Editor

The official version of the *Digest of United States Practice in International Law* for calendar year 2017 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 2017 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. Introductions (in Calibri font) prepared by the editor are distinguishable from excerpts (in Times Roman font), which come from the original sources. 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. Bracketed insertions indicate editorial clarification or correction to the original text.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through May 2018) 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 2018 where they relate to the discussion of developments in 2017.

Updates on most other 2018 developments 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, where links to the documents are organized by the chapter in which they are referenced.

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 https://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 <https://www.govinfo.gov>, 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 <https://www.govinfo.gov/app/collection/CDOC>, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at <https://www.govinfo.gov/app/collection/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 <https://www.congress.gov>.

The U.S. government’s official web portal is <https://www.usa.gov>, with links to government agencies and other sites; the State Department’s home page is <http://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:

<https://www.cadc.uscourts.gov/bin/opinions/allopinions.asp>;

U.S. Court of Appeals for the First Circuit:

<http://www.ca1.uscourts.gov/opinions/>;

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://www.ca4.uscourts.gov/opinions/search-opinions>;

U.S. Court of Appeals for the Fifth Circuit:

<http://www.ca5.uscourts.gov/electronic-case-filing/case-information/current-opinions>;

U.S. Court of Appeals for the Sixth Circuit:

<http://www.ca4.uscourts.gov/opinions/search-opinions>;

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:

<http://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:
<http://www.ca10.uscourts.gov/clerk/opinions/daily>;
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 <https://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. Other links to individual federal court websites are available at <http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links>.

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, CITIZENSHIP, AND PASSPORTS

1. Derivative Citizenship: *Morales-Santana*

The United States Supreme Court issued its decision in the *Morales-Santana* case in June 2017. As discussed in *Digest 2016* at 1-12 and *Digest 2015* at 1-6, the case involves the constitutionality of the statutory provisions governing when a child born abroad out of wedlock is granted U.S. citizenship at birth. Plaintiff Morales-Santana was born out of wedlock in the Dominican Republic to a Dominican mother and a U.S. citizen father. His U.S. citizen father did not have the physical presence required under the relevant provision of the Immigration and Nationality Act (“INA”) to transmit U.S. citizenship to Morales-Santana. Morales-Santana later challenged his deportation from the United States, arguing that the differing requirements for out of wedlock citizen fathers and mothers to transmit U.S. citizenship violate the Fifth Amendment’s equal protection clause. The Court of Appeals for the Second Circuit invalidated the ten-year physical presence requirement for out of wedlock fathers, requiring them to instead show the same one-year continuous physical presence required for out of wedlock mothers.

The Supreme Court held that the differing requirements for unwed mothers and fathers violate the equal protection clause, but the Court did not extend the shorter one-year residency requirement to convey citizenship to Morales-Santana, as the Court of Appeals had. Excerpts below from the Court’s opinion (with footnotes omitted) discuss the issue of statelessness, as well as the reasoning for the remedy directed by the Court.

* * * *

The Government maintains that Congress established the gender-based residency differential in §1409(a) and (c) to reduce the risk that a foreign-born child of a U. S. citizen would be born stateless. Brief for Petitioner 33. This risk, according to the Government, was substantially greater for the foreign-born child of an unwed U.S.-citizen mother than it was for the foreign-born child of an unwed U.S.-citizen father. *Ibid.* But there is little reason to believe that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed mothers.

As the Court of Appeals pointed out, with one exception, nothing in the congressional hearings and reports on the 1940 and 1952 Acts “refer[s] to the problem of statelessness for children born abroad.” 804 F. 3d, at 532–533. ... Reducing the incidence of statelessness was the express goal of *other* sections of the 1940 Act. See 1940 Hearings 430 (“stateless[ness]” is “object” of section on foundlings). The justification for §1409’s gender-based dichotomy, however, was not the child’s plight, it was the mother’s role as the “natural guardian” of a nonmarital child. ... It will not do to “hypothesiz[e] or inven[t]” governmental purposes for gender classifications “*post hoc* in response to litigation.” *Virginia*, 518 U. S., at 533, 535–536.

Infecting the Government’s risk-of-statelessness argument is an assumption without foundation. “[F]oreign laws that would put the child of the U.S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father’s citizenship at birth),” the Government asserts, “would *protect* the child of the U.S.-citizen father against statelessness by providing that the child would take his mother’s citizenship.” Brief for Petitioner 35. The Government, however, neglected to expose this supposed “protection” to a reality check. Had it done so, it would have recognized the formidable impediments placed by foreign laws on an unwed mother’s transmission of citizenship to her child. See Brief for Scholars on Statelessness as *Amici Curiae* 13–22, A1–A15.

Experts who have studied the issue report that, at the time relevant here, in “at least thirty countries,” citizen mothers generally could not transmit their citizenship to nonmarital children born within the mother’s country. *Id.*, at 14; see *id.*, at 14–17. “[A]s many as forty-five countries,” they further report, “did not permit their female citizens to assign nationality to a nonmarital child born outside the subject country with a foreign father.” *Id.*, at 18; see *id.*, at 18–21. In still other countries, they also observed, there was no legislation in point, leaving the nationality of nonmarital children uncertain. *Id.*, at 21–22; see Sandifer, A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality, 29 Am. J. Int’l L. 248, 256, 258 (1935) (of 79 nations studied, about half made no specific provision for the nationality of nonmarital children). Taking account of the foreign laws actually in force, these experts concluded, “the risk of parenting stateless children abroad was, as of [1940 and 1952], and remains today, substantial for unmarried U. S. fathers, a risk perhaps greater than that for unmarried U.S. mothers.” Brief for Scholars on Statelessness as *Amici Curiae* 9–10; see *id.*, at 38–39. One can hardly characterize as gender neutral a scheme allegedly attending to the risk of statelessness for children of unwed U.S.-citizen mothers while ignoring the same risk for children of unwed U.S.-citizen fathers.

In 2014, the United Nations High Commissioner for Refugees (UNHCR) undertook a ten-year project to eliminate statelessness by 2024. See generally UNHCR, Ending Statelessness Within 10 Years, online at <http://www.unhcr.org/en-us/protection/statelessness/546217229/special-report-ending-statelessness-10-years.html> (all Internet materials as last visited June 9, 2017). Cognizant that discrimination against either mothers or fathers in citizenship and

nationality laws is a major cause of statelessness, the Commissioner has made a key component of its project the elimination of gender discrimination in such laws. UNHCR, *The Campaign To End Statelessness: April 2016 Update 1* (referring to speech of UNHCR “highlight[ing] the issue of gender discrimination in the nationality laws of 27 countries—a major cause of statelessness globally”), online at <http://www.unhcr.org/ibelong/wp-content/uploads/Campaign-Update-April-2016.pdf>; UNHCR, *Background Note on Gender Equality, Nationality Laws and Statelessness 2016*, p. 1 (“Ensuring gender equality in nationality laws can mitigate the risks of statelessness.”), online at <http://www.refworld.org/docid/56de83ca4.html>. In this light, we cannot countenance risk of statelessness as a reason to uphold, rather than strike out, differential treatment of unmarried women and men with regard to transmission of citizenship to their children.

In sum, the Government has advanced no “exceedingly persuasive” justification for §1409(a) and (c)’s gender-specific residency and age criteria. Those disparate criteria, we hold, cannot withstand inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens.

IV

While the equal protection infirmity in retaining a longer physical-presence requirement for unwed fathers than for unwed mothers is clear, this Court is not equipped to grant the relief Morales-Santana seeks, *i.e.*, extending to his father (and, derivatively, to him) the benefit of the one-year physical-presence term §1409(c) reserves for unwed mothers.

There are “two remedial alternatives,” our decisions instruct, *Westcott*, 443 U. S., at 89 (quoting *Welsh v. United States*, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in result)), when a statute benefits one class (in this case, unwed mothers and their children), as §1409(c) does, and excludes another from the benefit (here, unwed fathers and their children). “[A] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.” *Westcott*, 443 U. S., at 89 (quoting *Welsh*, 398 U. S., at 361 (opinion of Harlan, J.)). “[W]hen the ‘right invoked is that to equal treatment,’ the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.” *Heckler v. Mathews*, 465 U. S. 728, 740 (1984) (quoting *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U. S. 239, 247 (1931); emphasis deleted). “How equality is accomplished . . . is a matter on which the Constitution is silent.” *Levin v. Commerce Energy, Inc.*, 560 U. S. 413, 426–427 (2010).

The choice between these outcomes is governed by the legislature’s intent, as revealed by the statute at hand. . . . Ordinarily, we have reiterated, “extension, rather than nullification, is the proper course.” *Westcott*, 443 U. S., at 89. . . .

The Court has looked to Justice Harlan’s concurring opinion in *Welsh v. United States*, 398 U. S., at 361–367, in considering whether the legislature would have struck an exception and applied the general rule equally to all, or instead, would have broadened the exception to cure the equal protection violation. In making this assessment, a court should “‘measure the intensity of commitment to the residual policy’”—the main rule, not the exception—“‘and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.’” *Heckler*, 465 U. S., at 739, n. 5 (quoting *Welsh*, 398 U. S., at 365 (opinion of Harlan, J.)).

The residual policy here, the longer physical-presence requirement stated in §§1401(a)(7) and 1409, evidences Congress' recognition of "the importance of residence in this country as the talisman of dedicated attachment." *Rogers v. Bellei*, 401 U. S. 815, 834 (1971); see *Weedin v. Chin Bow*, 274 U. S. 657, 665–666 (1927) (Congress "attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent. . . . [T]he heritable blood of citizenship was thus associated unmistakably with residence within the country which was thus recognized as essential to full citizenship." (internal quotation marks omitted)). And the potential for "disruption of the statutory scheme" is large. For if §1409(c)'s one-year dispensation were extended to unwed citizen fathers, would it not be irrational to retain the longer term when the U.S.-citizen parent is married? Disadvantageous treatment of marital children in comparison to nonmarital children is scarcely a purpose one can sensibly attribute to Congress.

Although extension of benefits is customary in federal benefit cases, see *supra*, at 23–24, n. 22, 25, all indicators in this case point in the opposite direction. Put to the choice, Congress, we believe, would have abrogated §1409(c)'s exception, preferring preservation of the general rule.

V

The gender-based distinction infecting §§1401(a)(7) and 1409(a) and (c), we hold, violates the equal protection principle, as the Court of Appeals correctly ruled. For the reasons stated, however, we must adopt the remedial course Congress likely would have chosen "had it been apprised of the constitutional infirmity." *Levin*, 560 U. S., at 427. Although the preferred rule in the typical case is to extend favorable treatment, see *Westcott*, 443 U. S., at 89–90, this is hardly the typical case. Extension here would render the special treatment Congress prescribed in §1409(c), the one-year physical-presence requirement for U.S.-citizen mothers, the general rule, no longer an exception. Section 1401(a)(7)'s longer physical-presence requirement, applicable to a substantial majority of children born abroad to one U.S.-citizen parent and one foreign-citizen parent, therefore, must hold sway. Going forward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim, as the Government suggests, §1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers. . . .

* * * *

2. Attempts to Challenge Passport Denial under the APA: *Hinojosa* and *Villafranca*

The United States filed appellate briefs in two federal cases in 2017 in which litigants who were denied a U.S. passport while overseas, on the basis that they had not established U.S. citizenship, relied on the Administrative Procedure Act ("APA") as a basis for challenging the denial. The lower courts in both cases agreed with the U.S. government that the APA does not provide a remedy under these circumstances because an administrative remedy is provided in 8 U.S.C. § 1503(b)-(c), which allows an applicant who has been denied a right or privilege on grounds of non-nationality to seek lawful entry into the United States by applying at a U.S. diplomatic or consular office for a certificate of identity for the purpose of travelling to a U.S. port of entry and applying for admission. Under 8 U.S.C. § 1503(c), a determination at the port of entry that the

person is not entitled to admission to the United States is subject to judicial review in habeas corpus.

In *Hinojosa v. Horn*, No. 17-40077 (5th Cir.), the applicant claimed she was born in Texas, contrary to indications in her birth record and certificate of baptism that she was born in Mexico. With her application for a U.S. passport, the applicant submitted an affidavit from her purported birth father and a report of DNA testing. After she failed to provide any further evidence in response to the State Department's request, her passport application was denied on the grounds that she had provided insufficient documentation to establish that she had been born in the United States. She then proceeded to file a case in federal court, which proceeded to the U.S. Court of Appeals for the Fifth Circuit. The following is the summary of the U.S. government's argument in its brief on appeal, filed on April 18, 2017. The brief is available in full at <https://www.state.gov/s/l/c8183.htm>.

* * * *

Congress has provided a remedy for an individual, like Hinojosa, who is denied a right or privilege on the ground that she is not a U.S. citizen. For an individual who is outside the United States or who does not reside in the United States, that remedy is set forth at 8 U.S.C. § 1503(b)-(c): she may seek a certificate of identity from a U.S. consulate that she can then use to seek entry to the United States, and, if she is denied entry, may then seek review of that denial in habeas. Hinojosa would rather bypass the procedures set forth at Section 1503(b)-(c) and seek immediate habeas relief or a review of the State Department's action under the APA. But neither the habeas statute nor the APA grants courts jurisdiction over her efforts to evade the statutory scheme. This Court should affirm the District Court's dismissal of her claims.

First, the District Court lacked subject matter jurisdiction over Hinojosa's habeas claim at this point because Hinojosa is not "in custody" as required to establish jurisdiction under the habeas statute. As the Magistrate Judge and the District Court correctly concluded, Hinojosa "is not being subjected to restraints that are not shared by all U.S. citizens," who must bear a U.S. passport to lawfully re-enter the United States, and "are required to prove their citizenship prior to receiving a passport." ROA.153. Her location outside of the United States does not convert the denial of a passport application into "custody." If Hinojosa were correct, analogous government actions that remove individuals from the United States would result in those individuals' continuing (and arguably indefinite) "custody." The Fifth Circuit, however, has rejected that theory and held that such aliens cannot be considered "in custody" for purposes of the habeas statute. See *Merlan v. Holder*, 667 F.3d 538, 539 (5th Cir. 2011).

Second, the District Court also properly dismissed Hinojosa's habeas claim for failure to exhaust her administrative remedies, a precondition to seeking habeas relief in federal court. The Court correctly found no exceptions excusing Hinojosa from that exhaustion requirement. This Court should affirm the District Court's dismissal of Hinojosa's habeas claims on both grounds.

The District Court also properly dismissed Hinojosa’s APA claim. The APA’s waiver of sovereign immunity applies only where there is no alternative statutorily provided remedy or where the alternative remedy is inadequate. Here, however, Section 1503(b) and (c) provide an adequate remedy for Hinojosa to seek admission and, ultimately, judicial review of her claim of citizenship. Where such an adequate, alternative remedy exists, the APA does not permit Hinojosa to bypass that remedy.

Rusk v. Cort, 369 U.S. 367 (1962), a case in which Hinojosa places extensive but misplaced reliance, does not permit a different conclusion. That case held that the APA provided jurisdiction for an individual to challenge, while still abroad, the involuntary forfeiture of his citizenship, and did not require him, as Section 1503 would have, to travel to the United States to face criminal charges and incarceration related to the reasons the Government believed he had forfeited his citizenship. *Rusk* fails to support Hinojosa’s argument, for two reasons. First, as the District Court correctly held, *Rusk* had assumed that the APA was an independent grant of subject-matter jurisdiction, a position the Supreme Court expressly abrogated in *Califano v. Sanders*, 430 U.S. 99, 105 (1977). And second, nothing in *Rusk* suggests that its holding—that an undisputed U.S. citizen at birth should not have to travel to the United States and face criminal penalties to seek relief for an allegedly unconstitutional revocation and deprivation of his citizenship—should extend to an individual who has never been adjudicated to be a U.S. citizen and challenges only the factual finding that she was not. The District Court properly found, instead, that in view of the remedy available to Hinojosa at Section 1503(b)-(c), there is no “final agency action for which there is no other adequate remedy in a court,” 5 U.S.C. § 704, and therefore the APA’s waiver of sovereign immunity does not apply. This Court should affirm that decision.

* * * *

On May 1, 2017, the United States filed its brief on appeal in *Villafranca v. Tillerson*, No. 17-40134 (5th Cir.). In this case, Ms. Villafranca’s passport was revoked after her Mexican birth certificate listing Mexico as her place of birth was discovered. The State Department sent the notice revoking the passport while Ms. Villafranca was in Mexico and advised her that she could pursue the remedy in 8 U.S.C. § 1503(b)-(c), which is described *supra*. The following is the summary of the U.S. argument in its brief on appeal in *Villafranca*. The full text of the brief is available at <https://www.state.gov/s/l/c8183.htm>.

* * * *

The district court properly granted Defendants’ Motion to Dismiss for lack of subject matter jurisdiction because Ms. Villafranca cannot pick and choose her own remedies to challenge her passport revocation when Congress has already outlined her appropriate remedy. The district court correctly dismissed her claim for relief under 8 U.S.C. § 1503(a) because that provision is only available to persons bringing suit from within the United States. It correctly dismissed her habeas claim because it is possible for her to obtain relief from § 1503(b)-(c). It also correctly dismissed her APA claim because § 1503(b)-(c) provides her an adequate alternative to APA

review of her passport revocation. Accordingly, the Court should affirm the district court’s decision to dismiss Ms. Villafranca’s complaint.

* * * *

3. U.S. Passports Invalid for Travel to North Korea

On July 21, 2017, Secretary Tillerson made the determination that “the serious risk to United States nationals of arrest and long-term detention represents imminent danger to the physical safety of United States nationals traveling to and within the Democratic People’s Republic of Korea (DPRK),” pursuant to 22 CFR 51.63(a)(3). Accordingly, “all United States passports are declared invalid for travel to, in, or through the DPRK unless specially validated for such travel, as specified at 22 CFR 51.64.” The restriction on travel to the DPRK was effective 30 days after publication of in the Federal Register, which occurred August 2, 2017. 82 Fed. Reg. 36,067 (Aug. 2, 2017). The action was authorized by 22 U.S.C. § 211a and Executive Order 11295 and 22 CFR 51.63(a)(3). The restriction remains in effect for one year unless extended or revoked by the Secretary of State.

B. IMMIGRATION AND VISAS

1. Consular Nonreviewability

a. Morfin v. Tillerson

In September 2017, the United States filed a brief in the Supreme Court opposing the petition for certiorari in *Morfin v. Tillerson*, No. 17-98. The case involves the reviewability of a consular decision to deny an immigrant visa to an alien spouse of a U.S. citizen based on 8 U.S.C. 1182(a)(2)(C)(i), which relates to aliens for whom there is “reason to believe” they have been “an illicit trafficker in any controlled substance.” The Supreme Court denied the petition for certiorari on October 30, 2017. Excerpts follow (with footnotes omitted) from the U.S. brief opposing cert. See *Digest 2015* at 15-20 for discussion of the Supreme Court’s decision in *Kerry v. Din*.

* * * *

Petitioners contend ... that the court of appeals adopted an erroneous interpretation of 8 U.S.C. 1182(a)(2)(C)(i), which renders inadmissible an alien whom a consular officer has “reason to believe” is or was involved in illicit drug trafficking, and that its holding implicates a disagreement among the courts of appeals on the meaning of that provision. This case, however, does not present that question. Instead, the court of appeals held that petitioner Morfin’s constitutional challenge to the decision to refuse a visa to petitioner Ulloa—an unadmitted, nonresident alien abroad—is foreclosed because the decision rests on a facially legitimate and

bona fide reason, and that therefore no further review of the consular officer's decision is available. That conclusion is correct and does not conflict with any decision of another court of appeals. Further review is not warranted.

1. a. The court of appeals correctly determined that petitioners' challenge to the consular officer's denial of a visa to Ulloa is foreclosed by this Court's decisions in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Kerry v. Din*, 135 S. Ct. 2128 (2015), and the principles that those cases embody.

i. "The exclusion of aliens is a fundamental act of sovereignty" that the Constitution entrusts to the political branches. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). "The right to" exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Ibid.* This Court thus "ha[s] long recognized the power to * * * exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). "[A]ny 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." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952).

In accordance with this constitutional foundation, this Court has long recognized Congress's "plenary power to make rules for the admission of aliens," including by establishing statutory grounds of inadmissibility. *Mandel*, 408 U.S. at 766. Indeed, "[t]his Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo*, 430 U.S. at 792 (citation and internal quotation marks omitted). "The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based" are "wholly outside the power of this Court to control." *Id.* at 796 (citation omitted). Through the INA, Congress has "confer[red] upon consular officers exclusive authority to review applications for visas * * * subject to the eligibility requirements in the statute and corresponding regulations." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1156-1157 (D.C. Cir. 1999). The Department of State's regulations provide that "[a] visa can be refused only upon a ground specifically set out in the law or implementing regulations." 22 C.F.R. 40.6.

To be sure, Congress generally "may, if it sees fit, * * * authorize the courts to" review a decision to exclude an alien based on the eligibility requirements that it has created. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). Absent such affirmative authorization, however, judicial review of the exclusion of aliens outside the United States is ordinarily unavailable. Cf. *Knauff*, 338 U.S. at 542-547 (holding that the Attorney General's decision to exclude at the border the alien wife of a U.S. citizen "for security reasons" was "final and conclusive"). Courts have distilled from these fundamental and longstanding principles the rule—sometimes referred to in shorthand as "the doctrine of consular nonreviewability"—that the denial or revocation of a visa for an alien abroad "is not subject to judicial review * * * unless Congress says otherwise." *Saavedra Bruno*, 197 F.3d at 1159; see *id.* at 1157-1162 (tracing history of nonreviewability doctrine).

Congress has not “sa[id] otherwise,” *Saavedra Bruno*, 197 F.3d at 1159, but instead has declined to provide for judicial review of decisions to exclude aliens abroad. It has not authorized any judicial review of visa refusals— even by the alien affected, much less by third parties like Morfin here. *E.g.*, 6 U.S.C. 236(f) (“Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa.”); see 6 U.S.C. 236(b)(1) and (c)(1). Congress also has expressly forbidden any “judicial review” of the revocation of a visa (subject to a narrow exception if the alien is in removal proceedings in the United States and the only ground of removal is revocation of the visa, an exception inapplicable to aliens abroad). 8 U.S.C. 1201(i).

Indeed, when this Court once held that aliens physically present in the United States—but not aliens abroad—could seek review of their exclusion orders under the APA, see *Brownell v. Tom We Shung*, 352 U.S. 180, 184-186 (1956), Congress intervened to foreclose such review. Congress expressly precluded APA suits challenging exclusion orders and permitted review only through habeas corpus—a remedy that is unavailable to an alien seeking entry from abroad. See Act of Sept. 26, 1961, Pub. L. No. 87-301, §5(a), 75 Stat. 651-653 (8U.S.C. 1105a(b) (1994)). And even in *Tom We Shung*, the Court took it as given that review by aliens abroad was unavailable. See 352 U.S. at 184 n.3 (“We do not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad.”).

To be sure, Congress has created in the APA, 5 U.S.C. 702, “a general cause of action” for “persons ‘adversely affected or aggrieved by agency action within the meaning of a relevant statute.’ ” *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984) (citation omitted). But that cause of action does not permit review of the denial of entry to an alien abroad because the APA does not displace the general rule barring review of decisions to exclude such aliens. See *Saavedra Bruno*, 197 F.3d at 1157-1162. The APA does not apply at all “to the extent that * * * statutes preclude judicial review,” 5 U.S.C. 701(a)(1), and the conclusion is “unmistakable” from the historical context that “the immigration laws ‘preclude judicial review’ of the consular visa decisions,” *Saavedra Bruno*, 197 F.3d at 1160 (citation omitted). In addition, Section 702 itself contains a “qualifying clause” providing that “‘[n]othing herein’—which includes the portion of § 702 from which the presumption of reviewability is derived—‘affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.’ ” *Id.* at 1158 (quoting 5 U.S.C. 702(1)). “[T]he doctrine of consular nonreviewability—the origin of which predates passage of the APA—thus represents one of the ‘limitations on judicial review’ unaffected by [Section] 702’s opening clause granting a right of review to persons suffering ‘legal wrong’ from agency action.” *Id.* at 1160 (citation omitted). In short, Congress has emphatically maintained the bar to judicial review of the denial of entry to aliens abroad. See *id.* at 1157-1162.

ii. The exclusion of aliens abroad typically raises no constitutional questions because aliens abroad lack any constitutional rights regarding entry. “[A]n alien who seeks admission to this country may not do so under any claim of right”; instead, “[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government,” and “only upon such terms as the United States shall prescribe.” *Knauff*, 338 U.S. at 542; see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Mandel*, 408 U.S. at 762.

This Court, however, has twice engaged in limited judicial review when a U.S. citizen contended that the refusal of a visa to an alien abroad impinged upon the citizen's *own* constitutional rights. In *Mandel*, the Executive denied admission—through the denial of a waiver of an inadmissibility—to a Belgian journalist, Ernest Mandel, who wished to speak about communism. 408 U.S. at 756-759. As the Court explained, the alien himself could not seek review because he “had no constitutional right of entry to this country.” *Id.* at 762. The Court addressed (and rejected) only the claim of U.S. citizens that the alien's exclusion violated their own constitutional rights. *Id.* at 770. That claim necessarily failed, the Court held, because the Attorney General (through his delegee) gave “a facially legitimate and bona fide reason” for Mandel's exclusion: Mandel had violated the conditions of a previous visa. *Ibid.*; see *id.* at 759, 769. When the Executive supplies such a reason, *Mandel* concluded, “the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the” asserted constitutional rights of U.S. citizens. *Id.* at 770. The Court expressly did not decide whether review would be available even where no reason was given for denial of a visa. *Id.* at 769.

In *Din*, the Court considered but denied a claim by a U.S. citizen that due process entitled her to a more extensive explanation for the denial of a visa to her alien husband. 135 S. Ct. at 2131-2138 (opinion of Scalia, J.); *id.* at 2139-2141 (Kennedy, J., concurring in the judgment). The plurality concluded that the claim failed because the U.S. citizen had no due-process right in this context. *Id.* at 2131-2138. Concurring in the judgment, Justice Kennedy (joined by Justice Alito) concluded that, assuming without deciding that the U.S. citizen had some liberty interest in her spouse's visa application, any requirements of due process were satisfied because the government provided a facially legitimate and bona fide reason for denying her husband a visa. *Id.* at 2140-2141 (finding that the government's citation of the statutory basis for the refusal provided a facially legitimate reason under *Mandel* and “indicate[d]” that it “relied upon a bona fide factual” basis for denying the visa). The concurring Justices then stated that, “[a]bsent an affirmative showing of bad faith on the part of the consular officer who denied [the] visa—which [the U.S.-citizen plaintiff] ha[d] not plausibly alleged with sufficient particularity—*Mandel* instructs [courts] not to ‘look behind’ the Government's exclusion of [the husband] for additional factual details beyond what its express reliance on [the statute] encompassed.” *Id.* at 2141.

Mandel and *Din* reflect the Constitution's “exclusive[.]” vesting of power over the admission of aliens in the “political branches.” *Mandel*, 408 U.S. at 765 (citation omitted); see *Fiallo*, 430 U.S. at 792-796 (applying *Mandel*'s test to an equal-protection challenge to a statute governing admission of aliens). They also reflect that aliens abroad seeking a visa and initial admission have no constitutional rights at all regarding entry into the country.

iii. The court of appeals correctly applied these principles in rejecting petitioners' claims here. Although much of petitioners' argument is directed to whether the consular officer correctly applied the INA in finding that there was “reason to believe” that Ulloa was involved in drug trafficking, 8 U.S.C. 1182(a)(2)(C)(i); see Pet. 9-21, such statutory challenges to a decision to deny a visa are not reviewable at all. ... And as an alien abroad, Ulloa himself has no constitutional rights in connection with entry into this country. ...

The only contention that the lower courts arguably could entertain (and did entertain) was Morfin's assertion that the decision to deny a visa to Ulloa violated Morfin's own due-process rights. See Pet. App. 3a-8a, 13a-14a. The court of appeals correctly held that—assuming arguendo that any such due-process rights exist, a question *Din* did not resolve—Morfin's claim fails under *Mandel* and *Din* because the consular officer gave a “facially legitimate and bona fide

reason,” which courts “will n[ot] look behind.” *Mandel*, 408 U.S. at 770; see *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). As in *Din*, the consular officer’s citation of Section 1182(a)(2)(C)(i) “indicates” that the officer “relied upon a bona fide factual basis for denying a visa.” 135 S. Ct. at 2140. Indeed, the consular officer’s invocation of that provision—which was even more specific than the statutory provision cited by the consular officer in *Din*, see *id.* at 2141 (addressing 8 U.S.C. 1182(a)(3)(B))—reflects a determination that there was “reason to believe” that Ulloa had been involved in illicit drug trafficking, rendering him inadmissible. 8 U.S.C. 1182(a)(2)(C)(i); see Pet. App. 6a-7a.

The concurring Justices in *Din* stated that, “[a]bsent an affirmative showing of bad faith on the part of the consular officer who denied [the alien spouse] a visa—which [the U.S.-citizen plaintiff] ha[d] not plausibly alleged with sufficient particularity—*Mandel* instructs [courts] not to ‘look behind’ the Government’s exclusion of [the alien] for additional factual details beyond what its express reliance on [the statute] encompassed.” *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). Petitioners have made no showing of bad faith here. See Pet. App. 7a. Petitioners have not shown that the consular officer lacked a “bona fide factual basis” for his decision. *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). To the contrary, as the court of appeals explained, the consular officer clearly identified such a basis. Pet. App. 6a. Accordingly, even assuming that Morfin has a protected due-process interest in this context, there is no occasion to consider that situation here.

b. Petitioners’ counterarguments lack merit. Petitioners contend (Pet. 24) that *Mandel* and *Din* do not preclude “visa denials at consulates from review for legal error.” See Pet. 22-25. That is incorrect. Nothing in either decision says or suggests that review is generally available for any purported legal error in a consular officer’s decision to refuse a visa. And the limited judicial review of constitutional claims of U.S. citizens conducted in *Mandel* and *Din*—which only assumed but did not decide that the constitutional provisions at issue required some explanation for the visa denial—was rooted in an acceptance of the longstanding principle that such decisions generally are *not* reviewable at all. See pp. 12-14, *supra*; Pet. App. 2a-6a; *Saavedra Bruno*, 197 F.3d at 1157-1162. Petitioners do not grapple with this principle or its history. Moreover, *Mandel*’s rule restricting review of First Amendment challenges by U.S. citizens to the exclusion of aliens abroad—limiting review to at most determining whether the responsible official gave a facially legitimate and bona fide reason—would make no sense if garden-variety claims of legal error by consular officers were universally subject to judicial review.

Petitioners assert (Pet. 25) that this understanding of *Mandel* and *Din* would create an incongruity in the immigration laws by making the same alleged error reviewable in removal proceedings (and other matters involving aliens in the United States) but not where an alien abroad challenges the refusal of a visa. But that simply reflects that both the general rule of consular nonreviewability, and *Mandel*’s holding that a constitutional challenge must be rejected at least where a “facially legitimate and bona fide reason” is given, 408 U.S. at 770, applies to the denial of entry to aliens abroad. See pp. 12-14, *supra*. That distinction also reflects the underlying principle that aliens abroad have no constitutional rights regarding their initial admission to the United States. See pp. 12-13, *supra*. Moreover, the fact that Congress *has* provided for limited review of certain issues in the removal context, see 8 U.S.C. 1201(i), 1252, but has provided no review of a consular officer’s visa-denial decisions abroad, shows that what petitioners criticize as an inconsistency is in fact a basic feature of the statutory scheme.

Petitioners’ related contention (Pet. 25) that “there is no reason to believe that Congress intended to prevent courts from engaging in review of consular determinations for legal error” similarly disregards the relevant history. Petitioners focus (Pet. 25-26) on the express preclusion of judicial review in 8 U.S.C. 1252(a)(2)(B) of certain discretionary matters. But that preclusion is included in a section of the INA addressing judicial review of removal orders, see 8 U.S.C. 1252(a)(1), which are entered against aliens in the United States or stopped at the border; it makes clear that discretionary determinations in that setting are not reviewable. Section 1252 does not provide for judicial review of the denial of visas to aliens abroad at all, so subsection (a)(2)(B) of that provision is irrelevant here. And indeed, the fact that Congress did not at the same time affirmatively provide for judicial review of such visa denials reinforces the conclusion that such review is foreclosed.

In pointing to Section 1252(a)(2)(B), moreover, petitioners again do not grapple with the decades-long historical backdrop, which makes clear that “[t]here was no reason for Congress to” preclude review of consular decisions “expressly.” *Saavedra Bruno*, 197 F.3d at 1162. “Given the historical background against which it has legislated over the years * * *, Congress could safely assume that aliens residing abroad were barred from challenging consular visa decisions in federal court unless legislation specifically permitted such actions.” *Ibid*.

* * * *

2. Petitioners principally argue (Pet.9-21) that review is warranted because the court of appeals misread Section 1182(a)(2)(C)(i)’s “reason to believe” standard, and that the decision below implicates an existing conflict on that question. Petitioners are mistaken.

a. The court of appeals’ holding concerned only Morfin’s constitutional challenge to the denial of a visa to Ulloa—the only claim petitioners could arguably assert. Pet. App. 3a-8a. The court was not confronted with the statutory question whether the consular officer was correct to find Ulloa inadmissible. No such statutory claim would have been reviewable at all. See pp. 8-12, *supra*. Instead, the court of appeals decided only that, as a constitutional matter, the consular officer’s stated reason was facially legitimate and bona fide, which under *Mandel* and *Din* required rejection of Morfin’s due-process claim. See Pet. App. 3a-8a.

* * * *

b. Petitioners’ contention (Pet. 10-15) that the decision below implicates an existing conflict among the courts of appeals on the correct interpretation of Section 1182(a)(2)(C)(i) fails for the same reason. The court of appeals’ holding here did not squarely address that issue of statutory interpretation. Any inconsistency in other courts’ articulation of the standard therefore is not relevant here. Cf. *Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321, 334 n.10 (D.C. Cir. 2015) (“[D]icta does not a circuit split make.”).

* * * *

b. Allen v. Milas

As discussed in *Digest 2016* at 22-23, the district court’s decision in *Allen v. Milas*, No. 15-705 (E.D. Cal. 2016) relied on *Din* to reject a challenge to the denial of an application for an immigrant visa for plaintiff’s spouse. The plaintiff appealed. The U.S. brief on appeal, filed January 17, 2017, in the U.S. Court of Appeals for the Ninth Circuit, is excerpted below and available at <https://www.state.gov/s/l/c8183.htm>.

* * * *

This Court should affirm the dismissal. Mr. Allen challenges an actual decision made by the consular officer. He expressly abandons the constitutional argument he made before the district court. . . . What remains is an argument that goes to the heart of what is insulated from judicial review by the doctrine of consular nonreviewability. Allen’s claims of legal error are inapposite. There is no error in the decision of the consular officer, but even if there were, the doctrine of consular nonreviewability would still bar judicial review of the visa refusal.

* * * *

I. Circuit precedent forecloses Allen’s argument that APA review exists to challenge consular decisions.

The doctrine of consular nonreviewability is a common law doctrine with deep historical roots. Under the doctrine, federal courts lack subject matter jurisdiction to review a consular officer’s issuance or refusal of a visa. *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 970-71 (9th Cir. 1986). The doctrine of consular nonreviewability also precludes the Court from reviewing the findings of a consular officer under the guise of the APA, which the doctrine of consular nonreviewability predates. *Li Hing*, 800 F.2d at 971; *see also Bruno v. Albright*, 197 F.3d 1153, 1160-62 (D.C. Cir. 1990).

The doctrine of consular nonreviewability is broad, and precludes the judicial review of a consular officer’s visa decision even if the allegation is that the consular officer erred. *Li Hing*, 800 F.2d at 970-71; *Loza-Bedoya v. INS*, 401 F.2d 343, 347 (9th Cir. 1969); *Capistrano v. Dept of State*, 267 Fed. Appx. 593, 594-95 (9th Cir. 2008). Allen’s argument that there is legal error in the decision of the consular officer, and that that legal error provides a hook for jurisdiction under the APA, is foreclosed by this circuit precedent. To create an avenue for judicial review of consular decisions on the basis of alleged legal error, this Court would have to revisit its prior decisions en banc.

The Supreme Court has repeatedly recognized the principle that “the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government.” *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *see also U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (“[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.”); *Fiallo v. Bell*, 430 U.S. 787, 792

(1977) (“over no conceivable subject is the legislative power of Congress more complete than it is over” the admission of aliens) (quotations omitted).

This principle gives rise to the doctrine of consular nonreviewability. *Li Hing*, 800 F.2d at 970 (“Exercising jurisdiction over this case would, therefore, violate the long-recognized judicial nonreviewability of a consul’s decision to grant or deny a visa.”). This doctrine holds that a “consular official’s decision to issue or withhold a visa is not subject either to administrative or judicial review.” *Id.* at 971.

When Congress passed the INA, it mandated that an alien shall apply for a visa with the consular officer in her country, essentially conferring upon those officials the exclusive discretionary authority to issue and refuse visas. 8 U.S.C. §§ 1104(a)(1), 1201(g)(1). Given the extensive historical deference to consular visa decisions, “Congress could safely assume that aliens residing abroad were barred from challenging consular visa decisions in federal court unless legislation specifically permitted such actions.” *Bruno*, 197 F.3d at 1159-62.

In discussing the doctrine of consular nonreviewability, the Ninth Circuit has noted the history of the INA, and Congress’s rejection of a proposal to create a “semijudicial board, similar to the Board of Immigration Appeals, with jurisdiction to review consular decisions pertaining to the granting or refusal of visas.” *Ventura-Escamilla v. INS*, 647 F.2d 28, 30-31 (9th Cir. 1981).... The INA expressly precludes even the Secretary of State from reviewing consular officer visa determinations. ...

Allen challenges an actual decision made by the consular officer. His claims of error are precisely what is insulated from judicial review by the doctrine of consular nonreviewability. *Ventura-Escamilla*, 647 F.2d at 30 (“Essentially the relief sought is a review of the Consul’s decision denying their application for a visa. Such a review is beyond the jurisdiction of the Immigration Judge, the BIA and this court.”); *Loza-Bedoya*, 410 F.2d at 347; *Braude v. Wirtz*, 350 F.2d 702, 706 (9th Cir. 1965). The doctrine of consular nonreviewability is a near-total bar to judicial review of consular officer decisions. The district court correctly held that to the extent that the court may have jurisdiction, it was only to confirm that the refusal was facially legitimate and bona fide.... Because Allen has now abandoned his constitutional challenge to the consular officer’s refusal, that narrow slice of judicial review has gone away. ... What remains of Allen’s arguments are entirely barred by the doctrine of consular nonreviewability.

There is no error in the decision of the consular officer in this case. But, even if there were, the doctrine of consular nonreviewability would still be a bar to this Court’s jurisdiction. *Loza-Bedoya*, 410 F.2d at 347 (“Though erroneous this Court is without jurisdiction to order any American consular officer to issue a visa to any alien whether excludable or not.”). The Ninth Circuit is part of the consensus that the consular nonreviewability bar is not lifted for an allegation of error. *Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987) (no jurisdiction where allegation was consul’s decision not authorized by the INA); *Burrafato v. Dept’ of State*, 523 F.2d 554, 557 (2d Cir. 1975) (no jurisdiction where allegation was State Department failed to follow its own regulations); *Chun v. Powell*, 223 F.Supp.2d 204, 206 (D.D.C. 2002) (holding that consular nonreviewability applies “where the decision is alleged to have been based on a factual or legal error.”).

Allen now faults the district court for applying the *Mandel* “facially legitimate and bona fide” standard of review. But Allen asked for this type of review in his complaint. ... Now before this Court, Allen is expressly disavowing any type of constitutional challenge to the consular decision. ... Allen is arguing only that there is legal error in the refusal. ... Allen rejects application of the “facially legitimate and bona fide” standard to his case. ... Allen then goes on

to make the striking argument that while only the narrow “facially legitimate and bona fide” review is available for constitutional claims, full APA review should be available for claims of legal error....

This argument makes no sense. There cannot be minimal review available for constitutional claims but wide open review for legal claims. *Mandel* (and *Bustamante* and *Din*) limited judicial review to constitutional claims by U.S. citizen spouse petitioners relating to consular decisions. Since Allen now concedes he is not making a constitutional claim, that small window of review is closed. Not even the “facially legitimate and bona fide” standard of review applies in this case. There is no judicial review whatsoever available to raise a nonconstitutional challenge to the decision of the consular officer. *Loza-Bedoya* 410 F.2d at 347; *Li Hing*, 800 F.2d at 970; *Ventura-Escamilla*, 647 F.2d at 30.

Notwithstanding the precedential force of *Li Hong*, *Loza-Bedoya*, and *Ventura-Escamilla*, Allen argues that there are cases in which this Court has reviewed alleged errors of law in the decision of consular officers. But none of these cases involves the decision of a consular officer to issue or refuse a visa, which is the scope of the doctrine of consular nonreviewability. Allen cites: *ASSE Int’l, Inc. v. Kerry*, 803 F.3d 1059 (9th Cir. 2015), a case challenging the State Department’s imposition of sanctions against an exchange program sponsor. AOB at 18-19. *ASSE Int’l* was not about a visa adjudication by a consular officer, and the doctrine of consular nonreviewability was not discussed. 803 F.3d at 1079.

Next, Allen cites *Singh v. Clinton*, 618 F.3d 1085 (9th Cir. 2010), and *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1997), two cases from the broader category of cases that challenge the authority of the consul to take or fail to take action. ... These cases establish that there may be mandamus relief available where the claim is one of consular inaction—but Allen makes no such allegation in this case. Instead he is challenging the meat of the decision by the consular officer. *Singh* and *Patel* have no bearing on this case.

Next, Allen cites *Wong v. Department of State*, 789 F.2d 1380 (9th Cir. 1986). ... *Wong* involved a challenge to the State Department’s revocation of a visa; the Ninth Circuit held that the doctrine of consular nonreviewability does not apply to visa revocations—it applies only to the consul’s initial decision to grant or refuse a visa. *Li Hing*, 800 F.2d at 970. Allen’s is not a case involving the revocation of a visa that she previously held, so any jurisdiction that could be available to challenge a visa revocation is not available here.

Finally, Allen cites *Braude*, 360 F.2d at 703. ... *Braude* is one of the earliest articulations in this circuit of the doctrine of consular nonreviewability: “we are constrained to hold that no right of judicial review exists on the part of these nonresident aliens of determinations made by the executive branch acting pursuant to Congressional directive.” 350 F.2d at 706. *Braude* does go on to analyze the would-be visa sponsors’ claims under the APA, ultimately holding that the sponsors lacked standing to bring suit. 350 F.2d at 707. The precedent set in *Braude* is therefore that these visa sponsors lack standing to bring suit—not that the APA is a back door means for reviewing the merits of a visa refusal.

The law on this question has been settled for at least 30 years in the Ninth Circuit. *Ventura-Escamilla*, 647 F.2d at 32 (“We repeat: This court is without power to substitute its judgment for that of a Consul, acting pursuant to valid regulations promulgated by the Secretary, on the issue of whether a visa should be granted or denied.”). The APA does not provide a cause of action to assert a claim otherwise barred by the doctrine of consular nonreviewability. *Bruno*, 197 F.3d at 1158-60. Only by ignoring the Ninth Circuit cases directly on point—*Li Hing*, *Ventura-Escamilla*, *Loza-Bedoya*— and analogizing to peripheral cases can Allen advance the

argument that somehow, after all these years, APA review is now available to challenge the decision of the consular officer on the refusal of a particular visa.

* * * *

c. Chehade v. Tillerson

On October 27, 2017, the U.S. Court of Appeals for the Ninth Circuit issued its decision in *Chehade v. Tillerson*, No. 16-55236, affirming the lower court's dismissal of a challenge to the denial of a visa for Rana Chehade, the mother of Rola Chehade. Relying on *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) and *Kerry v. Din*, 135 S.Ct. 2128, 2131 (2015) (plurality opinion), the court found that Rana Chehade had no constitutional right of review and no cause of action, but it assumed that the daughter, a United States citizen, had a protected liberty interest in her relationship with her mother such that she could challenge the process of denying her mother's visa. Applying the reasoning in the plurality opinion in *Kerry v. Din*, the Ninth Circuit concluded that because the consular officer provided a facially legitimate reason for denying the visa application by citing § 1182(a)(3)(B), and the daughter had not shown that the consular officer denied her mother's visa application in bad faith, the case was properly dismissed.

d. Hazama v. Tillerson

On March 20, 2017, the U.S. Court of Appeals for the Seventh Circuit affirmed the lower court's dismissal of a challenge to a consular official's unfavorable decision on a visa application, but held that the lower court erroneously based its dismissal on lack of subject matter jurisdiction rather than the failures to state a claim and to meet the criteria for mandamus relief. *Hazama v. Tillerson*, No. 15-2982. Samira Hazama is a U.S. citizen, married to Ahmed Abdel Hafiz Ghneim, a citizen and resident of the Palestinian Authority. Hazama filed a petition seeking a permanent resident visa for Ghneim, but the consular officer denied the application for three of the reasons enumerated in 8 U.S.C. § 1182(a): the commission of a crime of moral turpitude; previous removal from the United States; and unlawful presence in the United States. Later, a consular officer again denied Ghneim's application for having personally engaged in terrorist activities, another basis listed at 8 U.S.C. § 1182(a)(3)(B)(i). Hazama and Ghneim filed a petition for a writ of mandamus. The Seventh Circuit pointed out that mandamus is proper only if the order would inflict irreparable harm, is not effectively reviewable at the end of the case, and far exceeds the bounds of judicial discretion. Applying *Din*, the Seventh Circuit assumed that Hazama had a sufficient interest in the grant of a visa to her husband to bring a claim, but held that she did not show that the consular decision was not facially legitimate and bona fide.

2. Visa Regulations and Restrictions

a. Nonimmigrant Visas

On September 5, 2017, the State Department published a final rule clarifying procedures regarding waiver of documentary requirements, due to an unforeseen emergency, for nonimmigrants seeking admission to the United States. 82 Fed. Reg. 41,883 (Sep. 5, 2017). The final rule “substantially reinstates a 1999 Department of State regulatory amendment that was invalidated by court order in *United Airlines, Inc. v. Brien*, 588 F.3d 158 (2d Cir. 2009).” *Id.* The notice of proposed rulemaking was issued by the State Department in 2016 and includes additional background. 81 Fed. Reg. 12,050 (Mar. 8, 2016). That background explains:

Pursuant to Section 212(a)(7)(B)(i) of the Immigration and Nationality Act (INA), a nonimmigrant is inadmissible to the United States if he or she does not present an unexpired passport and valid visa at the time of application for admission. 8 U.S.C. 1182(a)(7)(B)(i). Either or both of these requirements may be waived by the Secretary of Homeland Security and the Secretary of State, acting jointly, in specified situations, as provided in INA section 212(d)(4) (8 U.S.C. 1182(d)(4)). One circumstance in which this requirement may be waived is when a nonimmigrant is unable to present a valid visa or unexpired passport due to an unforeseen emergency. In accordance with INA section 212(d)(4) (8 U.S.C. 1182(d)(4)), the Department of State and the Department of Homeland Security have consulted and are acting jointly to propose amendments to 8 CFR 212.1 and 22 CFR 41.2.

b. Presidential Actions

(1) Executive Orders on Foreign Terrorist Entry into the United States

On January 27, 2017, the President issued Executive Order 13769 “Protecting the Nation from Foreign Terrorist Entry into the United States.” 82 Fed. Reg. 8977 (Feb. 1, 2017). Section 3(a) of E.O. 13769 directs the Departments of State and Homeland Security to “conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.” E.O. 13769 suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.

Litigation in multiple federal courts in the United States barred implementation of Executive Order 13769. A stay issued by the U.S. Court of Appeals for the Ninth Circuit on February 9, 2017 applied nationwide. In response, the President revoked Executive Order 13769 and replaced it with Executive Order 13780 of March 6, 2017. 82 Fed. Reg. 13,209 (Mar. 9, 2017), excluding from the suspensions categories of aliens that prompted judicial concerns and otherwise clarifying and refining the previous order.

E.O. 13780 retains in section 2(a) the call in E.O. 13769 for a comprehensive review to identify additional information needed from foreign countries to adjudicate visas and admissions under the INA in order to ensure that individuals admitted are not security or public safety threats. Excerpts follow from E.O. 13769.

* * * *

Sec. 2. *Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional

countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

Sec. 3. *Scope and Implementation of Suspension.*

(a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspension of entry pursuant to section 2 of this order shall apply only to foreign nationals of the designated countries who:

- (i) are outside the United States on the effective date of this order;
- (ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and
- (iii) do not have a valid visa on the effective date of this order.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this order shall not apply to:

- (i) any lawful permanent resident of the United States;
- (ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;
- (iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;
- (iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;
- (v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; or
- (vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspension of entry pursuant to section 2 of this order, a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegate, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest. Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa issuance process will be

effective both for the issuance of a visa and any subsequent entry on that visa, but will leave all other requirements for admission or entry unchanged. Case-by-case waivers could be appropriate in circumstances such as the following:

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.*, traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

(ix) the foreign national is traveling as a United States Government-sponsored exchange visitor.

Sec. 4. *Additional Inquiries Related to Nationals of Iraq.* An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership, since Executive Order 13769 was issued, concerning individuals suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS. Such review shall include consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS, as well as any other information bearing on whether the applicant may be a threat to commit acts of terrorism or otherwise threaten the national security or public safety of the United States.

Also on March 6, 2017, the President issued a Memorandum “Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry Into the United States, and Increasing Transparency Among Departments and Agencies of the Federal Government and for the American People.” 82 Fed. Reg. 16,279 (Apr. 3, 2017). Section 2 of the March 6, 2017 Memorandum directs the Secretaries of State and Homeland Security, in consultation with the Attorney General, to “implement protocols and procedures as soon as practicable that in their judgment will enhance the screening and vetting of applications for visas and all other immigration benefits, so as to increase the safety and security of the American people.”

On June 26, 2017, the U.S. Supreme Court issued a decision on Executive Order 13780. See State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/06/272184.htm>. The Supreme Court decided that most provisions in E.O. 13780 could go into effect. Senior officials in the administration provided a background briefing on implementation of E.O. 13780 on June 29, 2017. The briefing is available at <https://www.state.gov/r/pa/prs/ps/2017/06/272281.htm>, and excerpted below.

* * * *

...We at State will be implementing the executive order in compliance with the Supreme Court’s decision and in accordance with the presidential memorandum issued on June 14th, 2017. We have worked closely with our interagency partners to ensure that this is an orderly rollout. We will, as said before, instruct our posts to begin implementation at 8 o’clock p.m. Eastern Daylight Time, June 29th.

Our plan is not to cancel previously scheduled visa application appointments, so individuals should continue to come in for their visa interviews as scheduled. Our consular officers have then been given detailed instructions to make case-by-case determinations on whether individuals would qualify for visas under the new guidance.

We will first be applying the traditional screening to these individuals. That is, we will be assessing whether they qualify under the Immigration and Nationality Act, and we will then see, if they do qualify under the INA, whether they qualify under the guidance. Individuals who are qualified will then be subjected to all vetting as normal. All security and screening vetting will be applied to anybody who is deemed qualified for a visa.

* * * *

...The executive order does not bar entry for individuals who are excluded from the suspension provision under the terms of the EO who obtain a waiver from State or Customs or who demonstrate a bona fide relationship. USCIS is going to be working in coordination with Department of State and Justice. They have developed guidance for their workforce regarding the adjudication of refugee applications. Both CBP and CIS ... have guidance for their employees and have been working to make sure the employees are well versed in how the EO will be implemented.

* * * *

...I just want to provide a brief update to the extent we have it on the schedule going forward. There is no schedule yet as far as briefings, but the Solicitor General's Office expects that briefs will be due over the summer and that the arguments will likely take place the week of October 1st, which is the beginning of the next Supreme Court term. Again, we don't have finality on that, but that is the expectation within the Department of Justice. And the arguments obviously and the briefing will cover the entire injunction. Obviously, a significant piece of that injunction was lifted, but we will be ... arguing the whole case come October.

* * * *

On September 24, 2017, the President issued Proclamation 9645 on "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats." 82 Fed. Reg. 45,161 (Sep. 27, 2017). The first paragraphs of the Presidential Proclamation state:

In Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), on the recommendations of the Secretary of Homeland Security and the Attorney General, I ordered a worldwide review of whether, and if so what, additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States pose a security or safety threat. This was the first such review of its kind in United States history. As part of the review, the Secretary of Homeland Security established global requirements for information sharing in support of immigration screening and vetting. The Secretary of Homeland Security developed a comprehensive set of criteria and applied it to the information-sharing practices, policies, and capabilities of foreign governments. The Secretary of State thereafter engaged with the countries reviewed in an effort to address deficiencies and achieve improvements. In many instances, those efforts produced positive results. By obtaining additional information and formal commitments from foreign governments, the United States Government has improved its capacity and ability to assess whether foreign nationals attempting to enter the United States pose a security or safety threat. Our Nation is safer as a result of this work.

Despite those efforts, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, has determined that a small number of countries—out of nearly 200 evaluated—remain deficient at this time with respect to their identity-management and information-sharing capabilities, protocols, and practices. In some cases, these countries also have a significant terrorist presence within their territory

Section 1(g) of the Presidential Proclamation identifies the following countries as having “inadequate” identity-management protocols, information-sharing practices, and risk factors: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. As a result, entry restrictions and limitations were imposed for those countries. Sections 2 and 3 of the September 24 Proclamation follow.

* * * *

Sec. 2. *Suspension of Entry for Nationals of Countries of Identified Concern.* The entry into the United States of nationals of the following countries is hereby suspended and limited, as follows, subject to categorical exceptions and case-by-case waivers, as described in sections 3 and 6 of this proclamation:

(a) *Chad.*

(i) The government of Chad is an important and valuable counterterrorism partner of the United States, and the United States Government looks forward to expanding that cooperation, including in the areas of immigration and border management. Chad has shown a clear willingness to improve in these areas. Nonetheless, Chad does not adequately share public-safety and terrorism-related information and fails to satisfy at least one key risk criterion. Additionally, several terrorist groups are active within Chad or in the surrounding region, including elements of Boko Haram, ISIS-West Africa, and al-Qa’ida in the Islamic Maghreb. At this time, additional information sharing to identify those foreign nationals applying for visas or seeking entry into the United States who represent national security and public-safety threats is necessary given the significant terrorism-related risk from this country.

(ii) The entry into the United States of nationals of Chad, as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended.

(b) *Iran.*

(i) Iran regularly fails to cooperate with the United States Government in identifying security risks, fails to satisfy at least one key risk criterion, is the source of significant terrorist threats, and fails to receive its nationals subject to final orders of removal from the United States. The Department of State has also designated Iran as a state sponsor of terrorism.

(ii) The entry into the United States of nationals of Iran as immigrants and as nonimmigrants is hereby suspended, except that entry by such nationals under valid student (F and M) and exchange visitor (J) visas is not suspended, although such individuals should be subject to enhanced screening and vetting requirements.

(c) *Libya.*

(i) The government of Libya is an important and valuable counterterrorism partner of the United States, and the United States Government looks forward to expanding on that cooperation, including in the areas of immigration and border management. Libya, nonetheless, faces significant challenges in sharing several types of information, including public-safety and terrorism-related information necessary for the protection of the national security and public safety of the United States. Libya also has significant inadequacies in its identity-management protocols. Further, Libya fails to satisfy at least one key risk criterion and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal

from the United States. The substantial terrorist presence within Libya's territory amplifies the risks posed by the entry into the United States of its nationals.

(ii) The entry into the United States of nationals of Libya, as immigrants, and as nonimmigrants on business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas, is hereby suspended.

(d) *North Korea.*

(i) North Korea does not cooperate with the United States Government in any respect and fails to satisfy all information-sharing requirements.

(ii) The entry into the United States of nationals of North Korea as immigrants and nonimmigrants is hereby suspended.

(e) *Syria.*

(i) Syria regularly fails to cooperate with the United States Government in identifying security risks, is the source of significant terrorist threats, and has been designated by the Department of State as a state sponsor of terrorism. Syria has significant inadequacies in identity-management protocols, fails to share public-safety and terrorism information, and fails to satisfy at least one key risk criterion.

(ii) The entry into the United States of nationals of Syria as immigrants and nonimmigrants is hereby suspended.

(f) *Venezuela.*

(i) Venezuela has adopted many of the baseline standards identified by the Secretary of Homeland Security and in section 1 of this proclamation, but its government is uncooperative in verifying whether its citizens pose national security or public-safety threats. Venezuela's government fails to share public-safety and terrorism-related information adequately, fails to satisfy at least one key risk criterion, and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal from the United States. There are, however, alternative sources for obtaining information to verify the citizenship and identity of nationals from Venezuela. As a result, the restrictions imposed by this proclamation focus on government officials of Venezuela who are responsible for the identified inadequacies.

(ii) Notwithstanding section 3(b)(v) of this proclamation, the entry into the United States of officials of government agencies of Venezuela involved in screening and vetting procedures—including the Ministry of the Popular Power for Interior, Justice and Peace; the Administrative Service of Identification, Migration and Immigration; the Scientific, Penal and Criminal Investigation Service Corps; the Bolivarian National Intelligence Service; and the Ministry of the Popular Power for Foreign Relations—and their immediate family members, as nonimmigrants on business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas, is hereby suspended. Further, nationals of Venezuela who are visa holders should be subject to appropriate additional measures to ensure traveler information remains current.

(g) *Yemen.*

(i) The government of Yemen is an important and valuable counterterrorism partner, and the United States Government looks forward to expanding that cooperation, including in the areas of immigration and border management. Yemen, nonetheless, faces significant identity-management challenges, which are amplified by the notable terrorist presence within its territory. The government of Yemen fails to satisfy critical identity-management requirements, does not share public-safety and terrorism-related information adequately, and fails to satisfy at least one key risk criterion.

(ii) The entry into the United States of nationals of Yemen as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/ tourist (B–1/B–2) visas, is hereby suspended.

(h) *Somalia*.

(i) The Secretary of Homeland Security’s report of September 15, 2017, determined that Somalia satisfies the information-sharing requirements of the baseline described in section 1(c) of this proclamation. But several other considerations support imposing entry restrictions and limitations on Somalia. Somalia has significant identity-management deficiencies. For example, while Somalia issues an electronic passport, the United States and many other countries do not recognize it. A persistent terrorist threat also emanates from Somalia’s territory. The United States Government has identified Somalia as a terrorist safe haven. Somalia stands apart from other countries in the degree to which its government lacks command and control of its territory, which greatly limits the effectiveness of its national capabilities in a variety of respects. Terrorists use under-governed areas in northern, central, and southern Somalia as safe havens from which to plan, facilitate, and conduct their operations. Somalia also remains a destination for individuals attempting to join terrorist groups that threaten the national security of the United States. The State Department’s 2016 Country Reports on Terrorism observed that Somalia has not sufficiently degraded the ability of terrorist groups to plan and mount attacks from its territory. Further, despite having made significant progress toward formally federating its member states, and its willingness to fight terrorism, Somalia continues to struggle to provide the governance needed to limit terrorists’ freedom of movement, access to resources, and capacity to operate. The government of Somalia’s lack of territorial control also compromises Somalia’s ability, already limited because of poor record-keeping, to share information about its nationals who pose criminal or terrorist risks. As a result of these and other factors, Somalia presents special concerns that distinguish it from other countries.

(ii) The entry into the United States of nationals of Somalia as immigrants is hereby suspended. Additionally, visa adjudications for nationals of Somalia and decisions regarding their entry as nonimmigrants should be subject to additional scrutiny to determine if applicants are connected to terrorist organizations or otherwise pose a threat to the national security or public safety of the United States.

Sec. 3. *Scope and Implementation of Suspensions and Limitations.* (a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspensions of and limitations on entry pursuant to section 2 of this proclamation shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the applicable effective date under section 7 of this proclamation;

(ii) do not have a valid visa on the applicable effective date under section 7 of this proclamation; and

(iii) do not qualify for a visa or other valid travel document under section 6(d) of this proclamation.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this proclamation shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the applicable effective date under section 7 of this proclamation;

(iii) any foreign national who has a document other than a visa—such as a transportation letter, an appropriate boarding foil, or an advance parole document—valid on the applicable effective date under section 7 of this proclamation or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission;

(iv) any dual national of a country designated under section 2 of this proclamation when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa; or

(vi) any foreign national who has been granted asylum by the United States; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspensions of and limitations on entry set forth in section 2 of this proclamation, a consular officer, or the Commissioner, United States Customs and Border Protection (CBP), or the Commissioner’s designee, as appropriate, may, in their discretion, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited if such foreign nationals demonstrate that waivers would be appropriate and consistent with subsections (i) through (iv) of this subsection. The Secretary of State and the Secretary of Homeland Security shall coordinate to adopt guidance addressing the circumstances in which waivers may be appropriate for foreign nationals seeking entry as immigrants or nonimmigrants.

(i) A waiver may be granted only if a foreign national demonstrates to the consular officer’s or CBP official’s satisfaction that:

(A) denying entry would cause the foreign national undue hardship;

(B) entry would not pose a threat to the national security or public safety of the United States; and

(C) entry would be in the national interest.

(ii) The guidance issued by the Secretary of State and the Secretary of Homeland Security under this subsection shall address the standards, policies, and procedures for:

(A) determining whether the entry of a foreign national would not pose a threat to the national security or public safety of the United States;

(B) determining whether the entry of a foreign national would be in the national interest;

(C) addressing and managing the risks of making such a determination in light of the inadequacies in information sharing, identity management, and other potential dangers posed by the nationals of individual countries subject to the restrictions and limitations imposed by this proclamation;

(D) assessing whether the United States has access, at the time of the waiver determination, to sufficient information about the foreign national to determine whether entry would satisfy the requirements of subsection (i) of this subsection; and

(E) determining the special circumstances that would justify granting a waiver under subsection (iv)(E) of this subsection.

(iii) Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa adjudication process will be effective both for the issuance of a visa and for any subsequent entry on that visa, but will leave unchanged all other requirements for admission or entry.

(iv) Case-by-case waivers may not be granted categorically, but may be appropriate, subject to the limitations, conditions, and requirements set forth under subsection (i) of this subsection and the guidance issued under subsection (ii) of this subsection, in individual circumstances such as the following:

(A) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the applicable effective date under section 7 of this proclamation, seeks to reenter the United States to resume that activity, and the denial of reentry would impair that activity;

(B) the foreign national has previously established significant contacts with the United States but is outside the United States on the applicable effective date under section 7 of this proclamation for work, study, or other lawful activity;

(C) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry would impair those obligations;

(D) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry would cause the foreign national undue hardship;

(E) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(F) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee), and the foreign national can document that he or she has provided faithful and valuable service to the United States Government;

(G) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.*, traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;

(H) the foreign national is a Canadian permanent resident who applies for a visa at a location within Canada;

(I) the foreign national is traveling as a United States Government-sponsored exchange visitor; or

(J) the foreign national is traveling to the United States, at the request of a United States Government department or agency, for legitimate law enforcement, foreign policy, or national security purposes.

* * * *

After the September 24, 2017 presidential actions, the Supreme Court canceled the oral arguments scheduled in the previously-filed cases challenging E.O. 13780 and dismissed the cases. Federal courts are considering challenges to the September 24, 2017 Presidential Proclamation.*

* Editor's note: On January 19, 2018, the U.S. Supreme Court granted a petition for certiorari in a case challenging the Presidential Proclamation.

On October 17, 2017, the State Department issued a press statement on follow-up with one of the countries identified as deficient in the Presidential Proclamation: Chad. The October 17, 2017 press statement on visa restrictions for Chad, available <https://www.state.gov/r/pa/prs/ps/2017/10/274877.htm>, relate that U.S. National Security Adviser Lieutenant General H. R. McMaster had spoken to President Idriss Deby Itno of Chad regarding partnering with the United States in countering terrorism and that the government of Chad had shown a willingness to work on identity management practices and information sharing requirements so that vetting capabilities would improve and visa restrictions could be lifted.

On December 8, 2017, the State Department issued a media note announcing that the September 24, 2017 Presidential Proclamation was being fully implemented as of that day. The media note is excerpted below and available at <https://www.state.gov/r/pa/prs/ps/2017/12/276376.htm>.

* * * *

The Department of State is fully implementing Presidential Proclamation 9645 (*Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public-Safety Threats*), as the Supreme Court's December 4, 2017 orders permit. The Department began implementing the full Proclamation at the opening of business (local time) at U.S. embassies and consulates overseas today, Friday, December 8, 2017.

National security is our top priority in visa operations. Our embassies and consulates around the world are fully implementing Presidential Proclamation 9645 to protect the American people, now that U.S. Supreme Court orders permit us to do that and based on extensive guidance provided to them by the Department.

All countries share responsibility to prevent terrorist attacks, transnational crime, and immigration fraud. The Presidential Proclamation directed the Departments of State and Homeland Security to restrict the entry of nationals of Chad, Iran, Libya, North Korea, Syria, Somalia, Venezuela, and Yemen in order to protect the security and welfare of the United States. These restrictions follow an extensive review and engagement with countries around the world involving an assessment of whether countries met certain information sharing criteria. Restrictions are tailored to each country, reflecting the unique factors in place for each.

No visas will be revoked under the Proclamation, and the restrictions are not intended to be permanent. The restrictions are conditional and may be lifted as countries work with the U.S. government to ensure the safety of Americans. Most countries in the world now meet the new requirements, which is an important element of ensuring our security.

The entry restrictions in the Proclamation do not apply to certain categories of individuals, including those who were inside the United States or who had a valid visa on the effective date of the Proclamation, as defined in Section 7 of the Proclamation, even after their visa expires or they leave the United States.

* * * *

(2) *Executive Order on “Buy American and Hire American”*

On April 18, 2017, the President issued an executive order on “Buy American and Hire American.” 82 Fed. Reg. 18,837 (Apr. 21, 2017). Section 2(b) states:

In order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad, including section 212(a)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(5)).

Section 5 provides as follows:

Ensuring the Integrity of the Immigration System in Order to “Hire American.” (a) In order to advance the policy outlined in section 2(b) of this order, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, and consistent with applicable law, propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse.

(b) In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.

c. *Visa restrictions*

On December 6, 2017, the State Department issued a press statement announcing visa restrictions on individuals responsible for undermining Cambodian democracy. The press statement is excerpted below and available at <https://www.state.gov/r/pa/prs/ps/2017/12/276288.htm>.

* * * *

As the White House stated in a November 16, press statement, the United States is taking concrete steps to respond to the Cambodian government’s actions that have undermined the country’s progress in advancing democracy and respect for human rights. These actions—which run counter to the Paris Peace Agreements of 1991 that ended a tragic conflict and accorded the Cambodian people democratic rights—include the dissolution of the main opposition political

party and banning of its leaders from electoral politics, imprisonment of opposition leader Kem Sokha, restriction of civil society, and suppression of independent media.

In direct response to the Cambodian government's series of anti-democratic actions, we announce the Secretary of State will restrict entry into the United States of those individuals involved in undermining democracy in Cambodia. In certain circumstances, family members of those individuals will also be subject to visa restrictions.

We call on the Cambodian government to reverse course by reinstating the political opposition, releasing Kem Sokha, and allowing civil society and media to resume their constitutionally protected activities. Such actions could lead to a lifting of these travel restrictions and increase the potential for Cambodia's 2018 electoral process to regain legitimacy.

We will continue to monitor the situation and take additional steps as necessary, while maintaining our close and enduring ties with the people of Cambodia.

* * * *

d. Presidential signing statement on CAATSA

The Countering America's Adversaries Through Sanctions Act of 2017, Public Law 115–44, Aug. 2, 2017, 131 Stat. 886 (22 U.S.C. 9401 *et seq.*) ("CAATSA") was signed into law on August 2, 2017. The President's signing statement includes the following:

[some of the law's] provisions...would require me to deny certain individuals entry into the United States, without an exception for the President's responsibility to receive ambassadors under Article II, section 3 of the Constitution. My Administration will give careful and respectful consideration to the preferences expressed by the Congress in these various provisions and will implement them in a manner consistent with the President's constitutional authority to conduct foreign relations.

3. Cuba Policy

On January 12, 2017, the United States and Cuba signed a joint statement regarding migration between the two countries, which modifies the Joint Communiqués dated December 14, 1984 and September 9, 1994 and the Joint Statement of May 2, 1995, all of which are collectively known as "Migration Accords." Excerpts follow from the January 12, 2017 Joint Statement.

* * * *

The United States of America and the Republic of Cuba have agreed to take a major step toward the normalization of their migration relations, in order to ensure a regular, safe and orderly migration. ... This Joint Statement is not intended to modify the Migration Accords with respect to the return of Cuban nationals intercepted at sea by the United States or the return of migrants found to have entered the Guantanamo Naval Base illegally.

In this framework, the United States of America shall henceforth end the special parole policy for Cuban nationals who reach the territory of the United States (commonly referred to as the wet foot-dry foot policy), as well as the parole program for Cuban health care professionals in third countries. The United States shall henceforth apply to all Cuban nationals, consistent with its laws and international norms, the same migration procedures and standards that are applicable to nationals of other countries, as established in this Joint Statement.

1. From the date of this Joint Statement, the United States of America, consistent with its laws and international norms, shall return to the Republic of Cuba, and the Republic of Cuba, consistent with its laws and international norms, shall receive back all Cuban nationals who after the signing of this Joint Statement are found by the competent authorities of the United States to have tried to irregularly enter or remain in that country in violation of United States law.

The United States of America and the Republic of Cuba state their intention to promote changes in their respective migration laws to enable fully normalized migration relations to occur between the two countries.

2. The United States of America and the Republic of Cuba shall apply their migration and asylum laws to nationals of the other Party avoiding selective (in other words, discriminatory) criteria and consistent with their international obligations.

3. The United States of America shall continue ensuring legal migration from the Republic of Cuba with a minimum of 20,000 persons annually.

4. The United States of America and the Republic of Cuba, determined to strongly discourage unlawful actions related to irregular migration, shall promote effective bilateral cooperation to prevent and prosecute alien smuggling and other crimes related to migration movements that threaten their national security, including the hijacking of aircraft and vessels.

5. The Republic of Cuba shall accept that individuals included in the list of 2,746 to be returned in accordance with the Joint Communiqué of December 14, 1984, may be replaced by others and returned to Cuba, provided that they are Cuban nationals who departed for the United States of America via the Port of Mariel in 1980 and were found by the competent authorities of the United States to have tried to irregularly enter or remain in that country in violation of United States law. The Parties shall agree on the specific list of these individuals and the procedure for their return.

6. The Republic of Cuba shall consider and decide on a case-by-case basis the return of other Cuban nationals presently in the United States of America who before the signing of this Joint Statement had been found by the competent authorities of the United States to have tried to irregularly enter or remain in that country in violation of United States law. The competent authorities of the United States shall focus on individuals whom the competent authorities have determined to be priorities for return.

As from the date of signing of this Joint Statement, the Parties shall carry out the necessary procedures for its implementation. The Parties may meet and revise such procedures from time to time to ensure effective implementation.

The competent authorities of the United States of America and the Republic of Cuba shall meet on a regular basis to ensure that cooperation under these Migration Accords is carried out in conformity with their respective laws and international obligations.

* * * *

Effective January 13, 2017, the U.S. Department of Homeland Security (“DHS”) eliminated the exception from expedited removal proceedings for Cuban nationals who arrive in the United States at a port of entry by aircraft. 82 Fed. Reg. 4769 (Jan. 17, 2017). The exception, as provided in 235(b)(1)(F) of the Immigration and Nationality Act (“INA”), 8 U.S.C. 1225(b)(1)(F), stated that expedited removal “shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.” *Id.* The exception had long applied to Cuban nationals due to the lack of full diplomatic relations between the United States and Cuba. As discussed in *Digest 2014* at 336, *Digest 2015* at 340-47, and *Digest 2016* at 363-68, the United States and Cuba re-established diplomatic relations in 2015. The Department of Justice issued a notice in parallel with the DHS notice, revising the Executive Office for Immigration Review (“EOIR”) regulations to eliminate the categorical exception from expedited removal proceedings for Cuban nationals who arrive in the United States at a port of entry by aircraft. 82 Fed. Reg. 4771 (Jan. 17, 2017).

At the same time, the exception from expedited removal proceedings for aliens who arrive by sea for Cuban nationals was also eliminated. 82 Fed. Reg. 4902 (Jan. 17, 2017). As summarized in the Federal Register notice:

On November 13, 2002, the former Immigration and Naturalization Service (INS) of the Department of Justice issued a notice designating certain aliens who arrive by sea, either by boat or other means, as eligible for placement in expedited removal proceedings, with an exception for Cuban citizens or nationals (hereinafter “Cuban nationals”). On August 11, 2004, DHS issued a notice designating certain aliens in the United States as eligible for placement in expedited removal proceedings, also with an exception for Cuban nationals. In light of recent changes in the relationship between the United States and Cuba, the Department has determined that the exceptions for Cuban nationals, contained in the designations of November 13, 2002 and August 11, 2004, are no longer warranted and are thus hereby eliminated. The rest of the November 13, 2002 and August 11, 2004 designations, including any implementing policies, are unaffected by this notice and remain unchanged.

4. Removals and Repatriations

The Department of State works closely with the Department of Homeland Security in effecting the removal of aliens subject to final orders of removal. It is the belief of the United States that every country has an obligation to accept the return of its nationals who cannot remain in the United States or any other country.

On May 31, 2017, the President of the United States and the Prime Minister of Vietnam issued a joint statement on enhancing their partnership, which includes the following on removals:

Prime Minister Nguyen Xuan Phuc affirmed that Vietnam will work actively with the United States to expeditiously return Vietnamese nationals subject to final orders of removal, using the 2008 United States-Vietnam Agreement on the Acceptance of the Return of Vietnamese Citizens as a basis. The two leaders pledged to set up a working group to discuss this issue.

The joint statement is available in full at <https://www.whitehouse.gov/briefings-statements/joint-statement-enhancing-comprehensive-partnership-united-states-america-socialist-republic-vietnam//>.

5. Agreements on Preventing and Combating Serious Crime

Three agreements on preventing and combating serious crime (“PCSC Agreements”) entered into force in 2017. Such agreements provide a mechanism for the parties’ law enforcement authorities to exchange personal data, including biometric (fingerprint) information, for use in detecting, investigating, and prosecuting terrorists and other criminals. For background, see *Digest 2008* at 81–83, *Digest 2009* at 66, and *Digest 2010* at 57–58. The agreement with Chile on Enhancing Cooperation in Preventing and Combating Serious Crime, signed at Washington May 30, 2013, entered into force on September 20, 2017. The agreement with Romania on Enhancing Cooperation in Preventing and Combating Serious Crime, signed at Washington October 5, 2015, entered into force on November 8, 2017. And the agreement with New Zealand signed at Washington March 20, 2013 entered into force on December 12, 2017.

C. 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; *Digest 2013* at 23–24; *Digest 2014* at 54–57; *Digest 2015* at 21–24; and *Digest 2016* at 36–40. In 2017, the United States extended TPS designations for Somalia, South Sudan, and Honduras; extended and redesignated Yemen; and announced the termination of TPS for Sudan, Haiti, and Nicaragua, as discussed below.

a. Yemen

On January 4, 2017, the Department of Homeland Security (“DHS”) announced the extension of the designation of Yemen for TPS for 18 months, from March 4, 2017, through September 3, 2018, and the redesignation of Yemen for TPS for 18 months, effective March 4, 2017, through September 3, 2018. 82 Fed. Reg. 859 (Jan. 4, 2017). The extension and redesignation are based on the determination that the conditions in Yemen that prompted the 2016 TPS redesignation continue to exist, specifically, the ongoing armed conflict and other extraordinary and temporary conditions that have persisted and pose a serious threat to the personal safety of Yemeni nationals if they were required to return to their country. *Id.* at 860–61.

b. Somalia

On January 17, 2017, DHS announced the extension of the designation of Somalia for TPS for 18 months from March 18, 2017 through September 17, 2018. 82 Fed. Reg. 4905 (Jan. 17, 2017). The extension was based on the determination that conditions in Somalia supporting the TPS designation continue to be met, namely, ongoing armed conflict and extraordinary and temporary conditions that prevent Somali nationals from returning in safety. *Id.*

c. Haiti

On May 24, 2017, DHS announced the extension of the designation of Haiti for TPS for six months, from July 23, 2017 through January 22, 2018. 82 Fed. Reg. 23,830 (May 24, 2017). The extension was based on the determination that conditions that formed the basis for the designation in the aftermath of the January 2010 earthquake persist, although Haiti has made significant progress in recovering. *Id.*

On November 20, 2017, DHS determined, after reviewing country conditions and consulting with the appropriate U.S. Government agencies, that conditions in Haiti no longer support its designation for TPS. 83 Fed. Reg. 2648 (Jan. 18, 2018). Termination is effective July 22, 2019, in order to allow for an orderly transition.

d. South Sudan

On September 21, 2017, the Department of Homeland Security (“DHS”) announced the extension of the designation of South Sudan for TPS for 18 months, from November 3, 2017, through May 2, 2019. 82 Fed. Reg. 44,205 (Sep. 21, 2017). The extension was based on the determination that the conditions in South Sudan that prompted the 2016 TPS redesignation continue to exist, specifically, the ongoing armed conflict and other extraordinary and temporary conditions that have persisted and pose a serious threat to the personal safety of South Sudanese nationals if they were required to return to their country. *Id.* at 44,206.

e. Sudan

On October 11, 2017, DHS announced the termination of the designation of Sudan for TPS, effective November 2, 2018. 82 Fed. Reg. 47,228 (Oct. 11, 2017). The termination was based on the determination that the conditions in Sudan have sufficiently improved and that ongoing armed conflict no longer prevents the return of nationals of Sudan to all regions of Sudan without posing a serious threat to their personal safety. *Id.* at 47,230. The Federal Register notice further elaborates on the rationale for termination as follows:

Conflict in Sudan is limited to Darfur and the Two Areas (South Kordofan and Blue Nile states). As a result of the continuing armed conflict in these regions, hundreds of thousands of Sudanese have fled to neighboring countries. However, in Darfur, toward the end of 2016 and through the first half of 2017, parties to the conflict renewed a series of time-limited unilateral cessation of hostilities declarations, resulting in a reduction in violence and violent rhetoric from the parties to the conflict. The remaining conflict is limited and does not prevent the return of nationals of Sudan to all regions of Sudan without posing a serious threat to their personal safety.

Above-average harvests have moderately improved food security across much of Sudan. While populations in conflict-affected areas continue to experience acute levels of food insecurity, there has also been some improvement in access for humanitarian actors to provide much-needed humanitarian aid.

Although Sudan’s human rights record remains extremely poor in general, conditions on the ground no longer prevent all Sudanese nationals from returning in safety.

Taking into account the geographically limited scope of the conflict, the renewed series of unilateral cessation of hostilities declarations and concomitant reduction in violence and violent rhetoric from the parties to the conflict, and improvements in access for humanitarian actors to provide aid, the Secretary has determined that the ongoing armed conflict and extraordinary and temporary conditions that served as the basis for Sudan's most recent designation have sufficiently improved such that they no longer prevent nationals of Sudan from returning in safety to all regions of Sudan. Based on this determination, the Secretary has concluded that termination of the TPS designation of Sudan is required because Sudan no longer meets the statutory conditions for designation. To provide for an orderly transition, this termination is effective November 2, 2018, twelve months following the end of the current designation. DHS estimates that there are approximately 1,040 nationals of Sudan (and aliens having no nationality who last habitually resided in Sudan) who currently receive TPS benefits.

f. Honduras

The Secretary of Homeland Security did not make a determination on Honduras's TPS designation by November 6, 2017, the statutory deadline. Accordingly, the TPS designation of Honduras was automatically extended for 6 months, from January 6, 2018 through July 5, 2018. 82 Fed. Reg. 59,630 (Dec. 15, 2017).

g. Nicaragua

On December 15, 2017, the Department of Homeland Security provided public notice of the determination to terminate the designation of Nicaragua for TPS. 82 Fed. Reg. 59,636 (Dec. 15, 2017). The termination is effective January 5, 2019, to allow twelve months for an orderly transition after the end of the current designation. *Id.* The notice in the Federal Register provides the following explanation of the rationale for termination:

DHS has reviewed conditions in Nicaragua. Based on the review, including input received from other relevant U.S. Government agencies, the Secretary has determined that conditions for Nicaragua's 1999 designation for TPS on the basis of environmental disaster due to the damage caused by Hurricane Mitch are no longer met. It is no longer the case that Nicaragua is unable, temporarily, to handle adequately the return of nationals of Nicaragua. Recovery efforts relating to Hurricane Mitch have largely been completed. The social and economic conditions affected by Hurricane Mitch have stabilized, and people are able to conduct their daily activities without impediments directly related to damage from the storm.

Nicaragua received a significant amount of international aid to assist in its Hurricane Mitch-related recovery efforts, and many reconstruction projects have now been completed. Hundreds of homes destroyed by the storm have been rebuilt. The government of Nicaragua has been working to improve access to remote communities and has built new roads in many of the areas affected by Hurricane Mitch, including the first paved road to connect the Pacific side of the country to the Caribbean Coast, which is nearly completed. Access to drinking water and sanitation has improved. Electrification of the country has increased from 50% of the country in 2007 to 90% today. Nearly 1.5 million textbooks have been provided to 225,000 primary students of the poorest regions of the country. Internet access is also now widely available.

In addition, Nicaragua's relative security has helped attract tourism and foreign investment. The Nicaraguan economy has strengthened due to increased foreign direct investment and exports of textiles and commodities.

Nicaragua's Gross Domestic Product (GDP) reached an all-time high of \$13.23 billion (USD) in 2016, has averaged over 5% growth since 2010, and Nicaragua's GDP per capita is higher today than in 1998. Public infrastructure investment has been a high priority for the government, and the government has demonstrated its ability to provide basic services to its citizens. The U.S. Department of State does not have a current travel warning for Nicaragua. DHS estimates that there are approximately 5,300 nationals of Nicaragua (and aliens having no nationality who last habitually resided in Nicaragua) who hold TPS under Nicaragua's designation.

Id. at 59,637.

2. Refugee Admissions in the United States

Presidential Determination No. 2017-13 of September 29, 2017 authorized the admission of up to 45,000 refugees to the United States during Fiscal Year 2018. 82 Fed. Reg. 49,083 (Oct. 23, 2017). The determination includes regional allocations of 19,000 from Africa; 5,000 from East Asia; 2,000 from Europe and Central Asia; 1,500 from America/Caribbean; and 17,500 from Near East/South Asia.

a. Status of the U.S. Refugee Admissions Program

Executive Order 13780, discussed *supra*, mandated a 120-day U.S. government review of the U.S. Refugee Admissions Program ("USRAP") to identify additional national security processes. Section 6 of E.O. 13780, "Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017," follows.

* * * *

(a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

(c) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

* * * *

On June 26, 2017, the Supreme Court issued its opinion in a case challenging E.O. 13780, in which it allowed some provisions of the order to take effect, but blocked others from taking full effect. *Trump v. International Refugee Assistance Project*, No. 16-1436. In accordance with that opinion, an alien with a bona fide relationship with a person or entity in the United States was still able to travel to and be resettled as a refugee in the United States. What constituted “a bona fide relationship with an entity” following the Supreme Court’s ruling was the subject of further litigation. In particular, after the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court ruling that an assurance by a resettlement agency constitutes such a bona fide relationship, the Supreme Court determined on September 12, 2017 that such an assurance did not constitute a bona fide relationship. *Trump v. Hawaii*, No. 16-1540.

The State Department held a briefing on June 29, 2017, after the Supreme Court allowed provisions of E.O. 13780 to take effect. The briefing transcript is available at <https://www.state.gov/r/pa/prs/ps/2017/06/272281.htm>, and includes the following regarding refugee admissions:

For the aspects related to refugees of the executive order, Section 6 is important, and it has two pieces: Section 6(a), which put in place 120-day suspension on the admission of any refugees to the United States, although that section includes an exception for those refugees who are in transit and booked for travel; and Section 6(b), which set a 50,000 limit on the admission of refugees for Fiscal Year 2017. There is an exemption for those individuals who have bona fide relationships, and that applies to both pieces—both 6(a) and 6(b).

Let me just say very briefly that those relationships have been described already, and we’re already giving information out to the field so they can implement it. On the family side, those relationships have been defined to include parents, spouses, children, adult son or daughters, sons and daughter-in-laws, and siblings.**

As regards relationships with entities in the United States, these need to be formal, documented, and formed in the ordinary course of events rather than to evade the executive order itself. Importantly, I want to add that the fact that a resettlement agency in the United States has provided a formal assurance for refugees seeking admission is not sufficient, in and of itself, to establish a bona fide relationship under the ruling. We’re going to provide additional information to the field on this.

But I do want to note that based on our discussions with Department of Justice, we have already informed the field and our various partners that under the in-transit exception, refugees will be permitted to travel if they’ve been booked to travel through July 6th. And we’re going to be addressing what happens to those who’ve been booked to travel after that time and those who are covered by the relationships.

** Editor’s note: Upon further review, fiancés were added to the list of relationships qualifying as close family members.

On October 23, 2017, the State Department, Department of Homeland Security, and Director of National Intelligence sent the President a memorandum providing their determinations: that there should be a 90-day further review of some aspects of the refugee program; that there should be a temporary suspension of a category of refugees called “follow to join” refugees; and that enhanced vetting procedures would be adopted with the resumption of the USRAP based on the 120-day review. The October 23, 2017 agency memo is available at https://www.dhs.gov/sites/default/files/publications/17_1023_S1_Refugee-Admissions-Program.pdf, and excerpted below.

* * * *

Pursuant to section 6(a) [of E.O. 13780], this memorandum reflects our joint determination that the improvements to the USRAP vetting process identified by the 6(a) working group are generally adequate to ensure the security and welfare of the United States, and therefore that the Secretary of State may resume travel of refugees into the United States and that the Secretary of Homeland Security may resume making decisions on applications for refugee status for stateless persons and foreign nationals, subject to the conditions described below.

Notwithstanding the additional procedures identified or implemented during the last 120 days, we continue to have concerns regarding the admission of nationals of, and stateless persons who last habitually resided in, 11 particular countries previously identified as posing a higher risk to the United States through their designation on the Security Advisory Opinion (SAO) list. The SAO list for refugees was established following the September 11th terrorist attacks and has evolved over the years through interagency consultations. The current list of countries was established in 2015. To address these concerns, we will conduct a detailed threat analysis and review for nationals of these high risk countries and stateless persons who last habitually resided in those countries, including a threat assessment of each country, pursuant to section 207(c) and applicable portions of section 212(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1157(c) and 1182(a), section 402(4) of the Homeland Security Act of 2002, 6 U.S.C. 202(4), and other applicable authorities. During this review, the Secretary of State and the Secretary of Homeland Security will temporarily prioritize refugee applications from other non-SAO countries. DHS and DOS will work together to take resources that may have been dedicated to processing nationals of, or stateless persons who last habitually resided in, SAO countries and, during the temporary review period, reallocate them to process applicants from non-SAO countries for whom the processing may not be as resource intensive.

While the temporary review is underway, the Secretaries of Homeland Security and State will cooperate to carefully scrutinize the applications of nationals of countries on the SAO list, or of stateless persons who last habitually resided in those countries, and will consider individuals for potential admission whose resettlement in the United States would fulfill critical foreign policy interests, without compromising national security and the welfare of the United States. As such, the Secretary of Homeland Security will admit on a case-by-case basis only refugees whose admission is deemed to be in the national interest and poses no threat to the security or welfare of the United States. We will direct our staff to work jointly and with law enforcement agencies to complete the additional review of the SAO countries no later than 90 days from the

date of this memorandum, and to determine what additional safeguards, if any, are necessary to ensure that the admission of refugees from these countries of concern does not pose a threat to the security and welfare of the United States.

Further, it is our joint determination that additional security measures must be implemented promptly for derivative refugees—those who are “following-to-join” principal refugees that have already been resettled in the United States—regardless of nationality. At present, the majority of following-to-join refugees, unlike principal refugees, do not undergo enhanced DHS review, which includes soliciting information from the refugee applicant earlier in the process to provide for a more thorough screening process, as well as vetting certain nationals or stateless persons against classified databases. We have jointly determined that additional security measures must be implemented before admission of following-to-join refugees can resume. Based on an assessment of current systems checks, as well as requirements for uniformity identified by Section 5, we will direct our staffs to work jointly to implement adequate screening mechanisms for following-to-join refugees that are similar to the processes employed for principal refugees, in order to ensure the security and welfare of the United States. We will resume admission of following-to-join refugees once those enhancements have been implemented.

* * * *

On October 24, 2017, the State Department issued a fact sheet on the status of the USRAP. The fact sheet is excerpted below and available at <https://www.state.gov/r/pa/prs/ps/2017/10/275074.htm>.

* * * *

While the Departments of State, Homeland Security, and Office of the Director of National Intelligence have jointly determined that the screening and vetting enhancements to the USRAP are generally adequate to ensure the security and welfare of the United States and therefore that the Secretary of State and Secretary of Homeland Security may resume that program, they have also concluded that additional in-depth review is needed with respect to refugees of 11 nationalities previously identified as potentially posing a higher risk to the United States. Admissions for applicants of those 11 potentially higher-risk nationalities will resume on a case-by-case basis during a new 90-day review period.

For family members who are “following-to-join” refugees that have already been resettled in the United States, additional security measures must also be implemented for all nationalities. Admissions of following-to-join refugees will resume once those enhancements have been implemented.

The United States will continue to resettle more refugees than any other country in the world, and we will continue to offer protection to the most vulnerable refugees while upholding the safety and security of the American people. The United States remains the world’s leader in humanitarian assistance to refugees and displaced persons, providing more than \$8 billion in FY 2017.

* * * *

U.S. Secretary of State Rex W. Tillerson delivered a press statement on Executive Order 13780 on October 25, 2017. That statement is available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/10/275082.htm>.

b. Central American Minors Program

In a November 8, 2017 State Department media note, the U.S. government announced the end of the Central American Minors (“CAM”) refugee program in fiscal year 2018. The media note, available at <https://www.state.gov/r/pa/prs/ps/2017/11/275415.htm>, provides the following background on the program:

The CAM refugee program became effective on December 1, 2014, and allowed certain parents lawfully present in the United States to request a refugee resettlement interview for their children and eligible family members who are nationals of El Salvador, Guatemala, and Honduras.

The media note also explains that, “[t]he decision to end the CAM refugee program was made as part of the overall U.S. government review of the U.S. Refugee Admissions Program for FY 2018.”

3. Migration

On June 22, 2017, at the 35th session of the Human Rights Council, the United States delivered a statement on a proposed resolution on the protection of human rights of migrants. U.N. Doc. A/HRC/35/L.28. The U.S. statement follows and is available at <https://geneva.usmission.gov/2017/06/22/statement-on-the-protection-of-the-human-rights-of-migrants-resolution/>.

* * * *

The United States joins consensus on the “Protection of the Human Rights of Migrants” resolution and looks forward to working with Member States during the remainder of the intergovernmental consultations and negotiations leading to the adoption of a global compact for safe, orderly, and regular migration in 2018.

In joining consensus on the resolution, we would like to clarify our views on several elements in the text. First, we underscore our understanding that none of the provisions in this resolution create or affect rights or obligations of States under international law. The United States will pursue the commitments in the resolution consistent with U.S. law and policy and the federal government’s authority. In pursuing these goals, the United States will also continue to take steps to ensure national security, protect territorial sovereignty, and maintain the health and

safety of its people, including by exercising its rights and responsibilities to prevent irregular migration and control its borders, consistent with international obligations.

With respect to the preambular language related to the best interest of children and due process, the U.S. government draws from a wide range of available resources to safely process migrant children, in accordance with applicable laws and is committed to ensuring that migrant children are treated in a safe, dignified, and secure manner. The United States believes that its current practices with respect to children are consistent with this commitment. Further, the United States provides appropriate procedural safeguards for all migrants, including asylum seekers, and we interpret the resolution's reference to due process and other protections, including in the context of returns, to be consistent with our existing national laws and policies in this regard.

The United States dissociates from the language concerning the criminalization of irregular migration. The United States supports the language expressing concern regarding xenophobia and hostility to migrants, which is an increasing problem that all should address. However, consistent with the statement which recalls "that each State has a sovereign right to determine whom to admit to its territory, subject to that State's international obligations," the United States maintains its right to enforce its immigration laws, including through its criminal laws, consistent with its national security interests and in accordance with its domestic laws. We find no need to express concern in this regard. We view this as a separate issue from combatting xenophobia, and regret that the concepts were linked in the same paragraph in the resolution.

The United States looks forward to advancing the objectives of this resolution, including through voluntary practical actions to be elaborated during the negotiation of the non-binding global compact on safe, orderly, and regular migration in 2018.

* * * *

On December 3, 2017, Secretary Tillerson announced in a press statement that the United States was ending its participation in the UN process to develop a Global Compact on Migration("GCM"). The press statement is excerpted below and available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/12/276190.htm>.

* * * *

Negotiations on the GCM will be based on the New York Declaration, a document adopted by the UN in 2016 that commits to "strengthening global governance" and contains a number of policy goals that are inconsistent with U.S. law and policy.

While we will continue to engage on a number of fronts at the United Nations, in this case, we simply cannot in good faith support a process that could undermine the sovereign right of the United States to enforce our immigration laws and secure our borders.

The United States supports international cooperation on migration issues, but it is the primary responsibility of sovereign states to help ensure that migration is safe, orderly, and legal.

* * * *

Cross References

Lin v. United States (*nationality of residents of Taiwan*), **Ch. 5.C.3**

Diplomatic relations (including with Cuba), **Ch. 9.A**

CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

***Avena* Implementation and Related Issues**

On August 21, 2017, a state court in Nevada issued its decision that the lack of consular assistance to a Mexican national, Carlos Gutierrez, a habeas petitioner who was charged with and sentenced on capital murder charges, prejudiced Gutierrez such that the death penalty in his case must be vacated. *Gutierrez v. State of Nevada*, No. CR94-1795B (2d. Dist. Nev. Washoe, 2017). The court found that evidence of Gutierrez's mental health problems, childhood exposure to toxins, and cognitive impairments was not presented as possible mitigating information at sentencing and would have been discovered had the Mexican consul been notified of the case, as required under the Vienna Convention on Consular Relations. The court's opinion is available at <https://www.state.gov/s/l/c8183.htm>.

B. CHILDREN

1. Adoption

a. Report on Intercountry Adoption

In April 2017, the State Department released its Annual Report to Congress on Intercountry Adoptions. The Fiscal Year 2016 Annual Report, as well as past annual reports, can be found at <https://travel.state.gov/content/adoptionsabroad/en/about-us/publications.html>. The report includes several tables showing numbers of intercountry adoptions by country during fiscal year 2016, average times to complete adoptions, and median fees charged by adoption service providers.

b. U.S. Adoption Service Providers

On July 28, 2017, the Department of State entered into a Memorandum of Agreement with Intercountry Adoption Accreditation and Maintenance Entity, Inc. ("IAAME"), designating IAAME as an accrediting entity for five years, for the purpose of accreditation of agencies and approval of persons to provide adoption services in intercountry adoptions pursuant to the Hague Convention, the Intercountry Adoption Act ("IAA"), and the Intercountry Adoption Universal Accreditation Act ("UAA"). 82 Fed. Reg. 40,614 (Aug. 25, 2017). The text of the Memorandum of Agreement is available as part of the notice in the Federal Register. *Id.*

On October 6, 2017, the Council on Accreditation ("COA") informed the State Department that it would not be able to continue as an accrediting entity. See State Department adoption notice, available at <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/adoption-notice-coa-statement-of-october-6-2017-14oct2017.html>. COA's Memorandum of Agreement ("MOA") with the Department provides that the parties will consult on a solution that will enable COA to continue to perform its duties until the end of the Agreement period, if possible. If no solution can be reached, the agreement may be terminated on a mutually agreed date or not less than 14 months from the date the Department received written notice from COA. The adoption notice elaborates on the status of COA:

In accordance with the IAA, the Department conducts an annual performance review of each AE to ensure it is in compliance with the IAA, the UAA, and implementing regulations. Prior annual performance reviews made recommendations about COA's implementation of certain policies and procedures in support of accreditation and approval decisions, as well as the ongoing monitoring and oversight of adoption service providers, including their supervision of foreign providers. The discovery, during the debarment process of an adoption service provider in 2016, of issues that had existed prior to the provider's most recent re-accreditation but did not prevent its re-accreditation, raised additional concerns with COA's performance. As a result of these and other concerns, the Department undertook a more extensive annual review of COA's operations in the spring of 2017.

On August 8, 2017, the Department provided its annual performance review to COA in which it identified numerous concerns and deficiencies in the implementation of many of its policies and procedures. The Department required COA to undertake specific corrective measures to address these concerns and deficiencies. For example, the Department instructed COA to act within 30 days to ensure adoption service providers comply with regulations regarding foreign-supervised providers.

As discussed in *Digest 2016* at 48, the State Department temporarily debarred European Adoption Consultants, Inc. ("EAC") for a period of three years in December 2016. EAC was given an opportunity to dispute the Department's temporary debarment action at a hearing held October 23-26, 2017. On December 13, 2017, Assistant

Secretary of State for Consular Affairs Carl Risch upheld the Department's temporary debarment of EAC. See State Department notice, available at <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/European-Adoption-Consultants-Temporary-Debarment-Upheld.html>.

c. *Litigation*

As discussed in *Digest 2016* at 48-54, the United States filed a motion to dismiss a federal complaint challenging the U.S. Government's suspension (since 2010) of adoptions based on abandonment in Nepal. Consular officers in Nepal were unable to reliably verify reports of abandonment in the country. On March 31, 2017, the U.S. District Court for the District of Columbia Circuit issued its decision granting the motion to dismiss. *Skalka et al. v. Johnson et al.*, No. 16-107 (D.D.C.). The court rejected the plaintiffs' argument that the regulatory requirement to "investigate" each orphan petition requires the government to conduct an investigation within any particular time, and thus prohibits the government from indefinitely suspending processing of adoptions. The court agreed with the United States Government that if information it needs to evaluate orphan petitions is unavailable or unreliable, it may be appropriate to suspend processing until such time as the information becomes reliable (however long that may take), rather than being compelled to evaluate individual cases on the basis of insufficient evidence. Excerpts follow (with footnotes omitted) from the court's opinion.

* * * *

None of these standards for assessing agency inaction, nor any of the cases applying them, are a particularly good fit for a case like this one where the agency has decided, for a considered policy reason, to suspend processing what it admits are required adjudications on visa petitions. Indeed, the agencies promise to process the petitions as soon as doing so would be reliable and efficient. This is the very type of prioritizing and balancing of resources our Circuit Court acknowledged agencies are uniquely situated to calculate. In the end, however, the dispositive question is whether the suspension is both lawful and reasonable. Unfortunately for the plaintiffs, it is both!

Neither of plaintiffs' textual citations—to the statute at 8 U.S.C. § 1154(b) and the regulation at 8 C.F.R. §204.3(k)—provide a sufficient legal basis for the Court to conclude that the agencies are unjustified in suspending the visa petitions here until such time as the information from the Nepalese government is sufficiently reliable to satisfy our agencies that the statutory requirements set by Congress are actually met. The use of "shall" in the statute relates to the Secretary's duty when, *and if*, the requirements of the statute are met. And the regulatory requirement to conduct an abandonment investigation merely prohibits issuing an orphan visa *prior* to an investigation taking place. It does not require the agencies to undertake these investigations on a particular regularized basis. In other words, it does nothing to limit the inherent discretion that the agencies have to manage the procedures for handling the large

number of visa petitions they receive. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (decision not reviewable when it “involves a complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise,” such as “the procedures it adopts for implementing [a] statute”). Moreover, the regulations themselves prescribe careful procedures for ensuring the accuracy of abandonment investigations. Put simply, it cannot be said that the existing regulations as a whole “require” the agencies to investigate an individual case to the point of complete satisfaction when the officers have genuine doubt about the reliability of their source. To say the least, evaluating the reliability of the foreign government’s information is critical to exercising their discretionary duty. As such, the agency action here has not been unlawfully withheld.

The final, related, question is whether the delay in question is unreasonable. ... I find that it is not. First, there is no deadline or timeframe prescribed by Congress for these investigations. To the contrary, Congress has given the agencies wide discretion in the area of immigration processing. *See Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir. 2015); *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State*, 104 F.3d 1349, 1353 (D.C. Cir. 1997). Indeed, this is the very type of agency action, like the one in *In re Barr*, 930 F.2d 72, that if compelled would presumably delay other adjudications. The Court would be outside its limited role in these cases if it required the agencies to invest the high degree of resources that would be necessary to accurately investigate plaintiffs’ visa petitions, if possible, while others would suffer in response.

Next, I recognize that the nature of plaintiffs’ interests, and that of any orphans in Nepal who would be adopted, is of the most sensitive kind and most certainly involves “human health and welfare.” The agencies must therefore prioritize these cases consistent with the sense of urgency one would expect when familial interests at stake. ...Expediting the agencies’ delayed action in this situation would certainly have the effect of harming the “competing or higher priority” of accuracy. To say the least, accurately adjudicating whether a child has truly been abandoned by his or her parents is the first priority for the agency in this situation. Compelling agency action otherwise would insinuate the Court into the agencies’ judgment about whether they could accurately adjudicate these cases. That sort of judgment is at the very heart of the expertise that should be exercised by a U.S. Government official who is intimately familiar with the facts in Nepal and not a District Court judge who is ordering agency action in Washington, D.C. Small wonder that every other country in the world appears to have likewise suspended orphan adoptions in Nepal!

Finally, I can’t help but note that although it has been more than six years since the suspension went into effect, it has only been about two years since it was most recently reviewed by a U.S. delegation to Nepal. It has been even less time since the couples who are plaintiffs in this case submitted the petitions that should trigger investigation. ...In my review of the comparable cases, a delay of this length does not typically require judicial intervention. *Compare Debba v. Heinauer*, 366 F. App’x 696 (8th Cir. 2010) (10 years to adjudicate a permanent resident application not unreasonable); *In re City of Virginia Beach*, 42 F.3d 881 (4th Cir. 1994) (four and a half years not unreasonable in an adjudication affecting health and human welfare); *Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988) (a five year delay might be close to the unreasonable threshold because delay was “unexplained”). Moreover, as long as the agencies are regularly revisiting the question whether they can rely on Nepalese sources to provide accurate information, then they are not delaying materially longer than necessary. The agencies have represented, and the Court has no reason to doubt, that when the situation in Nepal is improved to the point of reliability, the couples’ petitions will be reviewed with due haste. Accordingly,

there is no plausible cause of action at this time under either the APA or the Mandamus Act because the agencies' action has not been unlawfully withheld or unreasonably delayed.

* * * *

2. Abduction

a. Annual Reports

As described in *Digest 2014* at 71, the International Child Abduction Prevention and Return Act ("ICAPRA"), signed into law on August 8, 2014, increased the State Department's annual Congressional reporting requirements pertaining to countries' efforts to resolve international parental child abduction cases. In accordance with ICAPRA, the Department submits an Annual Report on International Parental Child Abduction to Congress by April 30 of each year and a report to Congress on the actions taken toward those countries determined to have a pattern of noncompliance in the Annual Report by July 30 of each year. See International Parental Child Abduction page of the State Department Bureau of Consular Affairs, <https://travel.state.gov/content/childabduction/en/legal/compliance.html>.

The 2017 Report on International Parental Child Abduction (IPCA) is available at <https://travel.state.gov/content/dam/childabduction/complianceReports/2017%20ICAPRA%20Report%20-%20Final.pdf>. The 2017 report on actions taken is available at <https://travel.state.gov/content/dam/childabduction/complianceReports/2017%20IPCA%20Action%20Report%20-%20Final.pdf>. The 2017 action report summarizes actions the Department of State took in countries cited in the annual report for demonstrating a pattern of noncompliance: Argentina, the Bahamas, Brazil, Dominican Republic, Ecuador, Guatemala, India, Jordan, Nicaragua, Panama, Peru, Romania, and Tunisia. ICAPRA defines a pattern of noncompliance as the persistent failure: (1) of a Convention country to implement and abide by provisions of the Hague Abduction Convention; (2) of a non-Convention country to abide by bilateral procedures that have been established between the United States and such country; or (3) of a non-Convention country to work with the Central Authority of the United States to resolve abduction cases.

b. Hague Abduction Convention

Pakistan officially acceded to the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Convention") on March 1, 2017, becoming the 96th Party to the Convention.

On May 1, 2017, the Convention entered into force between the United States and Fiji. Fiji was the 76th partner of the United States under the Convention. As described in a May 2, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/05/270595.htm>:

The Convention is a valuable civil law mechanism for parents seeking the return of children who have been wrongfully removed from or retained outside their country of habitual residence by another parent or family member. Parents seeking access to children residing in treaty partner countries may also invoke the Convention. The Convention is critically important because it establishes a legal framework between partner countries to resolve parental abduction cases. The Department of State's Office of Children's Issues serves as the Central Authority for the United States under the Convention. We welcome this partnership with Fiji and look forward to working together on this critical issue.

The United States participated along with other Member States, organizations and observers, in the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, held from October 10-17, 2017. The conclusions and recommendations adopted by the Special Commission are available at <https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf>.

c. *U.S.-Saudi Arabia Memorandum of Understanding*

On July 17, 2017, U.S. Consul General Virginia Sher Ramadan and Saudi Arabia's Deputy Minister for Consular Affairs Tamim Bin Majed Al-Dosari signed, on behalf of their governments, a memorandum of understanding on international parental child abduction ("MOU"). The MOU establishes a joint commission to cooperate in cases of international parental child abduction. The full text of the MOU is available at <https://www.state.gov/s/l/c8183.htm>.

Cross References

Draft General Comment on Article 6 of the ICCPR (regarding consular notification), Ch. 6.A.2.b

Children, Ch 6.C.

Enhanced consular immunities, Chapter 10.D.2.

Family law, Ch 15.B.

CHAPTER 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. Extradition Treaties

See Chapter 4 for Acting Legal Adviser Richard Visek's December 2017 testimony before the Senate Foreign Relations Committee on the extradition treaties with Kosovo and Serbia that were transmitted to the Senate in January 2017 for advice and consent.

2. *United States v. Microsoft*

On December 6, 2017, the United States filed its brief in *United States v. Microsoft*, No. 17-2, in the Supreme Court of the United States. The U.S. government obtained a warrant requiring Microsoft to disclose email information for an account based on probable cause to believe the account was being used to further illegal drug activity. Microsoft complied in part, but refused to disclose the contents of emails which it had "migrat[ed]" to a datacenter in Ireland. The lower court denied Microsoft's motion to quash. On July 14, 2016, the court of appeals reversed, reasoning that the warrant was issued pursuant to Section 2703 of the Electronic Communications Privacy Act, which does not apply extraterritorially. The petition for rehearing en banc was denied on January 24, 2017, and the U.S. petition for certiorari, filed June 23, 2017, was granted October 16, 2017. The following excerpts comprise the summary of the U.S. argument in its December 6, 2017 Supreme Court brief.*

* Editor's note: On March 23, 2018, Congress passed and the President signed the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), resolving the main issue in the *Microsoft* appeal. The United States notified the Supreme Court that the legislation renders the case moot. On April 17, 2018, the Supreme Court issued a per curiam opinion, vacating the judgment on review, remanding to the Court of Appeals with instructions to vacate and direct the District Court to dismiss the case as moot.

* * * *

Under 18 U.S.C. 2703, the government may compel a U.S. service provider to disclose electronic communications within its control, regardless of whether the provider stores those communications in the United States or abroad.

A. Applying Section 2703 to require the disclosure of data stored abroad does not violate the presumption against extraterritoriality. Even where that presumption is un rebutted, a court must examine whether “the conduct relevant to the statute’s focus occurred in the United States.” *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). The focus turns on the acts that the statutory provision “seeks to regulate” and the parties or interests that it “seeks to protect.” *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010) (brackets, citation, and internal quotation marks omitted). The focus inquiry is provision-specific; the focus of Section 2703 need not be the same as other provisions of the [Stored Communications Act or] SCA or the [Electronic Communications Privacy Act of 1986 or] ECPA. See *RJR Nabisco*, 136 S. Ct. at 2103, 2106.

The focus of Section 2703 is on domestic conduct: the disclosure of electronic records to the government in the United States. Congress captioned that provision “Required disclosure of customer communications or records.” Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Patriot Act), Pub. L. No. 107-56, Tit. II, § 212(b), 115 Stat. 284-285 (emphasis omitted). Section 2703’s text accordingly describes the multiple mechanisms by which the government can “require the disclosure” of electronic records. 18 U.S.C. 2703(a); see 18 U.S.C. 2703(b) (“governmental entity may require a provider * * * to disclose”); 18 U.S.C. 2703(c) (“governmental entity may require a provider * * * to disclose”). The legislative history underscores that Congress sought to regulate providers’ disclosure of electronic information to the government, not providers’ storage of that information. And because any disclosure to the government occurs in the United States, such disclosure involves a permissible domestic application of Section 2703.

The court of appeals took a different view, concluding that the “focus” of the SCA is “user privacy.” Pet. App. 43a. Even if that were correct, any invasion of privacy occurs in the United States. Microsoft does not invade a user’s privacy when it transfers data from an Irish server to a U.S. server, or vice versa. A user has no right under the SCA to have his data stored in one location or another, or even to know where it is stored. Instead, any invasion of privacy occurs only when Microsoft divulges a user’s communications to the government and the government examines those communications for evidence of a crime.

B. The conclusion that a Section 2703 warrant compels U.S. providers to disclose foreign-stored data comports with common-law principles that were well established when Congress enacted the SCA. Courts have long held that “[t]he test for the production of documents is control, not location.” *Marc Rich & Co. v. United States*, 707 F.2d 663, 667 (2d Cir.), cert. denied, 463 U.S. 1215 (1983). Thus, a subpoena recipient in the United States is required to disclose requested records regardless of whether the recipient has chosen to store those records abroad. See *id.* at 667-668.

The same rule applies to Section 2703 warrants. Although those devices are warrants in the sense that they require the government to demonstrate probable cause under oath before a neutral magistrate judge and state with particularity the items to be searched, they are executed like subpoenas. Rather than authorizing law enforcement officers to physically enter private premises, a Section 2703 warrant authorizes the government to “require the disclosure by a provider of electronic communications.” 18 U.S.C. 2703(a); see 18 U.S.C. 2703(b) and (c). In practice, then, the statutory requirement to disclose records pursuant to a Section 2703 warrant operates like the execution of a subpoena: The government serves a demand for records on a person who controls the potential evidence. Just as a subpoena requires the recipient to produce material stored abroad that is within the recipient’s control, so too does a Section 2703 warrant. Congress did not incongruously grant the government access to less information when it employs a Section 2703 warrant than when it employs Section 2703’s other disclosure mechanisms.

C. A more restrictive reading of Section 2703 would undermine an important tool for law enforcement and introduce arbitrariness to the statutory scheme. Because Microsoft gives dispositive weight to the location of data, a provider could move all information about U.S. subscribers beyond the reach of U.S. law enforcement simply by building its servers outside the United States. Or it could follow other major providers, such as Google, which move data all over the world, sometimes breaking it into “shards” so that different portions of a single email account may be stored in multiple countries at any one moment. Even though such providers can access information from their offices in the United States, Microsoft’s data-location theory would erect an insurmountable barrier to U.S. law enforcement’s securing of critical evidence.

D. In response, Microsoft argues that its theory is necessary to avoid international discord. That concern is overstated. Many other countries construe their laws to authorize compelling domestic entities to produce foreign-stored evidence, even if they place varying restrictions on the use of that power. Indeed, the United States is a party to a treaty that requires parties to have the power to compel service providers within their territory to produce data under the providers’ control for law enforcement purposes. And to the extent Microsoft worries that it will be subject to conflicting legal regimes at home and abroad, that situation has not often arisen and can be addressed through existing mechanisms if it does. In any event, it provides no basis for overriding the best reading of the statutory scheme.

* * * *

3. Law Enforcement Memorandum of Understanding with Cuba

On January 16, 2017, the United States and Cuba signed a bilateral Law Enforcement Memorandum of Understanding to deepen law enforcement cooperation and information sharing. See State Department media note, available at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/267007.htm>. As summarized in the media note:

Under this memorandum, the United States and Cuba will continue the Law Enforcement Dialogue process, which includes technical exchanges on specific law enforcement issues of mutual concern such as counternarcotics, money laundering, fraud and human smuggling, and counterterrorism.

4. Universal Jurisdiction

Emily Pierce, Counselor for the U.S. Mission to the United Nations, delivered remarks on October 10, 2017 at a Sixth Committee Meeting on “The Scope and Application of the Principle of Universal Jurisdiction.” Ms. Pierce’s remarks are excerpted below and available at <https://usun.state.gov/remarks/8019>.

* * * *

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

Despite the importance of this issue and its long history as part of international law relating to piracy, the United States reiterates its view that basic questions remain about how jurisdiction should be exercised in relation to universal crimes and states’ views and practices related to the topic.

We have engaged in lengthy, thoughtful discussions on a variety of important topics regarding universal jurisdiction, including its definition, the scope of the principle, as well as its application, in the years since the Committee took up this issue. The submissions made by states to date, the work of the Working Group in this Committee, and the Secretary-General’s reports have been extremely useful in helping us to identify differences of opinion among States as well as points of consensus on this issue. In the Working Group, we are looking forward to hearing the views of other delegations on the possibilities for further progress on this issue, including whether there are new, practical approaches to tackling our work.

The United States continues to analyze the contributions of other states and organizations. We welcome this Committee’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. Determination of Countries Not Fully Cooperating with U.S. Antiterrorism Efforts

On May 1, 2017, Secretary Tillerson issued his determination and certification, pursuant to, *inter alia*, section 40A of the Arms Export Control Act (22 U.S.C. § 2781), that certain countries “are not cooperating fully with United States antiterrorism efforts.” 82 Fed. Reg. 24,424 (May 26, 2017). The countries are: Eritrea, Iran, Democratic People's Republic of Korea, Syria, and Venezuela.

b. State Sponsors of Terrorism

See Chapter 16 for discussion of the Secretary of State's 2017 designation of the Democratic People's Republic of Korea ("DPRK") as a State Sponsor of Terrorism ("SST").

c. Country reports on terrorism

On July 19, 2017, the Department of State released the 2016 Country Reports on Terrorism. See State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/07/272684.htm>. 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 covers the 2016 calendar year and provides policy-related assessments; country-by-country breakdowns of foreign government counterterrorism cooperation; and information on state sponsors of terrorism, terrorist safe havens, foreign terrorist organizations, and the global challenge of chemical, biological, radiological, and nuclear terrorism. The report is available at www.state.gov/i/ct. On the day the report was released, Acting Coordinator for Counterterrorism Justin Siberell delivered remarks on key aspects of the report, which are available at <https://www.state.gov/r/pa/prs/ps/2017/07/272694.htm>, and excerpted below.

* * * *

Terrorist attacks and fatalities from terrorism declined globally in 2016 from levels seen in 2015, and at the end of my remarks I will summarize a few of the topline statistics that are included as an appendix to the yearly report.

ISIS remained the most capable terrorist organization globally in 2016, directing and inspiring terror cells, networks, and individuals around the world, even as it faced increased military pressure in Iraq and Syria and suffered considerable territorial losses ... through the year. ...

We also faced a resilient al-Qaida and an Iranian regime that remained the leading state sponsor of terrorism.

The international community strengthened cooperation in a number of areas, including by expanding information-sharing related to terrorist identities to prevent terrorist travel, strengthening border and aviation security, and putting increased resources into efforts to counter radicalization to violence and terrorist recruitment.

As you all are aware, ISIS lost considerable territory it controlled in Iraq and Syria through 2016, and the report provides detailed assessment of that progress. Iraqi Security Forces supported by the coalition delivered a series of defeats on ISIS through 2016, beginning with the liberation of Ramadi in February, the recapture of Fallujah in June, and the seizure of the

Qayyarah Air Base in northern Iraq in July, and finally the launch of the broad offensive in Nineveh in October that led to Iraqi Security Force penetration deep into eastern Mosul by the end of the year.

As you know, the Iraqi Security Forces completed the liberation of eastern Mosul in January, and earlier this month the Iraqi Government announced the liberation of all of Mosul from ISIS after one of the most complex urban combat operations since World War II. This is a critical milestone in the global fight against ISIS and underscores the success of the international effort led by the Iraqi Security Forces.

In Syria, the border between Syria and Turkey was fully cleared of ISIS presence in 2016. Syrian Democratic Forces supported by coalition efforts liberated a number of cities and towns used by ISIS as transit and facilitation hubs for foreign terrorist fighters and ISIS external plotting efforts, including Manbij and Jarabulus. These operations set the stage for the operation to isolate and liberate Raqqa, which, as you know, is currently underway.

ISIS has relied heavily upon foreign terrorist fighters but was unable to sustain a sufficient inward flow of new foreign terrorist fighter recruits in 2016 to compensate for battlefield losses. While the sustained military campaign and ISIS' loss of territory and resources are key factors in that, governments around the world enacted a number of reforms and improved border security measures to make it much more difficult for foreign terrorist fighters to transit to and from Iraq and Syria.

As a result of its loss of territory and foreign terrorist fighters, attacks outside ISIS territorial strongholds in Iraq and Syria were an increasingly important part of ISIS' 2016 terrorism campaign. ISIS dispatched operatives from Iraq and Syria to conduct attacks but also worked aggressively to inspire and encourage attacks by its followers to demonstrate continued strength and relevance. ISIS directed its followers to attack in their home countries rather than attempt to travel to the conflict zone, which itself is an acknowledgement of the more difficult environment faced by aspiring foreign terrorist fighters to access the conflict area.

Another feature of the terrorism landscape in 2016—and this is a continuation of what we saw in 2014 and 2015—is the exploitation by terrorist groups of ungoverned territory and conflict zones to establish safe havens from which to expand their reach. In 2016 ISIS established a presence in the Libyan coastal city of Sirte, from which it was expelled as a result of a concerted ground campaign by Libyan forces with U.S. air support.

Somalia, Yemen, northeastern Nigeria, portions of the Sinai Peninsula, the Afghanistan-Pakistan border regions, and portions of the Philippines, among other places, are examples of such safe-haven environments.

Turning to al-Qaida, al-Qaida and its regional affiliates exploited the absence of credible and effective state institutions in a number of states and regions to remain a significant worldwide threat despite sustained pressure by the United States and its partners. Al-Qaida in the Arabian Peninsula remained a significant threat to Yemen, the Gulf region, and the United States despite a number of key leadership losses as the ongoing conflict in Yemen hindered U.S. and partnered efforts to counter the group.

...[A]l-Nusra Front, al-Qaida's affiliate in Syria, continued to exploit ongoing armed conflict to maintain a territorial safe haven in parts of northwestern Syria. And al-Shabaab continued to conduct asymmetric attacks throughout Somalia and parts of Kenya despite weakened leadership and increasing defections. The establishment of a new government in Somalia and its efforts along with the international community to extend governance while

maintaining security force pressure on al-Shabaab is an important recent development in Somalia.

Al-Qaida in the Islamic Maghreb and its affiliates in Mali have shifted their operational emphasis from holding territory to perpetrating attacks against government and civilian targets, including hotels in Burkina Faso, Mali, and Cote d'Ivoire, as well as UN peacekeeping forces in northern Mali.

And then finally, al-Qaida in the Indian subcontinent continue to operate in South Asia, which the ... al-Qaida Core has historically exploited for safe haven, and claim several attacks targeting religious minorities, police, secular bloggers, and publishers in Bangladesh.

In Afghanistan, al-Qaida suffered continued losses, including through the death of senior leader Faruq al-Qahtani, who was killed in a U.S. operation in Kunar, Afghanistan in October 2016.

Attacks by homegrown lone offenders continued in 2016, particularly in public spaces and other soft targets. Examples of this include the attack in Nice in July, in which a Tunisian national drove a truck into a Bastille Day festivities parade, killing 86; in Germany, an ISIS-claimed truck attack killed 12 in a crowded Christmas market in Berlin in December; and of course, in the United States, Omar Mateen killed 49 in an attack on the Pulse nightclub in Orlando.

While ISIS continued to receive most of the headlines and remains a top focus for U.S. and international CT efforts, Iran remained the foremost state sponsor of terrorism globally. As explained in the report, Iran continues to provide support to Hizballah, Palestinian terrorist groups in Gaza, and various groups in Syria, Iraq, and throughout the Middle East. Iran employed the Quds Force of its Islamic Revolutionary Guard Corps to implement foreign policy goals, provide cover for intelligence operations, and create instability in the Middle East. The Quds Force is Iran's primary mechanism for cultivating and supporting terrorists outside of Iran. Iran has acknowledged the involvement of the Quds Force in conflicts in Iraq and Syria.

In 2016, Iran remained the primary source of funding for Hizballah and coordinated closely with Hizballah in its efforts to create instability in the Middle East. Hizballah is a designated foreign terrorist organization, and Iran has trained thousands of its fighters at camps in Iran. Hizballah has contributed significant numbers of its fighters to support the Assad regime in Syria and carried out several attacks against Israeli Defense Forces in 2016 along the Lebanese border with Israel.

Iran continued to support Iraqi militant groups, including designated foreign terrorist organization Kata'ib Hizballah, and it has provided weapons, funding, and training to Bahraini militant groups that have conducted attacks on Bahraini security forces. In January 2016, Bahraini security officials dismantled a terrorist cell linked to the Quds Force that was planning to carry out a series of bombings throughout the country.

Iran remained unwilling to bring to justice senior al-Qaida members it continued to detain and has refused to publicly identify the members in its custody. Since at least 2009, Iran has allowed al-Qaida facilitators to operate a core facilitation pipeline through the country, enabling al-Qaida to move funds and fighters to South Asia and Syria.

Now that's a rundown of the major trends and findings as contained in the report. You'll find a lot more details in the individual country sections and then the accompanying statistical annex. And just a few words about the statistical annex which is appended to the report, and it is prepared by the University of Maryland's National Consortium for the Study of Terrorism and Responses to Terrorism, known as START, by the acronym START.

As I noted at the top of the briefing, the total number of terrorist attacks in 2016 decreased by 9 percent, and total deaths due to terrorist attacks decreased by 13 percent compared to 2015. This was largely due to fewer attacks and deaths from terrorist attacks in Afghanistan, Syria, Nigeria, Pakistan, and Yemen. At the same time, there was an increase in terrorist attacks and total deaths in several countries, including Iraq, Somalia, and Turkey. ISIS was responsible for more attacks and deaths than any other perpetrator group in 2016. In 2015, it was the Taliban that was responsible for more attacks and deaths.

And although terrorist attacks took place in 104 countries in 2016, they were heavily concentrated geographically, as they have been for the past several years. Fifty-five percent of all attacks took place in Iraq, Afghanistan, India, Pakistan, and the Philippines, and 75 percent of all deaths due to terrorist attacks took place in Iraq, Afghanistan, Syria, Nigeria, and Pakistan.

All of these statistics and more are in the annex, as I said, that is appended to the report. And while I cite these statistics which are compiled by the University of Maryland and they are not a U.S. Government product, I must emphasize that numbers alone do not provide the full context, ... a point we make consistently when the numbers ... fall and rise from year to year in the report.

* * * *

d. ECJ determination regarding Hamas

On July 27, 2017, the State Department issued a media note welcoming the July 26 decision by the European Court of Justice to keep Hamas on the European Union's list of terrorist organizations. See media note available at <https://www.state.gov/r/pa/prs/ps/2017/07/272877.htm>.

e. UN

On December 21, 2017, the UN Security Council adopted two resolutions on the threat to international peace and security posed by terrorist acts. Resolution 2395 updates, strengthens, and renews the mandate of the Counterterrorism Executive Directorate ("CTED"). Ambassador Michele J. Sison, U.S. Deputy Permanent Representative to the UN, delivered remarks after the adoption of Resolution 2395, which are excerpted below and available at <https://usun.state.gov/remarks/8234>.

* * * *

Mr. President, this Council and the international community have found common cause in our fight against terrorism, but we are continually reminded of how much more we have to do. In 2017, terrorists have targeted villagers in the Sahel and worshippers in the Sinai. And, here, in this great world city of New York, we've twice seen the dangers posed by self-radicalized individuals. But the world is adapting, and we're getting better at fighting terrorism. In the Middle East, the Defeat-ISIS Coalition has liberated almost all of the territory of the so-called

Islamic State. And later today, the Security Council will adopt a landmark resolution to give us new tools to counter the threat posed by foreign terrorist fighters.

Here at the United Nations, this has been a remarkable year of change and reform. This year has seen some of the greatest changes to the UN counterterrorism architecture in over a decade. Under the Secretary-General's leadership, the UN has taken important first steps toward streamlining, elevating, and focusing its counterterrorism efforts with the establishment of the new UN Office of Counterterrorism. To further these reform efforts, today the Security Council has adopted a resolution to update and strengthen the mandate of the Counterterrorism Executive Directorate.

Established by the Security Council thirteen years ago, CTED has grown to become a critical counterterrorism body. In 2017, CTED again showed its great value. CTED experts have visited more than twenty countries to assess their implementation of counterterrorism resolutions, held many important briefings and open meetings, and engaged outside experts from governments, civil society, academia, and the private sector. CTED now has new leadership. We warmly welcome Michele Coninsx and applaud her vision for a strong, dynamic CTED.

The overarching goal of the resolution adopted today—which will renew CTED's mandate for another four years—was to strengthen CTED even further. Today, more than ever before, we need a CTED that is agile and able to respond to new threats. I would highlight three goals of today's important resolutions.

First, this resolution aimed to help CTED focus squarely on its core mandate of visiting Member States to assess their implementation of counterterrorism resolutions. We hope it will foster even better CTED assessment reports built around actionable recommendations to counter terrorism. If we strengthen CTED's ability to carry out this core mandate, we can better ensure CTED's recommendations are acted on throughout the UN system and beyond.

Our second goal was to strengthen CTED's role as an early warning system for the Security Council and its Counterterrorism Committee. CTED can help the Counterterrorism Committee identify and assess cutting-edge counterterrorism events, trends, and threats. This requires broad engagement—and not just with Member States, but also civil society, academia, and the private sector. We also must look to media, cultural, and religious leaders, with an emphasis on women, youth, and locally-focused organizations.

And, third, this resolution aims to establish firmly CTED's place in the reformed UN counterterrorism architecture. Our goal was to promote a close and cooperative relationship with the new UN Office of Counterterrorism. For example, we want to see CTED's assessments and recommendations directly inform the technical assistance and capacity building efforts undertaken by other parts of the UN.

In addition to advancing these goals, the resolution adopted today recognizes one of the greatest lessons we've learned in the fight against terrorism. After many years of experience, the international community has come to recognize that effective counterterrorism strategies must be comprehensive and balanced strategies, which prioritize all four pillars of the UN's Global Counterterrorism Strategy. In practice, this means counterterrorism efforts must be multi-faceted, tailored to local conditions, and take into account ethnic and religious minorities. Successful counterterrorism efforts must simultaneously focus on strengthening criminal justice systems, tackling terrorist financing, bolstering civil aviation security, and protecting soft targets and critical infrastructure.

And just as terrorists target, exploit, and recruit women, we must respond by integrating gender as a cross-cutting issue throughout our counterterrorism efforts. That's why this mandate calls for CTED to integrate a gender perspective in its work, and, for the first time in a CTED mandate, also focuses on the impact of terrorism on children.

Now, one of the most essential elements of a balanced counterterrorism strategy is countering violent extremism. The prevention and countering of violent extremism has now become a core component of effective counterterrorism strategies worldwide. Today's resolution acknowledges the importance of this preventive work. It also brings us closer to an "all-of-UN" counterterrorism effort that includes critical prevention elements whenever and wherever appropriate.

The United States is also encouraged that CTED's mandate now reflects the reality that we will never defeat terrorism without respecting human rights. Heavy-handed counterterrorism responses and repression are gifts to terrorists. Putting human rights at the core of our counterterrorism efforts doesn't weaken our response to terrorism—it strengthens it. For this reason, we encourage CTED to ensure that respect for human rights is integrated throughout its work.

We thank our colleagues at CTED and in the Council for their hard work and shared commitment in the struggle against terrorism.

* * * *

Also on December 21, 2017, Secretary Tillerson issued a press statement on the adoption of UN Security Council Resolution 2396 on foreign terrorist fighters. That statement is excerpted below and available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/12/276749.htm>.

* * * *

Today, the United Nations Security Council unanimously adopted a new resolution that will help Member States detect and counter the threat posed by foreign terrorist fighters (FTFs), especially those returning from the conflict zone in Iraq and Syria. Resolution 2396 is particularly timely, given the collapse of ISIS's false caliphate and its continuing efforts to commit terrorist attacks around the world.

Building on the positive legacy of UN Security Council Resolution (UNSCR) 2178, which was adopted in 2014 and obliged all states to criminalize FTF-related activities, the Security Council today directed members to take additional steps to address the terrorist threat as it has evolved over the last three years.

Working with our partners, the United States led the negotiation of this new set of international obligations and commitments. UNSCR 2396 requires all UN members to use Passenger Name Record (PNR) data and Advanced Passenger Information (API) to stop terrorist travel. It also requires members to collect biometric data and develop watchlists of known and suspected terrorists, including foreign terrorist fighters. In addition, the new resolution calls for stricter aviation security standards and urges UN members to share counterterrorism information with each other.

These tools—which the United States has been using for years and which have now been embraced by the international community—will be critical in preventing the movement of ISIS fighters and other terrorists across the globe.

The successful adoption of UNSCR 2396 demonstrates the United States’ unwavering commitment to the complete defeat of ISIS. It also shows that the Security Council—along with the 66 countries that co-sponsored the resolution—remains firmly, unquestionably united in the face of the common threat of transnational terrorism. We look forward to working with countries, UN bodies, civil society, and the private sector to implement this groundbreaking resolution.

* * * *

f. U.S. actions against terrorist groups

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

See Chapter 16.A.4.b.

(2) Foreign terrorist organizations

(i) New designations

In 2017, the Secretary of State designated one** additional organization and its associated aliases as a Foreign Terrorist Organization (“FTO”) under § 219 of the Immigration and Nationality Act: Hizbul Mujahideen, also known as HM and other aliases, 82 Fed. Reg. 39,150 (Aug. 17, 2017).

(ii) Amendments of FTO designations

During 2017, the Secretary of State amended the designations of several FTOs to include additional aliases. The designation of al-Qa’ida in the Arabian Peninsula was amended to include the additional aliases Sons of Abyan, Sons of Hadramawt, Sons of Hadramawt Committee, Civil Council of Hadramawt, and National Hadramawt Council. 82 Fed. Reg. 28,731 (June 23, 2017). The State Department amended the designation of Hizballah to add other aliases: Lebanese Hizballah, Lebanese Hezbollah, LH; Foreign Relations Department, FRD; External Security Organization, ESO, Foreign Action Unit, Hizballah ESO, Hizballah International, Special Operations Branch, External Services Organization, and External Security Organization of Hezbollah. 82 Fed. Reg. 28,730 (June 23, 2017). The State Department determined that the designation of Abdallah Azzam Brigade

** Editor’s note: Some designation determinations made in 2017 were not published in the Federal Register until 2018: (1) ISIS-West Africa (ISIS-WA) and aliases, 83 Fed. Reg. 8730 (Feb. 28, 2018); (2) ISIS-Bangladesh and aliases, 83 Fed. Reg. 8729 (Feb. 28, 2018); and (3) ISIS-Philippines and aliases, 83 Fed. Reg. 8730 (Feb. 28, 2018).

should be amended to include the additional aliases, Marwan Hadid Brigades, also known as Marwan Hadid Brigade, 82 Fed. Reg. 50,928 (Nov. 2, 2017).

(iii) *Reviews of FTO designations*

During 2017, 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: Haqqani Network, 82 Fed. Reg. 50,727 (Nov. 1, 2017); Jaish-e-Mohammed, 82 Fed. Reg. 50,728 (Nov. 1, 2017); Islamic Jihad Union, 82 Fed. Reg. 50,728 (Nov. 1, 2017); Abdallah Azzam Brigade, 82 Fed. Reg. 50,927 (Nov. 2, 2017); Islamic Resistance Movement (Hamas and other aliases), 82 Fed. Reg. 52,764 (Nov. 14, 2017).

The Secretary determined that the circumstances that were the basis for the designation of the Abu Nidal Organization as a foreign terrorist organization have changed in such a manner as to warrant revocation of the designation and revoked the designation. 82 Fed. Reg. 25,654 (Jun. 2, 2017).

(3) *Rewards for Justice Program*

On May 10, 2017, the State Department announced a reward offer of up to \$10 million for information leading to the identification or location of Muhammad al-Jawlani, leader of the al-Nusrah Front (“ANF”) terrorist group. See media note, available at <https://www.state.gov/r/pa/prs/ps/2017/05/270779.htm>. This was the first Rewards for Justice offer for a leader of ANF, which is the Syrian branch of al-Qaida. The media note summarizes al-Jawlani’s background as follows:

In April 2013, al-Jawlani pledged allegiance to al-Qaida and its leader Ayman al-Zawahiri after he had a public falling out with ISIS. In July 2016, in a video posted online, al-Jawlani praised al-Qaida and al-Zawahiri and claimed the ANF was changing its name to Jabhat Fath Al Sham (“Conquest of the Levant Front”).

In May 2013, the U.S. Department of State, under the authority of Executive Order (E.O.) 13224, named al-Jawlani a Specially Designated Global Terrorist, blocking all his property and interests in property subject to U.S. jurisdiction and prohibiting U.S. persons from dealing with him. On July 24, 2013, the UN Security Council ISIL (Da’esh) and al-Qaida Sanctions Committee placed al-Jawlani on its list of sanctioned terrorists, making him subject to an international asset freeze, travel ban, and arms embargo.

Under al-Jawlani's leadership, ANF has carried out multiple terrorist attacks throughout Syria, often targeting civilians. In April 2015, ANF reportedly kidnapped, and later released, approximately 300 Kurdish civilians from a checkpoint in Syria. In June 2015, ANF claimed responsibility for the massacre of 20 residents in the Druze village Qalb Lawzeh in Idlib province, Syria.

In January 2017, ANF merged with several other hardline opposition groups to form Hayat Tahrir al-Sham (HTS). ANF remains al-Qaida's affiliate in Syria. Jawlani is not the leader of HTS, but remains the leader of ANF, which is at the core of HTS.

For background on the Rewards for Justice program, more information about those for whom reward offers have been made, and the program's enhancements under the USA PATRIOT Act, see the Rewards for Justice website, www.rewardsforjustice.net, and Digest 2001 at 932-34.

2. Narcotics

a. Majors list process

(1) International Narcotics Control Strategy Report

In March 2017, the Department of State submitted the 2017 International Narcotics Control Strategy Report ("INCSR"), an annual report to Congress required by § 489 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291h(a). The report describes the efforts of foreign governments to address all aspects of the international drug trade in calendar year 2015. Volume 1 of the report covers drug and chemical control activities and Volume 2 covers money laundering and financial crimes. The full text of the 2017 INCSR is available at <https://www.state.gov/j/inl/rls/nrcrpt/2017/>.

(2) Major drug transit or illicit drug producing countries

On September 13, 2017, the White House issued Presidential Determination 2017-12 "Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2018." 82 Fed. Reg. 45,413 (Sep. 28, 2017). In this year's determination, the President named 22 countries: 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. The President determined that Bolivia and Venezuela "failed demonstrably" during the last twelve months to make sufficient or meaningful efforts to adhere to their obligations under international counternarcotics agreements. The notice in the Federal

Register explained that Colombia had been seriously considered for designation as for failing demonstrably to adhere to its obligations, “due to the extraordinary growth of coca cultivation and cocaine production over the past 3 years, including record cultivation during the last 12 months.” However, Colombia was not designated according to the notice, because “the Colombian National Police and Armed Forces are close law enforcement and security partners of the United States in the Western Hemisphere, they are improving interdiction efforts, and have restarted some eradication that they had significantly curtailed beginning in 2013.” Simultaneously, the President determined that support for programs to aid the people of 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 2018 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*

In 2017 the President of the United States again certified, with respect to Colombia (Daily Comp. Pres. Docs., 2017 DCPD No. 00490, p. 1, Jul. 21, 2017), 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 Trump made his determination pursuant to § 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended, 22 U.S.C. §§ 2291–4. For background on § 1012, see *Digest 2008* at 114.

c. *UN*

On February 21, 2017, Luis E. Arreaga, Principal Deputy Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs, delivered remarks at the Bangkok III Conference in Washington, DC. His remarks are excerpted below and available at <https://www.state.gov/j/inl/rls/rm/2017/268033.htm>.

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As we begin our discussions, I think all of us can agree that the challenges posed by psychoactive substances require urgent attention from the international community, and that this forum provides a unique opportunity to work collectively to address these challenges. It is our sincere hope that at the end of this conference we have broad agreement on recommendations that our governments can consider for formal endorsement at the 60th Session of the Commission on Narcotic Drugs (CND) in Vienna next month.

Transnational criminal organizations dealing with illicit drugs are relying increasingly on synthetic products to harm our societies. They operate complex supply and distribution networks that cross multiple international boundaries. As a result the challenges they pose to the agencies responsible for countering these criminal organizations require that we redouble our efforts to work collectively. We need to work together to track and control the precursor chemicals used to manufacture drugs such as heroin, the synthetic opioid fentanyl, and methamphetamine. We need work together tackle new psychoactive substances (NPS), including fentanyl analogues, which are being produced and brought to market much faster than our traditional methods to evaluate and control them.

We recognize that we are making some progress. Tools created by the INCB, such as Pre-Export Notification Online (PEN Online) and the Precursors Incident Communication System (PICS), have been critical in this regard. The United States has used these tools to shed light on the evolving threat posed by new methamphetamine precursor chemicals.

Not surprisingly, traffickers have adapted by seeking alternate shipping methods, and by developing new chemicals to circumvent international controls, monitoring, and surveillance.

Ladies and gentlemen we are confronting a dynamic challenge that requires similarly dynamic responses and cooperation.

In this connection, the United States will introduce a resolution for consideration at the 60th CND that advocates for increased international coordination and collaboration to address the problems posed by precursor chemicals.

We are confronting a national crisis which is already spreading to other countries, as is the case with our neighbor to the north, Canada. The Centers for Disease Control estimate that nearly 20,000 people died from overdose deaths involving heroin or fentanyl in 2015. This means that we had average of 91 overdose deaths involving opioids per day.

At this juncture, I would like to invite you to attend a side event hosted by the United States, Mexico, and Canada where you will have an opportunity to learn about the impact of fentanyl and its precursors in our countries.

While fentanyl itself is internationally controlled under the Single Convention, ANPP and NPP, the two most prevalent precursor chemicals used to illicitly manufacture fentanyl, are not controlled by any international drug convention. We need to control these precursors. In March, members of the Commission on Narcotic Drugs will have the opportunity to decide whether to control these fentanyl precursor chemicals—ANPP and NPP—under the 1988 Convention, and heed the recommendation of the International Narcotics Control Board to do so. If approved, this would be a critical measure to prevent the fentanyl threat from crossing other borders. We would greatly appreciate your country's support for this initiative at the CND next month.

The UN reports that more than 700 new substances have emerged over the last five years, and what we know about these substances is disconcerting and challenging because the international architecture set up to treat drug abuse and control the spread of those substances has not kept pace. We must adapt and use all the tools at our disposal.

This was endorsed by the 2016 UN General Assembly Special Session on the World Drug Problem (UNGASS). We think we should focus on four measures:

First, as with all substance abuse disorders, education, prevention, and treatment are the first lines of defense. In the United States, we support primary prevention to reduce the number of first time users, with an emphasis on young people.

Second, early warning and information sharing help us prepare for emerging NPS trends. The UNODC Global Synthetics Monitoring, Analysis Reporting and Trends (SMART) program

includes forensics and a database of legal approaches. The INCB's Project ION—International Operations on NPS—allows member states to share operational information on NPS trafficking and work together to dismantle these networks. We urge countries to provide information on new substances to UNODC and the INCB to make these tools as robust as possible.

Third, we need to develop flexible domestic systems that can handle the influx of NPS entering the market. In the United States, we have legislation that allows for criminal action against traffickers of drugs that are analogues of scheduled substances, because they have the same psychotropic effect but potentially a different chemical composition. We also have the ability to schedule substances on an emergency basis. On this note, the United States would like to highlight China's success in accelerating their processes for domestic control of NPS and synthetic opioids. China domestically controlled 116 NPS in 2015, and just last week, announced the domestic control of four harmful fentanyl analogues, including carfentanil, after only a four month domestic review process. Efforts such as these, exhibiting efficiency and flexibility, are worth emulating by the international community to handle the influx of NPS entering the market.

Fourth, we should expand the use of the treaty-based international scheduling tools to bolster our defenses against the most prevalent and dangerous substances. We believe that UNGASS strengthened the relevancy and role that the Conventions have in addressing global drug issues.

Madam Chairperson, decades of our mutual experience battling the drug problem have shown that voluntary international cooperation is vitally important. I think you will agree that inside our countries, public health, justice, and law enforcement agencies need to work closely together. At the regional level, organizations such as ASEAN, the Organization of American States, the EU, and the Paris Pact play critical roles in fostering cross-border coordination and information sharing. Globally, the INCB, UNODC, and the CND have the mandate to bring all countries together and to establish universal standards on issues such as chemical control and NPS.

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On March 13, 2017, William R. Brownfield, Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs, delivered remarks at the 60th Session of the Commission on Narcotic Drugs ("CND") in Vienna, Austria. His remarks are excerpted below and available at <https://www.state.gov/j/inl/rls/rm/2017/269232.htm>.

* * * *

At the first meeting of the Commission since last year's landmark United Nations General Assembly Special Session on the World Drug Problem (UNGASS), I reiterate the commitments we made there and urge that we focus on implementing them. We recognize the need for comprehensive, balanced approaches to drug policy and seek to advance the implementation of the UNGASS outcomes while re-affirming this Commission's primary role in international drug control matters. The 2009 Political Declaration called for a review, and that is what we accomplished at the 2016 UNGASS. So our focus here and for 2019 needs to be on the practical implementation of more than 100 recommendations agreed to at UNGASS.

My government is acutely focused on advancing implementation of the UNGASS

outcome document through practical and operational measures to address the challenges related to the world drug problem. One of the most serious is the ongoing opioid crisis impacting our communities.

According to the most recent data from our Centers for Disease Control and Prevention, in the United States alone, more than 33,000 people died from overdoses involving prescription or illicit opioids in 2015. Of these 33,000, 60 percent—or nearly 20,000 overdose deaths—involved heroin or synthetic opioids, including fentanyl. The presence of fentanyl in toxicology screenings, in fact, is so difficult to detect that we fear these numbers are actually an underestimation. The reality for us is that drug overdose has exceeded any other form of injury-related death, including traffic accidents. This dramatic increase in drug overdose fatalities is not simply a U.S. problem: according to the 2016 report from the International Narcotics Control Board (INCB), the overdose situation in other countries has reached “crisis levels.”

One way we can curb this trend is to increase regulations on the two most prevalent precursor chemicals used to produce illicit fentanyl, ANPP and NPP. As many of you know, the United States requested to add ANPP and NPP to the international control regime under the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The INCB conducted a scientific review, using information submitted by UN Member States, and recommended international control of these chemicals. We applaud the INCB’s rapid response. It demonstrates that the treaties are able to respond nimbly to today’s challenges.

International control of these chemicals will not prohibit their use in the legitimate market. They will only require increased regulation. My own United States has a legitimate industry for fentanyl as a medication. We have already placed these chemicals under domestic controls and have not seen an impact on legitimate industry use.

International control of these chemicals is an important prevention measure as well. We protect the public health and safety of our citizens by denying traffickers new markets and by preventing this epidemic from spreading to new territories.

Colleagues, we urge you to vote in support of this measure when it comes up for decision in the Plenary on Thursday afternoon.

Ladies and gentlemen, in 2015, the government of China took an unprecedented step and controlled 116 new psychoactive substances (NPS). And just last month, China announced the domestic control of four harmful fentanyl analogues, including carfentanil, a particularly dangerous veterinary form of fentanyl. My government applauds China’s leadership in this field. China’s action and the INCB’s rapid response to the request to control fentanyl pre-cursors are models of how to respond efficiently and flexibly to the influx of NPS on the market.

Finally, the United States is pleased to present two resolutions for consideration during this Commission. First, as follow-on from UNGASS, we offer a resolution seeking greater coordination across the UN system as we implement UNGASS outcomes. Second, as follow-on from the INCB’s conference in February on precursors and new psychoactive substances, we are advocating for increased cooperation on precursor chemicals. We look forward to discussing these texts with you in the course of this week.

I thank you, Madam Chairwoman. We look forward to a productive and successful Diamond Jubilee Commission on Narcotic Drugs.

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On March 16, 2017, after the UN Commission on Narcotic Drugs voted to add fentanyl precursors to the international control regime under the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, as proposed by the United States, Kara McDonald, Office Director for the State Department's Office of Policy, Planning and Coordination in the Bureau of International Narcotics and Law Enforcement Affairs, provided the following intervention on behalf of the United States. Her remarks are also available at <https://www.state.gov/j/inl/rls/rm/2017/268488.htm>.

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I want to express the gratitude of my government for this show of solidarity and support in voting to internationally control precursor chemicals to fentanyl. Let there be no mistake—this vote today will save lives. This is a profound example of how international action can positively impact the lives of our citizens.

Adding these precursor chemicals to the 1988 Convention will make it more difficult for traffickers to access them for illicit purposes, because they will now be subject to increased regulation by UN Member States.

The United States believes this action, as it takes effect, is an important tool in controlling the flow of fentanyl.

We note that the time between my government making this request to the UN Secretary General, to today's historic vote, was an unprecedented four months. My government congratulates the INCB for this record and looks forward to this serving as a precedent as we tackle the NPS crisis.

My delegation thanks the INCB, the UNODC Secretariat, and the member states for your support on this issue, and looks forward to our continued collaboration.

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3. Trafficking in Persons

a. Trafficking in Persons report

In June 2017, the Department of State released the 2017 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 2016 through March 2017 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 2017 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 <https://www.state.gov/j/tip/rls/tiprpt/2017/index.htm>. Chapter 6 in this *Digest* discusses the determinations relating to child soldiers.

On June 27, 2017, Secretary Tillerson and Susan Coppedge, Ambassador-at-Large for the Office to Monitor and Combat Trafficking in Persons, delivered remarks at the 2017 ceremony announcing the release of the 2017 Trafficking in Persons Report. Secretary Tillerson's remarks are excerpted below and available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/06/272205.htm>.

* * * *

I think before I get to some of my prepared remarks, ...since this was my first one of these to review and sign off on and make the report, I thought it useful to go back and read the original reason why we do this. This is the Victims of Trafficking and Violence Protection Act of 2000, and that's really where this all began. And I think it is useful to remind us why we're here this morning, why we're gathered in this room, and what the United States Government and the people of the United States were really trying to express in this area.

And I think if you go back to the preamble to this act, I think it really sums it up well. It says, "The purpose of this act is to combat trafficking in persons, a contemporary manifestation of slavery, whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect the victims." ...I want to read just one more line: "As the 21st century begins, the degrading institution of slavery continues throughout the world."

That is why we are here this morning. It then ... goes on to require that the State Department prepare this annual report to make an assessment of how governments around the world are taking action to address this. And I think it's really through actions what this act motivated and what the State Department is doing as it meets its obligation, is we're identifying first where the problems are: how do the problems manifest themselves—because they continue to evolve and take on new characteristics; how do we then work with governments to cause them to put in place laws that allow them to then pursue those who participate in these various forms of human trafficking; how do we encourage governments to enforce those laws and actually begin to hold people accountable; and lastly, how do we create the conditions where the victims or the potential victims of human trafficking are able to come forward in a non-threatening way and help us understand better how this is occurring.

And it's really the results of what we do that matter. ...

Human trafficking is as old as humankind. Regrettably, it's been with us for centuries and centuries. But in the expression of this act, as I read that one line to you, it is our hope that the 21st century will be the last century of human trafficking, and that's what we are all committed to. ...

Regrettably, our challenge is enormous. Today, globally, it's estimated that there are 20 million victims of human trafficking. So, clearly, we have a lot of work to do and governments around the world have a lot of work to do.

So let me now make a few comments on the report and why it's so important. Obviously, ... our failure to act in this area has so many other negative impacts around the world: it breeds corruption; it undermines rule of law; it erodes the core values that underpin a civil society. Transnational criminal networks also ... are partly enabled by participating in human trafficking activities as well.

When state actors or nonstate actors use human trafficking, it can become a threat to our national security.

North Korea, for instance, depends on forced labor to generate illicit sources of revenue in industries including construction, mining, and food processing. An estimated fifty to eighty thousand North Korean citizens are working overseas as forced laborers, primarily in Russia and China, many of them working 20 hours a day. Their pay does not come to them directly. It goes to the Government of Korea, which confiscates most of that, obviously.

The North Korean regime receives hundreds of millions of dollars per year from the fruits of forced labor. Responsible nations simply cannot allow this to go on, and we continue to call on any nation that is hosting workers from North Korea in a forced labor arrangement to send those people home. Responsible nations also must take further action. China was downgraded to Tier Three status in this year's report in part because it has not taken serious steps to end its own complicity in trafficking—including forced laborers from North Korea that are located in China.

American consumers and businesses must also recognize they may have an unwitting connection to human trafficking. Supply chains creating many products that Americans enjoy may be utilizing forced labor. The State Department does engage with businesses to alert them to these situations so that they can take actions on their own to ensure that they are not in any way complicit.

Most tragically, human trafficking preys on the most vulnerable, young children, boys and girls, separating them from their families, often to be exploited, forced into prostitution or sex slavery.

The State Department's 2017 Trafficking in Persons Report exposes human trafficking networks and holds their operators and their accomplices accountable.

The focus of this year's report is governments' responsibilities under the Palermo Protocol to criminalize human trafficking in all its forms and to prosecute offenders. We urge the 17 countries that are not a party to the international Protocol to Prevent, Suppress, and Punish Trafficking in Persons to reconsider their position and to join the other countries who have made that commitment.

The 2017 TIP Report also emphasizes governments must put forward tougher anti-corruption laws and enforce them, so that traffickers do not get a free pass for those who choose to turn a blind eye.

Importantly, nations must educate law enforcement partners on how to identify and respond to those who dishonorably wear the law enforcement uniform or the military uniform by allowing trafficking to flourish. The most devastating examples are police officers and those who we rely upon to protect us, that they become complicit through bribery, by actually working in brothels themselves, or obstructing investigations for their own profit. Complicity and corruption that allows human trafficking from law enforcement officials must end.

We know shutting down these networks is challenging. But these challenges cannot serve as an excuse for inaction.

The 2017 TIP Report also recognizes those governments making progress. We want to give them credit for what they are doing. Last year, governments reported more than 9,000 convictions of human-trafficking crimes worldwide, up from past years.

Just to mention a few highlights:

Last July, the president of Afghanistan ordered an investigation into institutionalized sexual abuse of children by police officers, including punishment for perpetrators. In January, a new law was enacted criminalizing *bacha baazi*, a practice that exploits boys for social and sexual entertainment. The government continues to investigate, prosecute, and convict traffickers—including complicit government officials.

In the Ukraine—a country that has been on the Watch List for years—the office of the prosecutor general issued directives to improve investigations of trafficking, and increased efforts to root out complicity, including convictions of police officers. A teacher at a government-run school, a government-run boarding school for orphans, has been arrested for trying to sell a child. And officials are now on notice that complicity in trafficking will be met with strict punishment.

In the Philippines, increased efforts to combat trafficking have led to the investigation of more than 500 trafficking cases and the arrest of 272 suspects—an 80 percent increase from 2015.

Given the scale of the problem, though, all of these countries, and many more, have much to do. But it is important to note their progress and encourage their continued commitment.

As with other forms of illicit crime, human trafficking is becoming more nuanced and more difficult to identify. Much of these activities are going underground and they're going online.

The State Department is committed to continuing to develop with other U.S. agencies, as well as our partners abroad, new approaches to follow these activities wherever they go and to train law enforcement to help them improve their technologies to investigate and prosecute these crimes.

To that end, I am pleased to highlight a State Department initiative announced earlier this year.

The Program to End Modern Slavery will increase funding for prosecution, protection, and prevention efforts to reduce the occurrence of modern slavery wherever it is most prevalent. The program is the result of the important support of Congress, especially from Chairman Corker, and other leaders committed to bringing more people out from under what is a crime against basic human rights.

The Program to End Modern Slavery will fund transformational programs but also set about to raise commitments of \$1.5 billion in support from other governments and private donors, while developing the capacity of foreign governments and civil society to work to end modern slavery in their own countries.

As we reflect on this year's reports and the state of human trafficking the world over, we recognize those dedicated individuals who have committed their lives—and in some cases put their lives at risk—in pursuit of ending modern slavery. For many victims, theirs is the first face of hope they see after weeks or even years of fear and pain.

The 2017 TIP Report Heroes will be recognized formally in just a few minutes, but I want to thank them and express my own admiration for their courage, leadership, sacrifice, and devotion to ending human trafficking. ...

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Ambassador Coppedge also provided a briefing on the 2017 TIP Report on June 27, 2017, available at <https://www.state.gov/r/pa/prs/ps/2017/06/272212.htm>. In her

briefing, Ambassador Coppedge summarized the statistics in the 2017 TIP Report as follows:

Of the 187 countries assessed under the minimum standards, 36 countries were placed on Tier One, 80 on Tier Two, 45 were placed on the Tier Two Watch List, and 23 countries were on Tier Three. In all, there were 21 downgrades, meaning a country moved down a level, and 27 upgrades.

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 30, 2017, the President issued a memorandum for the Secretary of State, “Presidential Determination With Respect to Foreign Governments’ Efforts Regarding Trafficking in Persons.” 82 Fed. Reg. 50,047 (Oct. 27, 2017). The President’s memorandum conveys determinations concerning the countries that the 2017 Trafficking in Persons Report lists as Tier 3 countries. See Chapter 3.B.3.a. *supra* for discussion of the 2017 report.

4. *Money Laundering*

Effective December 8, 2017, U.S. financial institutions were prohibited from opening or maintaining a correspondent account for, or on behalf of, Bank of Dandong Co., Ltd. (“Bank of Dandong”) as a financial institution of primary money laundering concern pursuant to Section 311 of the USA PATRIOT Act (Section 311). Covered U.S. financial institutions are required to take reasonable steps not to process transactions for the correspondent account of a foreign banking institution in the United States if such a transaction involves Bank of Dandong and to apply special due diligence to their foreign correspondent accounts that is reasonably designed to guard against their use to process transactions involving Bank of Dandong. 82 Fed. Reg. 51,758 (Nov. 8, 2017). The Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) found reasonable grounds for concluding that Bank of Dandong is a financial institution of primary money laundering concern due to its use to evade international sanctions on North Korea. Excerpts follow from FinCen’s findings, published in the Federal Register.

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...Increasing U.S. and international sanctions on North Korea have caused most banks worldwide to sever their ties with North Korean banks, impeding North Korea's ability to gain direct access to the global financial system. As a result, North Korea uses front companies and banks outside North Korea to conduct financial transactions, including transactions in support of its WMD and conventional weapons programs. For example, as of mid-February 2016, North Korea was using bank accounts under false names and conducting financial transactions through banks located in China, Hong Kong, and various Southeast Asian countries. The primary bank in China was Bank of Dandong.

In early 2016, accounts at Bank of Dandong were used to facilitate millions of dollars of transactions on behalf of companies involved in the procurement of ballistic missile technology. This includes facilitating financial activity for North Korean entities designated by the United States and listed by the United Nations (UN) for WMD proliferation, as well as for front companies acting on their behalf.

Bank of Dandong has, for example, facilitated financial activity for Korea Mining Development Trading Corporation (KOMID), a U.S.- and UN- designated entity. As of early 2016, a front company for KOMID maintained multiple bank accounts with Bank of Dandong. The President blocked KOMID by listing it in the Annex of Executive Order 13382 in 2005, and the Office of Foreign Assets Control (OFAC) designated KOMID pursuant to Executive Order 13687 in January 2015 for being North Korea's primary arms dealer and its main exporter of goods and equipment related to ballistic missiles and conventional weapons.

FinCEN is concerned that Bank of Dandong uses the U.S. financial system to facilitate financial activity for Korea Kwangson Banking Corporation (KKBC) and KOMID, as well as other entities connected to North Korea's WMD and ballistic missile programs. KKBC is a U.S.- and UN-designated North Korean bank that has provided financial services in support of WMD proliferators. For example, based on FinCEN's analysis of financial transactional data provided to FinCEN by U.S. financial institutions pursuant to the BSA as well as other information available to the agency, FinCEN assesses that at least 17 percent of Bank of Dandong customer transactions conducted through the Bank of Dandong's U.S. correspondent accounts from May 2012 to May 2015 were conducted by companies that have transacted with, or on behalf of, U.S.- and UN-sanctioned North Korean entities, including designated North Korean financial institutions and WMD proliferators. In addition, U.S. banks have identified a substantial amount of suspicious activity processed by Bank of Dandong, including: (i) Transactions that have no apparent economic, lawful, or business purpose and may be tied to sanctions evasion; (ii) transactions that have a possible North Korean nexus and include activity between unidentified companies and individuals and behavior indicative of shell company activity; and (iii) transactions that include transfers from offshore accounts with apparent shell companies that are domiciled in jurisdictions known for their financial secrecy and banking in another country.

FinCEN is also concerned that, until recently, an entity designated by OFAC for its ties to North Korea's WMD proliferation maintained an ownership stake in Bank of Dandong. Specifically, this entity, Dandong Hongxiang Industrial Development Co. Ltd. (DHID), maintained a minority ownership interest in Bank of Dandong until December 2016. The United States designated DHID in 2016 for acting for, or on behalf of, KKBC. KKBC maintained a direct relationship with Bank of Dandong since approximately 2013. FinCEN believes that DHID's ownership stake in Bank of Dandong allowed DHID to access the U.S. financial system

through the bank. Based on FinCEN's analysis of financial transactional data provided to FinCEN by U.S. financial institutions pursuant to the BSA, Bank of Dandong processed approximately \$56 million through U.S. banks for DHID between October 2012 and December 2014. Even though DHID may no longer maintain an ownership stake in Bank of Dandong, FinCEN is concerned that the close relationship between the two entities helped establish Bank of Dandong as a prime conduit for North Korean activity.

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5. Organized Crime

a. *UN General Assembly High-Level Debate on the UN Convention against Transnational Organized Crime*

On June 19, 2017, Daniel Foote, Deputy Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs, delivered remarks at the UN General Assembly High-Level Debate on the Implementation of the UN Convention against Transnational Organized Crime ("UNTOC"). His remarks are excerpted below and available at <https://www.state.gov/j/inl/rls/rm/2017/272024.htm>.

* * * *

President Trump identified combating transnational crime as one of his administration's top priorities. He issued Executive Order 13773 in February to direct the U.S. government to substantially improve cooperation to aggressively dismantle these criminal groups. Secretary of State Tillerson is helping lead this process and has elevated transnational organized crime as a top diplomatic U.S. priority. We are working to ensure that U.S. efforts to carry out this executive order complement our support to UNODC assistance programs and U.S. law enforcement cooperation under the UNTOC.

The UNTOC is not just a roster of political commitments or obligations. Instead, it requires all parties to criminalize acts like conspiracy, obstruction of justice, and money laundering, and gives authorities the standards they need to find and prosecute criminals globally.

Since 2005, the United States has relied on the UNTOC over 500 times to provide or request international legal cooperation with nearly 70 countries. The UNTOC has helped us request or answer requests from more than 30 countries to extradite over 200 charged or convicted members of organized criminal groups.

We have been asked today to evaluate the implementation of the UNTOC. In our view, this treaty's performance can and should not be evaluated by whether it helps achieve the Sustainable Development Goals—as important as they are—or whether States Parties create a new review mechanism.

Instead, we measure the impact of the UNTOC by its practical results and service to member states. We measure impact by the number of times governments have actually used the Convention as a basis for mutual legal assistance or extradition.

We are committed to debating new ideas to promote the UNTOC through its Conference of Parties (COP), the treaty's governing body. But we are convinced this treaty's success is linked to the empowerment of our experts who use it on a daily basis.

We are also supporting law enforcement experts at the multilateral level. That is why the United States sponsored a resolution last year at the UNTOC COP to enhance support for experts who facilitate international cooperation, known as "central authorities."

The success of the UNTOC is tied not to the work of diplomats in Vienna and New York, but rather to that of investigators and prosecutors in cities like Palermo, who desperately need to obtain bank records, evidence, and testimony from Switzerland, and fugitives from Spain and the United States....

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That is the focus we will bring to Vienna. We encourage all Parties to send their experts to Vienna to help bring this Convention to life.

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b. Sanctions Program

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

6. Corruption

On November 7, 2017, James A. Walsh, Acting Principal Deputy Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs, delivered opening remarks for the United States at the 7th Conference of States Parties to the UN Convention Against Corruption in Vienna, Austria. His remarks are excerpted below and available at <https://www.state.gov/j/inl/rls/rm/2017/275361.htm>.

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Madam President, distinguished delegates, and members of the Secretariat, it is a pleasure to welcome Guatemala as the incoming President of the Conference of States Parties to the United Nations Convention against Corruption. We commend the efforts of the Government of Guatemala under President Morales to support the fight against corruption and impunity undertaken by the Attorney General. Anti-corruption efforts are essential to all our governments' work to improve prosperity, enhance security, and promote good governance, and to our broader mission here in Vienna today.

Fourteen years ago, the international community joined together to sign a transformational document: a global legal framework for preventing and combating corruption. Since 2005, States Parties have met seven times to improve how we implement the Convention,

and today, we have much to show for it. Our frameworks, laws, and policies—and related international cooperation—are undoubtedly better today compared to 2005. However, our job is not finished.

The UNCAC provides us a common basis to take all the necessary steps to prevent and combat corruption if we have enough political will and use the treaty effectively. Whether we seek to prevent, criminalize, investigate, or prosecute corruption, or to recover and return stolen assets, this Convention remains the comprehensive global legal framework for fighting corruption. Where there might be any questions about how this Convention can work in practice, we should use the COSP and its working groups to share ideas and help each other. That is why we are all here.

Our own commitment to the UNCAC remains resolute. The United States continues to aggressively tackle corruption and its corrosive effect on security and prosperity. Domestically, our Department of Justice has continued robust enforcement of the Foreign Corrupt Practices Act (FCPA). In 2016, the United States had a record year for enforcement of the FCPA against corporate defendants, to include final enforcement actions against 28 multinational companies. In December 2016, for example, Odebrecht and Braskem—which paid over \$788 million in bribes to government officials across the globe—entered into the largest-ever global corporate resolution with Brazil, Switzerland, and the United States. International cooperation is instrumental in helping to investigate and prosecute these and many other corruption cases. In addition, we remain committed to targeting ill-gotten gains. Through international cooperation and our Kleptocracy Asset Recovery Initiative, we have seized or frozen over \$3 billion in corruption-related proceeds since 2010, having returned more than \$150 million to date with another \$30 million in process.

Abroad, anti-corruption technical assistance and capacity building remains a significant component of our foreign policy and foreign assistance. We have worked with partner countries to create a culture of integrity to prevent corruption and mitigate risk against corruption, develop consequence to corruption through laws and law enforcement, and strengthen civil society and oversight bodies. We continue to support UNODC and other international organizations that provide technical assistance to countries seeking to recover stolen assets.

We care deeply about technical assistance, so that is why my delegation has sponsored a related resolution at this COSP, with the principal goals of promoting transparency and information sharing. We look forward to working with you all to refine the text.

As we implement the UNCAC, we must also draw on all sectors of society to fight corruption, including civil society organizations and the private sector. We have nothing to hide—and much to gain—from their engagement with us in the COSP and its subsidiary bodies. We encourage all States Parties to engage more actively with civil society, including as part of the Review Mechanism and when formulating technical assistance programs related to the UNCAC.

We are cognizant that good-faith efforts by the United States or any single country will never be enough: we all must work together to adopt and enforce international standards of integrity, accountability, and transparency. As such, the United States looks forward to having our policies and practices reviewed under the second cycle of the UNCAC Review Mechanism in 2018.

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C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS**1. International Criminal Court****a. *Assembly of States Parties***

On December 8, 2017, Acting Legal Adviser Richard Visek delivered the statement on behalf of the United States at the 16th session of the Assembly of States Parties of the International Criminal Court. That statement follows and is available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-USA.pdf.

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The United States strongly supports justice and accountability for war crimes, crimes against humanity, and genocide, including through support of domestic accountability efforts. We appreciate the efforts of the ICC and the Parties to the Rome Statute to pursue these objectives. At the same time, recent developments in connection with a request by the Office of the Prosecutor to open an investigation into the situation in Afghanistan raise serious and fundamental concerns that we wish to register today.

The United States rejects any assertion of ICC jurisdiction over nationals of States that are not parties to the Rome Statute, absent a UN Security Council referral or the consent of that State. Dating back to the 1990s, the United States has consistently objected to any exercise of jurisdiction by the ICC over U.S. personnel. We affirm this continuing position of the United States Government, and object to the request by the Office of the Prosecutor for authorization from the Court to pursue an investigation of alleged actions by U.S. personnel in the context of the conflict in Afghanistan. As the United States has previously stated, we will regard as illegitimate any attempt by the Court to assert the ICC's jurisdiction over American citizens.

I'd like to briefly elaborate on some of the concerns of the United States.

As an initial matter, and as we have consistently emphasized, the United States is not a party to the Rome Statute and has not consented to any assertion of ICC jurisdiction, nor has the Security Council taken action under Chapter VII of the UN Charter to establish jurisdiction over U.S. personnel. It is a fundamental principle of international law that a treaty is binding only on its parties and that it does not create obligations for non-parties without their consent. The Rome Statute cannot be interpreted as disposing of rights of the United States as a non-Party without U.S. consent.

The United States respects the decision of those nations that have chosen to join the ICC, and in turn, we expect that our decision not to join and not to place our citizens under the court's jurisdiction will also be respected.

Additionally, we are concerned about any ICC determination—as required by the Rome Statute's core principle of complementarity—on, for example, the genuineness of U.S. legal proceedings without United States consent. The principle of complementarity fundamentally limits the ICC's exercise of jurisdiction to those cases in which a State is genuinely unwilling or unable to comply with its duties, such as those under the Geneva Conventions, to investigate and

prosecute war crimes, genocide, and crimes against humanity. Just as we have not consented to jurisdiction over our personnel, we have not consented to the ICC's evaluation of our own accountability efforts.

In raising these concerns, we are at the same time committed to accountability.

The United States has undertaken numerous, vigorous efforts to determine whether its personnel have violated the law and, where there have been violations, has taken appropriate actions to hold its personnel accountable. The United States is deeply committed to complying with law, and has a robust system of investigation, accountability and transparency that is among the best in the world. Indeed, we note the irony that in seeking permission to investigate the actions of U.S. personnel, the Prosecutor appears to have relied heavily upon information from investigations that the United States Government itself decided to make public. We question whether pursuing this investigation will make other countries less willing or able to engage in similar examinations of their own actions and to be transparent about the results. Furthermore, our efforts to hold ourselves to the highest standards of accountability and public transparency must not be misunderstood as an invitation for the ICC to review those efforts.

By intervening at this meeting, we are expressing our long standing, continuing, and principled objections. We registered these objections throughout the course of the negotiations in the 1990s. We registered these objections following the entry into force of the Rome Statute. And we repeat these objections today. Further, we have long believed and stated that justice is most effective when it is delivered at the local level. In this regard, we don't believe that moving to open an investigation by the ICC would serve the interests of either peace or justice in Afghanistan.

The United States stands as a strong ally in the fight to end impunity. Earlier this week, we joined many of you in commemorating the accomplishments of the International Criminal Tribunal for the Former Yugoslavia, an institution we have supported since day one as an important way to help ensure justice for the victims of atrocities committed during the Balkans conflict. Our support for such efforts dates back to Nuremberg and Tokyo. We were one of the most vocal supporters for the creation of tribunals to try those most responsible for atrocities committed in Rwanda and Sierra Leone. And we continue to support a number of hybrid, regional, and domestic efforts to ensure accountability for atrocity crimes, from Guatemala to Syria to Kosovo to South Sudan. The International Criminal Court can play an important role alongside these efforts by exercising its power judiciously within the limits of international law.

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b. General Assembly

On October 30, 2017, U.S. Special Adviser Carlos Trujillo delivered remarks at a meeting of the Sixth Committee on the Report of the International Criminal Court on its activities from August 2016 through July 2017. Mr. Trujillo's remarks are excerpted below and available at <https://usun.state.gov/remarks/8061>.

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The United States remains deeply committed to accountability for atrocity crimes, and we continue to support myriad international, regional, hybrid, and domestic mechanisms that work in pursuit of this goal. Among these options, we have long believed and stated that justice is most effective when it is delivered at the local level. We would call on the ICC and states to respect genuine domestic efforts to promote justice for atrocity crimes.

As we look across the landscape of international justice, we see countries taking on this important task, and the United States welcomes the progress they have made. In the Central African Republic, personnel have been appointed to the Special Criminal Court to begin the work of ending impunity for mass atrocities in that country. Since May of this year, the Head International Prosecutor as well as national and international magistrates, prosecutors, and investigators have been named. We are also encouraged by the work of the Kosovo Specialist Chambers, which continues to ready itself for any indictments from the Specialist Prosecutor's Office. In the last year a roster of judges was selected, along with a President of the Court, and the judges convened and adopted rules of procedure and evidence.

In addition to these positive steps in domestic systems, the United States is pleased to see advancements in a number of regional and hybrid efforts to end impunity for atrocity crimes. For example, in November of last year the Extraordinary Chambers in the Courts of Cambodia upheld the convictions of Nuon Chea and Khieu Samphan for crimes against humanity, finally bringing a measure of justice for the victims of murder, persecution, and other inhumane acts in Cambodia decades ago. In South Sudan, the African Union is working with the South Sudanese government to prepare for judicial processes of accountability, taking steps to establish a hybrid court to prosecute those responsible for atrocities committed in that country. For institutions like these, there is still much work to be done, but every step forward is a welcome one.

In this vein, the United States has supported building a foundation for accountability through documentation of atrocities that can help domestic courts deliver justice. In Iraq, for example, the United States supported UN Security Council Resolution 2379, adopted last month, requesting the Secretary-General to establish an investigative team composed of international and Iraqi experts, headed by a Special Adviser, to support Iraqi domestic efforts to hold ISIS accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to genocide, crimes against humanity, and war crimes. Information gathered by the team could be used by Iraq, and, with the approval of the Security Council, other Member States in whose territory ISIS has committed acts that may amount to genocide, war crimes, and crimes against humanity may request the team to collect evidence of such acts.

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The United States has also for years supported Syrian NGOs documenting human rights abuses and international humanitarian law violations in Syria, as well as the Independent International Commission of Inquiry (COI) established in 2011 by the UN Human Rights Council with a mandate to investigate all human rights violations in Syria. The United States has also strongly supported the call for accountability in numerous UN Security Council resolutions and supported the OPCW-UN Joint Investigative Mechanism (JIM) to investigate chemical weapons attacks. In the past year, we have supported the international community in taking efforts one step further with the International, Impartial, and Independent Mechanism (IIIM) for Syria, established through a United Nations General Assembly resolution in December 2016. Its

mandate is to consolidate and analyze evidence of violations of international humanitarian law and abuses and violations of human rights law, including evidence generated by the COI, NGOs, and others, and to prepare files in order to facilitate fair and independent criminal proceedings in appropriate fora. This can be an important step forward to support investigations and prosecutions of perpetrators of atrocities in Syria.

As these and other efforts demonstrate, it is through multiple institutions and mechanisms that the international community can fight to end impunity for those crimes that shock our common conscience.

As the United States considers these issues and how they relate to the ICC moving forward, I would recall that we have serious concerns with respect to the crime of aggression amendments, which we believe contain dangerous ambiguities regarding basic issues such as which states and what conduct would be covered by the amendments. As we have said consistently, we believe that such issues should be clarified before any decision is taken by ICC States Parties to activate the amendments. Taking concrete steps to do so will help ensure that states are able to join together when necessary to take action to prevent atrocities and safeguard collective security.

In closing, so long as minorities in Burma are persecuted and murdered, so long as civilians are attacked with chemical weapons in Syria, so long as South Sudanese children are abducted and forced into combat, so long as people are being tortured and disappeared in Burundi, states cannot stand idly by. Those who are responsible for atrocities must face consequences for their actions in accordance with international law. The United States will continue our work toward that end, steadfast in our commitment to pursue justice for the world's worst crimes.

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c. *Libya*

On May 8, 2017, U.S. Deputy Legal Adviser Stephen Townley delivered remarks at a UN Security Council briefing on the situation in Libya. Mr. Townley's remarks are excerpted below and available at <https://usun.state.gov/remarks/7792>.

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Thank you, Mr. President. Thank you, Madam Prosecutor, for the briefing on your office's efforts to pursue accountability for atrocity crimes committed in Libya.

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The United States remains dedicated to pursuing accountability for violations and abuses committed during the 2011 revolution. In this regard, we appreciate the continued efforts to bring Saif Qadhafi, accused of helping orchestrate the murder and persecution of hundreds of civilians, to justice. We urge all relevant Libyan actors to facilitate the transfer of Saif Qadhafi to The Hague so he may stand trial for his alleged crimes against humanity. We welcome the continued

reports of Libya's cooperation with the Prosecutor, consistent with this Council's calls for such cooperation and Libya's obligations under resolution 1970.

We have also taken note of the Court's recent decision to lift the seal on an arrest warrant for al-Tuhamy Mohamed Khaled, who is accused of being responsible for war crimes and crimes against humanity in Libya. We stress the importance of working to ensure accountability for such atrocity crimes, which would send a vital deterrent signal in the midst of ongoing violence that those who commit atrocity crimes in Libya will ultimately face justice.

The United States remains committed to supporting the Libyan people as they struggle for peace, prosperity, and democratic governance. Accountability for crimes in Libya will be key to an enduring success in this endeavor. We look forward to continued collaboration with this Council to realize a better future for all Libyans.

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On August 18, 2017, the State Department released as a media note the joint statement of the governments of France, the United Kingdom, and the United States regarding the ICC Arrest Warrant for Major Mahmoud al-Werfalli in Libya. The joint statement follows and the media note is available at <https://www.state.gov/r/pa/prs/ps/2017/08/273542.htm>.

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The governments of France, the United Kingdom, and the United States welcome the announcement on August 17 by the Libya National Army (LNA) that it will investigate reports of unlawful killings in Benghazi. We note that the LNA has recognized the arrest warrant by the International Criminal Court prosecutor for a member of the LNA, Major al-Werfalli, and are encouraged by the LNA's decision to suspend Major al-Werfalli pending an investigation. We call on the LNA to ensure that the investigation is carried out fully and fairly; and those responsible for the unlawful killings are held to account.

We are monitoring ongoing acts of conflict in Libya closely. Those suspected of committing, ordering, or failing to prevent unlawful killings and torture on all sides must be fully investigated and held accountable, as appropriate. We will continue our efforts at the international level to pursue appropriate action against those who are complicit in violations of international human rights law or international humanitarian law, whatever their affiliation. We consider that it is in Libya's interest to be able to rely on unified security forces responsible for the country's security and acting within the framework of Libya's laws and respecting international law.

The governments of France, the United Kingdom, and the United States also reaffirm their support for the Government of National Accord. We underscore the importance of the United Nations' central role in facilitating Libyan-led political dialogue, welcome the appointment of the new Special Representative of the Secretary-General Ghassan Salamé, and look forward to supporting his efforts to facilitate a political solution in Libya.

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Ambassador Michele J. Sison, U.S. Deputy Permanent Representative to the United Nations, delivered remarks at a UN Security Council briefing on the situation in Libya on November 8, 2017. Those remarks are excerpted below and available at <https://usun.state.gov/remarks/8095>.

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Thank you, Mr. President. Madam Prosecutor, thank you for the update on your office's work pursuant to Security Council Resolution 1970.

Six years ago, this Council referred the situation in Libya to the ICC in the context of appalling violations of human rights that were perpetrated during the 2011 revolution. The ICC has charged Saif Al-Islam Qadhafi with murder and persecution committed during the 2011 revolution, and we have called on all relevant Libyan actors to facilitate his transfer to the Court. We also note the ICC's arrest warrant for Tuhamy Mohamed Khaled and emphasize the need to bring to justice those involved in horrific acts committed by the Internal Security Agency against perceived opponents of the Qadhafi regime. All those responsible for crimes committed during the 2011 revolution must be held to account.

Today, much has changed in Libya. The country is not free from horrific acts of violence. We continue to call for the respect of human rights in Libya. We note with deep concern the recent airstrike in Derna, a city that remains in need of immediate and unfettered humanitarian access. We also strongly condemn the deplorable acts in al-Abyar, where on October 26th the bodies of 36 men who were shot to death were discovered.

The insecurity in the country highlights the urgent need to find a solution to the political crisis in Libya. National political reconciliation is key to ending the violent unrest that continues to plague the country. To that end, we welcome the steps that have been taken in line with the UN Action Plan that was announced in September, and we reiterate our full support for Special Representative of the Secretary-General Ghassan Salamé's leadership of ongoing mediation efforts. As delegations from the House of Representatives and the State Council negotiate amendments to the Libyan Political Agreement, we encourage all Libyan parties to support the UN political process and work together in the spirit of compromise and toward a common goal of a more peaceful and prosperous Libya.

We also call for those who are responsible for human rights violations and abuses or violations of international humanitarian law to be held accountable. They cannot act with impunity. To that end, we stress that the al-Abyar summary killings, as well as other reports of unlawful killings in Benghazi, must be fully investigated by the authorities on the ground. We have also noted the ICC accusations against Major al-Werfalli of war crimes in relation to the killing of 33 people in Benghazi. We are deeply concerned by allegations that al-Werfalli has carried out additional killings in Ajdabiya despite the ongoing investigation into his activities, as well as reports that al-Werfalli has returned to active duty despite the charges against him. The United States urges the relevant Libyan authorities to ensure that al-Werfalli is brought to justice in accordance with international law.

Mr. President, Madam Prosecutor, before closing, I would be remiss not to convey the United States' position with respect to recent developments related to the situation in Afghanistan. The United States believes that any ICC investigation or other activity concerning U.S. personnel is wholly unwarranted and unjustified. The United States is deeply committed to

complying with international law and has a robust national system of investigation, accountability, and transparency that is among the best in the world. The United States has a longstanding and continuing objection in principle to any ICC assertion of jurisdiction over U.S. personnel. More generally, we do not believe that an ICC investigation would serve the interests of either peace or justice in Afghanistan.

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d. Sudan

On June 8, 2017, Ambassador Sison delivered remarks at a UN Security Council briefing on Sudan and the ICC. Those remarks are excerpted below and available at <https://usun.state.gov/remarks/7838>.

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The need to bring justice to the victims of atrocities in Darfur is overwhelming. For over a decade, Darfur has been synonymous with suffering and unchecked impunity. In responding to a rebellion, the government launched what became a brutal campaign against the Fur, Massalit, and Zaghawa populations. As time went on, the conflict in Darfur grew into a staggering crisis, with thousands murdered, hundreds of thousands deliberately deprived of the basic means of survival, and millions displaced from their homes. Many of us will never forget the first shocking reports of Janjaweed militia on horses and camels, storming into villages to kill, rape, torture, and burn.

The ICC has examined and charged a horrific list of crimes in Sudan: genocide by killing; genocide by causing serious bodily or mental harm; genocide by deliberately inflicting conditions of life calculated to bring about the physical destruction of targeted groups; crimes against humanity of torture, murder, and rape; and war crimes including pillaging and deliberate attacks on peacekeepers.

For years, the conflict continued—even expanding into other parts of Sudan. During that time, we have consistently supported efforts to provide justice and accountability for crimes committed in Darfur and to finally break the cycle of impunity. At the same time, recognizing that the people of Darfur yearned for fewer bombings, less bloodshed, less conflict, and greater stability and safety, we also have focused on seeing an end to the conflict. Through bilateral engagement, we identified concrete steps to make tangible improvements in the lives of ordinary Sudanese and have seen results.

The Government of Sudan has taken meaningful positive steps with respect to the conflict, including committing to a unilateral cessation of hostilities, and while some violence persists, we have not seen government military offensives in this period as we have every year since these conflicts began. The Government of Sudan has also worked closely with our own to begin to address regional conflicts, improve humanitarian access, combat the threat of terrorism, and eliminate the threat of the Lord's Resistance Army. There is certainly more progress to be made on these fronts, but these are welcome steps towards a better future. Indeed, we now see the possibility of long-term progress that we hope will lead to more respect for human rights, more accountability, more rule of law, and more justice for Sudanese victims.

But as we see encouraging signs of a new approach to addressing the longstanding conflict and hope that further engagement will spur additional progress, we must also be clear: we must neither forget the victims nor the perpetrators of the crimes in Darfur. We cannot simply turn our backs on the victims of genocide who were forced from their homes and left to die of thirst or starvation, or on the thousands of women and girls who suffered brutal sexual violence, or on those who were targeted on the basis of their ethnic identity. There will be no stable and lasting peace in Sudan without justice for the many victims of crimes related to the conflict.

As Ambassador Nikki Haley has said here in this Council: “In case after case, human rights violations and abuses are not merely the incidental byproduct of conflict. They are the trigger for conflict.” If we do not address the victimization that has occurred and the magnitude of the violations and abuses inflicted, any peace will be hollow and easy to shatter by those seeking revenge for themselves, their loved ones, and their communities.

In the years since the conflict in Darfur began, we have seen inspiring examples of accountability across the globe, where those leaders who targeted their own citizens in order to maintain a stranglehold on power have been forced to face justice. Former Ivoirian President Laurent Gbagbo is now in court in The Hague, while Charles Taylor and Hissène Habré are serving lengthy prison sentences. Beyond Africa, senior former Khmer Rouge officials in Cambodia have been sentenced for war crimes and crimes against humanity, and leaders responsible for Dirty War-era crimes in Latin America and atrocity crimes in the former Yugoslavia have also been held to account.

The Council should not let Sudan be an exception. Having referred the situation in Darfur to the ICC over ten years ago, we must continue to demand Sudan’s compliance with this Council’s decisions. While victims have not yet seen justice, and refugees and internally displaced persons continue to struggle years after the conflict began, it is unacceptable that President Bashir still travels and receives a warm welcome from certain quarters of the world – and unacceptable that none of the Sudanese officials with outstanding arrest warrants have been brought to justice.

Thus, as we pursue more engagement with Sudan and greater relief and protection for the survivors of the conflict, we must also recommit to supporting accountability to bring a just and lasting peace to the people of Darfur.

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Ambassador Sison again addressed the UN Security Council at a further briefing on Sudan in December 2017. Those remarks from December 12, 2017 are excerpted below and available at <https://usun.state.gov/remarks/8213>.

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Thank you, Mr. President, and thank you, Madam Prosecutor, for your briefing. We agree with you that victims in Darfur need justice.

Since the beginning of the conflict in Darfur, more than 300,000 people have been killed and 4.7 million others have been affected, including more than 2 million people who were, and remain, internally displaced. In the past, both Sudanese government forces and their allied

militias have engaged in widespread and systematic killing, raping, and torturing of civilians. Perpetrators have burned villages and have blocked humanitarian aid from reaching populations in desperate need. Some rebel groups have conducted similar brutal attacks.

More than 12 years ago, this Council—alarmed by the atrocities taking place in Darfur—referred the situation to the International Criminal Court in order to bring to justice those responsible for such atrocities and to end the climate of impunity in Sudan. The United States has continued efforts to help end the conflict and improve conditions for the people of Darfur. This focus on the safety and security of Darfuri civilians was a key component of the Five-Track Engagement Plan, a framework launched in June 2016 under which the U.S. government offered to Sudan the revocation of certain economic sanctions if Sudan made progress in a number of areas. Under this process, we asked Sudan to maintain a cessation of hostilities in internal conflict areas such as Darfur and to improve humanitarian access.

We note that in 2017, the Government of Sudan has refrained from military offensives and stopped aerial bombardments in Darfur and that it has taken meaningful steps to expand humanitarian access. The armed opposition in Darfur, with the exception of one party, also reciprocated by announcing its own unilateral cessations of hostilities. However, much more progress is needed.

While Darfur has not experienced the same levels of violence in 2017 as in years past, lasting peace remains elusive, the human rights situation continues to be volatile, humanitarian needs remain high, and accountability remains nonexistent. Those responsible for human rights violations and abuses and attacks on civilians should be held accountable, including security forces using excessive force against civilians, such as in Kalma camp in September 2017, or members of armed militias who perpetrate atrocities against civilians in Darfur. We note in November 2017, the arrest by the Sudanese government of former Janjaweed commander, Musa Hilal, who is subject to UN sanctions for his commission of atrocities in Darfur, following clashes between the Sudanese security forces and armed militia loyal to Hilal.

We are concerned about reports of civilian fatalities, including the killing of women and children, that occurred during these clashes. We call on the Sudanese government to allow the UN, humanitarian organizations, and the media to access the area where the clashes took place so they can investigate the reports and provide assistance to those in need.

We also call on the government to investigate promptly and credibly any allegations against Hilal, in accordance with Sudan's human rights commitments and obligations, and to hold Hilal to account if he is found to have committed atrocities.

We note that the International Criminal Court has investigated allegations of atrocities committed by all sides and charged Sudanese government officials, militia leaders, and certain armed opposition members for crimes, including genocide; the crimes against humanity of torture, murder, and rape; and war crimes, including pillaging and deliberate attacks on peacekeepers.

We have noted for many years that it is unacceptable that the suspects in the Darfur situation remain at large and have not been brought to justice. In particular, we have expressed disappointment that Sudanese President Omar al-Bashir continues to travel to countries around the world. Receiving President Bashir on these visits has served only to burnish his image, diminish the seriousness of the charges against him, and dismiss the tremendous suffering of the victims. We must stand with the victims, no matter how powerful those who inflict abuses on them might be.

Other leaders who have targeted their own citizens—including former Ivoirian President Laurent Gbagbo, former Liberian President Charles Taylor, and former Khmer Rouge leaders Nuon Chea and Khieu Samphan—have been called to answer for their alleged crimes. Moving forward, we will continue to use the tools at our disposal to press Sudan to improve its human rights practices and to promote justice for the people of Darfur.

A Sudan that adheres to the rule of law, respects human rights, and breaks the cycle of impunity is one that will enjoy a sustainable peace and prosperity. We look forward to the day when Sudan is a valued contributor to regional security and stability.

Finally, I would be remiss if I did not reiterate the U.S. position with respect to recent developments related to the situation in Afghanistan, which is different from this situation in a number of respects. As we said in this Council in November, and as we reiterated at the Assembly of States Parties meeting last week, we continue to have serious concerns about, and a longstanding, principled objection to, any ICC investigation or other activity concerning U.S. personnel.

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

a. General

On June 7, 2017, Ambassador Sison addressed a UN Security Council briefing on the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Those remarks are excerpted below and available at <https://usun.state.gov/remarks/7831>.

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As we look toward December and the anticipated closure of the International Criminal Tribunal for the former Yugoslavia and merging of essential functions with the Mechanism for International Criminal Tribunals, the United States wishes to underscore that it remains as committed to the work of the Tribunal as we were when it was established nearly a quarter century ago.

Completion of the Tribunal's mandate is essential. We applaud the completion of trial proceedings in the Ratko Mladic case, and look forward to the delivery of the judgment later this year.

While we can never undo the horrors of war, bringing cases to their conclusions—as was done last year when former Republika Srpska President Radovan Karadžić was found guilty and sentenced to 40 years in prison for genocide, crimes against humanity, and violations of the laws and customs of war—goes a long way toward closing a dark chapter of history and creating a legacy of showing would-be perpetrators of atrocities elsewhere in the world that they cannot act with impunity. The United States has consistently emphasized that the Tribunal and the Mechanism establish facts through judicial process. This process is critical to counter those who

seek to distort facts, revise history, engage in genocide denialism, or rewrite reality.

The United States continues to be greatly concerned about the detrimental impact of increasingly divisive political speech in the region on the pursuit of justice for war crimes committed in the former Yugoslavia. Such inflammatory rhetoric harms regional cooperation among the states of the former Yugoslavia, which is essential to promoting accountability for war crimes. In this regard, the United States would like to express our sincere appreciation for the contribution of these Tribunals, including the Office of the Prosecutor, to developing a historical record of the facts, to counter those who seek to deny the nature of the widespread crimes, including genocide, that took place. The kinds of hateful ideologies that led to these horrific acts persist to this day, and together we must continue our efforts to relegate them to the past.

The United States also remains concerned that three arrest warrants for individuals charged with contempt of court in relation to witness intimidation in the case of Vojislav Šešelj have remained unexecuted in Serbia for nearly two and a half years. Cooperation with the Tribunal is an ongoing, binding obligation. The United States calls on Serbia to execute these arrests without further delay, and we look to the newly appointed Serbian War Crimes Prosecutor to play a constructive role in that process. The Council should be unified in the message to Serbia that failure to fully cooperate with the Tribunal in accordance with its statutes and the resolutions of this Council compromises the core functions of the international justice system and must be addressed with appropriate urgency.

The United States commends the ongoing work of the prosecutor's office to reshape the fugitive tracking program, so that the eight remaining fugitives from the International Criminal Tribunal for Rwanda may be swiftly located, arrested, and brought to justice. We are happy to see these changes. This effort is not window dressing; the restructuring that has been done appears capable of having a significant impact on tracking efforts, both by improving information sharing and placing a renewed emphasis on timely and effective intelligence and analysis. We remain committed to the apprehension of the remaining fugitives and look forward to engaging with the two new task forces – focused on Africa and Europe – in this effort. We call on all states, especially those in the Great Lakes region, to cooperate with efforts to apprehend these fugitives. To that end, the United States continues to offer a reward of up to \$5 million dollars for information leading to the arrest or transfer of these eight men.

With regard to management and the transition, the United States appreciates the careful planning and ongoing work of both the Tribunal for the Former Yugoslavia and Mechanism Registrars to navigate complicated issues during this period of transition for both institutions. We are happy to hear of the significant progress made to downsize offices, and reduce costs as the Tribunal looks to close at the end of the year.

We also noted the ICTY's concerns about staff attrition, and we thank them for their considerable efforts to retain core staff, including by providing training and making other accommodations, and urge them to continue these initiatives. We are grateful for the personal and professional sacrifices the staff of both tribunals have made.

In addition, we are glad to hear that the four audit reports of the Mechanism issued by the UN Office of Internal Oversight Services during the reporting period found satisfactory management and controls and that the Mechanism is striving to take necessary actions where recommendations for improvement were made. The United States remains deeply concerned that the Mechanism's casework is being severely impaired due to the situation of Judge Akay. We continue to emphasize the need for this matter to be resolved fairly and expeditiously.

The mandate of the Tribunal may be nearing an end, but its work to end impunity and promote justice will be enduring. Even more, the work of the Mechanism and Tribunal reminds us daily of the critical need to seek accountability where atrocities against civilians have so far been met with impunity – places like Syria and South Sudan.

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On December 6, 2017, Ambassador Sison delivered remarks at a UN Security Council briefing on the International Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda. Those remarks are excerpted below and available at <https://usun.state.gov/remarks/8200>.

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Today is an especially momentous occasion as we reflect on the most recent report and, more importantly, on the closing of the International Criminal Tribunal for the former Yugoslavia at the end of the month. The United States thanks President Meron, President Agius, and Prosecutor Brammertz – indeed all those who have served at the ICTY or supported it through their work in government, NGOs, or UN institutions over the past 23 years. In addition, we note our special gratitude and respect for the many victims who participated in proceedings and kept faith in the international community’s commitment to justice.

The ICTY was the first international tribunal since Nuremberg and Tokyo to investigate and prosecute allegations of war crimes, crimes against humanity, and genocide. As the vanguard of modern international justice, it established key precedents in international criminal law, setting the stage for and guiding the work of subsequent tribunals established to investigate and prosecute atrocities in Rwanda, Sierra Leone, Cambodia, and elsewhere.

Through its work, the ICTY has created a legacy of the greatest importance. It has established a factual and depoliticized record of the crimes committed during the war. We applaud the ICTY’s record, which includes indicting 161 individuals, and holding accountable senior political and military leaders for their roles in crimes committed during the war in the Balkans.

We especially highlight the recent verdict in the case of Ratko Mladic as an important step toward holding to account those individuals responsible for the tremendous suffering of the people of Bosnia and Herzegovina. Among other crimes, Mladic was found guilty of genocide in Srebrenica in 1995, crimes against humanity and persecution across the country, terrorizing the population of Sarajevo, and taking UN peacekeepers hostage. We hope this decision can provide some sense of justice and closure to victims and their families.

The United States has been a steadfast supporter of the ICTY, and we encourage all states to respect its rulings. Countries cannot pick and choose on matters of justice. Our commitment to supporting justice and reconciliation in the Balkans continues as the Tribunal’s remaining functions shift to the Mechanism for International Criminal Tribunals or MICT.

The primary focus of attention now moves to national jurisdictions and we call on all countries in the region to reinvigorate cooperation to resolve remaining cases. However, on the specific issue of the two surviving individuals charged with contempt of court in relation to witness intimidation in the case of Vojislav Šešelj, the United States applauds the order of President Agius transferring this case to the MICT. We call on the government of Serbia to cooperate with the MICT and execute the arrest warrants, and underscore the government's obligation to do so.

The United States commends the MICT for its progress during the reporting period. We appreciate the continued focus on the expeditious completion of trials and appeals. We also note with satisfaction that following the issuance of three audit reports during the reporting period, the MICT has either implemented, or is in the process of implementing, all recommendations. We are encouraged by the priorities identified by the President and the Prosecutor, and applaud the progress made in restructuring and refocusing the Fugitives and Investigations unit in order to apprehend the eight remaining ICTR fugitives.

The United States is firmly committed to the continuing efforts to locate and arrest the eight remaining ICTR fugitives. Three of the fugitives will be tried by the MICT and five others will be transferred to Rwanda. We continue to offer a reward of up to \$5 million dollars each for information leading to the arrest or transfer of these eight men, and stand ready to engage with the new task forces. We likewise call on all states and relevant law enforcement agencies in Europe and Africa to cooperate with efforts to apprehend these fugitives. They have escaped justice for too long. With a refocused tracking unit, and with the renewed cooperation of the international community and law enforcement agencies, their arrest is possible.

The MICT's efforts to increase public access to judicial records and translate International Criminal Tribunal for Rwanda trial judgments into Kinyarwanda, as well as the responsiveness by the Prosecutor to requests for assistance by national judicial authorities, are important initiatives that will ensure the ICTR has an enduring and broad impact. Similarly, the trainings for domestic prosecutors from East Africa conducted by the prosecutor will contribute to building the capacity of national jurisdictions to investigate and prosecute atrocity crimes. While the ICTY may be closing its doors, it leaves behind a legacy of justice, a robust body of international case law, and a hope among victims of atrocities that perpetrators, even the most senior military and political leaders of a country, can be held accountable. It also established a truthful, historical record that can both assist with regional reconciliation efforts and ensure crimes cannot be legitimately denied. The same can be said of the Rwanda Tribunal. The pursuit of justice for conflict-related atrocities is not over.

In the Balkans there are many hundreds of cases currently in the hands of national authorities in the region. In Rwanda and surrounding countries, fugitives remain at large. We call on these governments to credibly investigate and prosecute these cases, as appropriate, cooperating with one another and the MICT to that end. The United States will continue its support and congratulates the forward-looking efforts of the MICT to play a role in these processes, including through capacity building support.

As the ICTY has shown, when we work together, we can achieve a measure of justice and accountability for the world's most horrific atrocities.

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b. *International Criminal Tribunal for the Former Yugoslavia*

On December 4, 2017, Acting Legal Adviser Richard Visek delivered remarks at an event in New York commemorating the closure of the International Criminal Tribunal for the former Yugoslavia. His remarks are excerpted below and available at <https://usun.state.gov/remarks/8205>

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The Tribunal and all those who worked to make it a success should feel proud today. Its list of accomplishments is impressive. Since the Tribunal opened in 1993, it has indicted 161 senior leaders of regional governments, militaries, and paramilitaries for their roles in atrocities committed during the Balkan wars of the 1990s. Every indictment, every trial, every sentence was another step in ensuring a measure of justice for the victims of those crimes.

I also want to emphasize that each of these cases focused on determining the guilt or innocence of the accused. Fairness and impartiality have been the bedrock of the ICTY. Its verdicts DO NOT imply that a community or country is collectively responsible for the crimes committed by an individual.

The United States has supported the Tribunal since its inception, and we are proud that the ICTY stands as a milestone in modern international justice as the first international tribunal since Nuremberg and Tokyo to investigate and prosecute allegations of war crimes, crimes against humanity, and genocide. The Tribunal established key precedents in international criminal and humanitarian law and guided the work of later tribunals created to investigate and prosecute atrocities in Rwanda, Sierra Leone, Cambodia, and elsewhere. One of the Tribunal's pioneering achievements is its prosecution of wartime sexual violence. More than one third of those convicted by ICTY have been found guilty of crimes involving sexual violence.

ICTY also played an important role as a recorder of history. Adjudicated facts established by ICTY proceedings serve as an important means of fighting against impunity and revisionism in the former Yugoslavia. I would also like to emphasize that, although the ICTY is closing, the pursuit of justice in the Balkans continues. The Tribunal has encouraged judiciaries in the former Yugoslavia to continue their work of trying those responsible for committing war crimes during the 1990s. We urge national authorities to cooperate with each other, and with the Mechanism for International Criminal Tribunals to resolve remaining cases in their jurisdictions.

With the ICTY, we showed the world that we aim to hold accountable those who commit atrocities. So today, let us not only commemorate the Tribunal, but join voices to warn perpetrators of the gravest crimes that we will hold them accountable for their actions.

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Secretary of State Rex W. Tillerson also issued a statement on December 21, 2017 on the closing of the ICTY. That statement follows and is available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/12/276745.htm>.

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The United States congratulates the International Criminal Tribunal for the former Yugoslavia (ICTY), which will close its doors on December 31, 2017, on its many achievements. Since the inception of the ICTY in 1993, the United States has steadfastly supported the Tribunal's work. We applaud the Tribunal's record, which includes indicting 161 senior leaders of regional governments, militaries, and paramilitaries for their roles in atrocities committed during the Balkan wars of the 1990s.

While we recognize the ICTY's contributions to justice and reconciliation in the Balkans, we also believe there are lessons to learn from its experiences. We must work to deliver justice for victims efficiently and cost-effectively, while also prioritizing forums closer to where the crimes occurred, and with greater inclusion of victims in the process.

The pursuit of justice in the Balkans is not over. We call on national authorities to resolve remaining cases in their jurisdictions and to cooperate with one another and the UN Mechanism for International Criminal Tribunals to that end. The ICTY demonstrated that we can hold accountable those who commit the gravest of offenses. As it closes its doors, we also give notice to perpetrators of atrocities anywhere in the world that the United States remains committed to seeking accountability for their crimes.

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c. *UN Mechanism for International Criminal Tribunals ("MICT")*

On October 18, 2017 U.S. Special Advisor Carlos Trujillo delivered remarks at a General Assembly meeting on the report of the International Tribunal for Former Yugoslavia since 1991 and the International Residual Mechanism for Criminal Tribunals. Mr. Trujillo's remarks follow and are available at <https://usun.state.gov/remarks/8046>.

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As we look to the near horizon in December and see the coming closure of the International Criminal Tribunal for the former Yugoslavia, the United States again extends its sincere appreciation to President Meron, President Agius, and Prosecutor Brammertz for their ongoing work to achieve justice for victims of the vicious atrocities committed in the former Yugoslavia.

It is especially important to be here today participating in this debate, as we continue to face conflicts where serious crimes have been committed. We must continue to find ways to support accountability for perpetrators of atrocities, and justice for the victims.

As we look to the closure of the ICTY in December, we remain as committed as ever to the Tribunal, the independence of its work, and the successful transfer of functions to the Mechanism for International Criminal Tribunals. The United States wishes to underscore that

while the ICTY is successfully concluding its mandate, there remains much to do in the pursuit of justice and reconciliation. We must now turn our focus on fulfilling national-level obligations to resolve remaining war crimes cases, and we remain willing to support these efforts.

We applaud the ICTY for maintaining its completion schedule, on track to deliver judgements by the end of November in its two remaining substantive cases. With respect to the upcoming appeal judgment in the Prlić case against six former high-ranking officials from Herceg-Bosna, we support the independence of the Tribunal to reach its decision.

For the case against Ratko Mladić, charged with 11 counts of genocide, crimes against humanity, and violations of the laws and customs of war, we see it as a fitting bookend to the work of the Tribunal, and yet another example for the world to see that eventually those alleged to be responsible for atrocities will face justice.

Both of these cases, like all others, involve questions of individual criminality, and should not be seen as trials of any one country.

The United States also commends the work, under the leadership of the President of the ICTY, to hold legacy and closing events that can help ensure a long-lasting impact, particularly in ongoing efforts at justice and reconciliation.

The United States remains concerned about the divisive nature of some statements by some individuals in the region, which negatively impacts cooperation in the pursuit of justice for war crimes committed in the former Yugoslavia. This is particularly true when individuals deny or seek to revise the true record of crimes established by the ICTY. We should strive to depoliticize the historical record, which can help prevent a repetition of such widespread atrocities and create the space for technical experts to meet, share information, and work together in various fora to resolve remaining cases.

The United States also remains concerned about the government of Serbia's failure to execute the arrest warrants for the two surviving individuals charged with contempt of court in relation to witness intimidation in the case of Vojislav Šešelj. We continue to encourage Serbia to fulfill its obligations.

The International Residual Mechanism for Criminal Tribunals has also made notable progress since we last convened here. From an administrative perspective, staff moved into new premises in Arusha, Tanzania. Substantively, we recognize the continued focus on the expeditious completion of trials and appeals.

The United States applauds the MICT's efforts to assist national jurisdictions, such as by processing requests to question detained persons and protected witnesses. We understand that during the reporting period, the Office of the Prosecutor also answered 11 requests from member states and one international organization regarding Rwanda, and 239 requests for assistance from eight Member States and three international organizations in regards to the former Yugoslavia. In addition, it conducted capacity-building activities with national authorities from Africa, Europe, and Latin America. We are impressed with the range of assistance being provided while the MICT simultaneously remains guided by the Security Council's direction to remain a small and efficient structure.

The Office of the Prosecutor continues efforts to locate and arrest eight remaining fugitives, three of whom will be tried by the MICT – Félicien Kabuga, Protais Mpiranya, and Augustin Bizimana; and five of whom will be transferred to Rwanda – Fulgence Kayishema, Charles Sikubwabo, Aloys Ndimbati, Pheneas Munyarugarama, and Charles Ryandikayo. To that end, we appreciate the Prosecutor's review of tracking efforts and the development of updated and concrete strategies for apprehending the remaining fugitives. This includes

development of two task forces, one focused on Africa, and the other on Europe, bringing together key national law enforcement authorities, as well as INTERPOL. We commend the Prosecutor for undertaking this much-needed restructuring of the tracking team to ensure it has the capacity to conduct the range of investigative activities needed to succeed in its mission.

The United States remains equally committed to these efforts. We continue to offer a reward of up to \$5 million each for information leading to the arrest or transfer of these eight men, and stand ready to engage with the new task forces. We likewise call on all states, especially those in the Great Lakes region, to cooperate with efforts to apprehend these fugitives.

Finally, I want to again highlight two of my earlier points. First, while the ICTY is successfully concluding its mandate, the pursuit of justice and reconciliation remain priorities. We now focus our attention on national-level obligations to resolve remaining war crimes cases. Second, the work of both the MICT and ICTY remind us that in the face of horrific atrocities, we can work together to hold perpetrators accountable and achieve a measure of justice for victims.

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Cross References

Agreements on Preventing and Combating Serious Crime, **Ch. 1.B.5.**

Extradition Treaties with Serbia and Kosovo, **Ch. 4.A.1.**

Extradition case of Arias Leiva, **Ch. 4.B.3.**

Children (child trafficking), **Ch. 6.C.**

Children in Armed Conflict, **Ch. 6.C.2.**

Protecting Human Rights While Countering Terrorism, **Ch. 6.M.2.**

ILC's Work at its 69th Session: Crimes Against Humanity, **Ch. 7.C.1.**

Relations with Cuba, **Ch. 9.A.2.**

Maritime security and law enforcement, **Ch. 12.A.5.**

Wildlife trafficking, **Ch. 13.C.1.**

North Korea as State Sponsor of Terrorism, **Ch. 16.A.5.a.**

Terrorism sanctions, **Ch. 16.A.6.**

Transnational crime sanctions, **Ch. 16.A.10.**

Conflict avoidance and atrocity prevention, **Ch. 17.C.**

Counterterrorism operations, **Ch. 18.A.**

Global Initiative to Combat Nuclear Terrorism, **Ch. 19.B.4**

CHAPTER 4

Treaty Affairs

A. CONCLUSION, ENTRY INTO FORCE, AND RESERVATIONS

1. Treaties and International Agreements Generally

On December 13, 2017, Acting Legal Adviser Richard Vissek testified before the U.S. Senate Committee on Foreign Relations on five treaties under consideration by the Committee: extradition treaties with Kosovo and Serbia; maritime boundary delimitation treaties with Kiribati and the Federated States of Micronesia; and the UN Convention on the Assignment of Receivables in International Trade. Excerpts follow from Mr. Vissek's December 13, 2017 testimony.

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The Administration appreciates the Committee's prioritization of these treaties. Individually and collectively, these treaties advance U.S. interests. The extradition treaties will enhance our ability to combat transborder criminal activity. The maritime boundary treaties will improve our ability to explore, benefit from, conserve, and manage the natural resources of our maritime areas. And the Receivables Convention will help U.S. businesses gain access to capital. The Administration supports each of these treaties, and urges the Senate to provide its advice and consent to their ratification. During the remainder of my testimony, I will discuss the five treaties in additional detail.

Extradition Treaties with Kosovo and Serbia

The two extradition treaties pending before the Committee will update our existing treaty relationships with two important law enforcement partners—Kosovo and Serbia. The continuing growth in transborder crime, including terrorism, other forms of violent crime, drug trafficking, cybercrime, and the laundering of the proceeds of criminal activity, underscores the need for increased international law enforcement cooperation. Extradition treaties are essential tools in

that effort. The U.S. extradition relationships with Kosovo and Serbia are currently governed by the Treaty Between the United States of America and the Kingdom of Serbia for the Mutual Extradition of Fugitives from Justice, signed on October 25, 1901 (“the 1901 Treaty”). We have found that this treaty is not as effective as the modern treaties we have in force with other countries in ensuring that fugitives may be brought to justice. The two treaties now before the Committee would establish modern extradition relationships with both countries, thereby allowing us to engage in closer and more effective law enforcement cooperation. Replacing outdated extradition treaties with modern ones (as well as negotiating extradition treaties with new partners where appropriate) is necessary to create a seamless web of mutual obligations to facilitate the prompt location, arrest and extradition of international fugitives. As a result, these treaties are an important part of the Administration’s efforts to ensure that those who commit crimes against American victims will face justice in the United States.

Both new treaties contain several important provisions that will substantially serve our law enforcement objectives:

First, these treaties define extraditable offenses to include conduct that is punishable by imprisonment or deprivation of liberty for a period of one year or more in both states. This is the so-called “dual criminality” approach. Our older treaties, including the 1901 Treaty, provide for extradition only for offenses appearing on a list contained in the instrument. The problem with this approach is that, as time passes, the lists grow increasingly out of date. The dual criminality approach eliminates the need to renegotiate treaties to cover new offenses in instances in which both states pass laws to address new types of criminal activity. By way of illustration, so called “list Treaties” from the beginning of the 20th century do not cover various forms of cybercrime or money laundering. The new treaties with Kosovo and Serbia would fix this problem.

Second, these treaties address one of the most difficult and important issues in our extradition treaty negotiations—the extradition of nationals. As a matter of long-standing policy, the U.S. Government extradites United States nationals and strongly encourages other countries to extradite their nationals. Both of the treaties before the Committee contemplate the unrestricted extradition of nationals by providing that nationality is not a basis for denying extradition. This provision is particularly important in the context of Kosovo and Serbia because of certain provisions in their domestic law. Kosovo’s Supreme Court has ruled that its new constitution only permits the extradition of Kosovo nationals where required by international agreement. Kosovo has been clear that this provision in the treaty will overcome that obstacle, allowing them to extradite their nationals to the United States. Similarly, Serbia has domestic legislation that also permits extradition of nationals only pursuant to an obligation of a treaty to which Serbia is a party. Similarly, they have been clear that the provision on extradition of nationals in the new treaty overcomes this obstacle.

Third, the treaties include a modern “political offense” exception that states that extradition shall not be granted if the offense for which extradition is requested is a political offense, but establishes a number of categories of offenses that shall not be considered political offenses. These categories of offenses cover a range of violent crimes, including murder, kidnapping and hostage taking, and the use of various kinds of explosive devices. These categories of offenses, which did not exist in earlier extradition treaties, constitute exceptions to the political offense exception and align with a major longstanding priority of the United States to ensure that an overbroad definition of “political offense” does not impede the extradition of terrorists.

Fourth, unlike the 1901 Treaty, these new treaties contain a provision that permits the temporary surrender of a fugitive to the Requesting State when that person is facing prosecution for, or serving a sentence on, charges within the Requested State. This provision can be important to the Requesting State (and in some cases the fugitive) so that, for example: (1) charges pending against the person can be resolved earlier while evidence is fresh, or (2) where the person sought is part of a criminal enterprise, he can be made available for assistance in the investigation and prosecution of other participants in the enterprise.

Fifth, both of these treaties incorporate a number of procedural improvements over the 1901 Treaty, including direct transmission of provisional arrest requests through Justice Department channels, waiver and consent to extradition, and clear statements of the required materials to be included in a formal extradition request.

For all these reasons, U.S. ratification of the extradition treaties with Kosovo and Serbia will help us and our colleagues at the Justice Department further develop two important law enforcement relationships and advance our objective of combatting transnational crime.

Maritime Boundary Treaties with Kiribati and the Federated States of Micronesia

In an area where more than one country has maritime entitlements under international law, maritime boundaries are needed to clarify where each country may exercise its sovereignty, sovereign rights, and jurisdiction as a coastal State. In this connection, it is often noted that “good fences make good neighbors.” Delimited boundaries also provide legal certainty that enhances our ability to explore, benefit from, conserve, and manage the natural resources of our maritime areas, including with respect to our fisheries. Resolving the outstanding maritime boundaries of the United States around the world remains an ongoing project, with about a dozen such boundaries yet to be fully agreed with our neighbors.

These two treaties delimit the exclusive economic zone (or “EEZ”) and continental shelf between the United States and Kiribati, and between the United States and the Federated States of Micronesia (FSM), on the basis of equidistance. (Every point on an equidistance line is equal in distance from the nearest point on the coastline of each country.) This approach is wholly in line with international law and practice, and moreover serves to formalize the longstanding status quo regarding each side’s asserted rights and jurisdiction in these maritime areas. Accordingly, with appropriate technical adjustments, each treaty formalizes boundaries that have been informally adhered to by the Parties, and that are very similar to the existing limit lines of the EEZ asserted by the United States for decades and published in the Federal Register. Because of improved calculation methodologies and minor coastline changes, the four new maritime boundaries in these two treaties will result in a small net gain, primarily with respect to the Kiribati boundaries, of United States EEZ and continental shelf area relative to the existing limit lines of our EEZ.

The treaty with FSM establishes a single maritime boundary between Guam and several FSM islands. The boundary is approximately 447 nautical miles with 16 turning and terminal points. The treaty with Kiribati establishes three maritime boundaries in the Pacific with respect to the EEZ and continental shelf generated by various Kiribati islands and by each of the U.S. islands of Palmyra Atoll, Kingman Reef, Jarvis Island, and Baker Island. Specifically, the treaty with Kiribati defines three distinct boundary lines: for the boundary line between the United States’ Baker Island and the Kiribati Phoenix Islands group, six points are connected by geodesic lines that measure 332 nautical miles in total; for the boundary line between the United States’ Jarvis Island and the Kiribati Line Islands group, ten points are connected by geodesic lines that measure 548 nautical miles in total; and for the boundary line between the U.S. islands of

Palmyra Atoll and Kingman Reef and the Kiribati Line Islands group, five points are connected by geodesic lines that measure 383 nautical miles in total.

The form and content of the two treaties are very similar to each other, and to previous maritime boundary treaties between the United States and other Pacific island countries that have entered into force after receiving the Senate's advice and consent. Each of the two treaties consists of seven articles, which set out the purpose of each treaty; the technical parameters; the geographic location of the boundary lines; standard language indicating the agreement of the Parties that, on the opposite side of each maritime boundary, each Party will not "claim or exercise for any purpose sovereignty, sovereign rights, or jurisdiction with respect to the waters or seabed or subsoil"; a clause that the establishment of the boundaries will not affect or prejudice either side's position with respect to the rules of international law relating to the law of the sea; a provision for dispute settlement by negotiation or other peaceful means agreed upon by the Parties; and a provision that entry into force would follow an exchange of notes indicating that each side has completed its internal procedures. For the purpose of illustration only, the boundaries are depicted on maps attached to the treaties.

The treaties do not limit how we may choose to manage, conserve, explore, or develop the U.S. EEZ and continental shelf consistent with international law; they merely clarify the geographic scope of our sovereign rights and jurisdiction consistent with international law and with longstanding unilateral U.S. practice, and they reinforce other countries' recognition of the U.S. EEZ and continental shelf entitlements around the U.S. islands in question.

United Nations Convention on the Assignment of Receivables in International Trade

The United Nations Convention on the Assignment of Receivables in International Trade establishes uniform international rules governing a form of financing widely used in the United States involving the assignment of receivables. Expanded access to receivables financing in international trade, which the Convention would promote, will provide American businesses an additional source of capital at no cost to the U.S. taxpayer and require no material change to existing U.S. laws. This should particularly benefit small and medium-sized businesses that use receivables financing.

The Convention, which is largely based on U.S. law, provides modern, uniform rules for transactions in which businesses either sell their rights to payments from their customers (known as "receivables") to a bank or other financial institution, or use their rights to these payments as collateral for a loan from a lender (the businesses selling or using their receivables as collateral are referred to as "assignors" and buyers and lenders are referred to as "assignees"). Such transactions enable businesses to obtain greater access to credit at lower cost and thereby expand their operations.

These so-called "assignments of receivables" transactions are well established in the United States as a method of obtaining low-cost credit, and are governed by Article 9 of the Uniform Commercial Code (UCC), which has been adopted by all U.S. States and the District of Columbia, Puerto Rico, and the Virgin Islands. The Convention provides economically-useful rules for cross-border transactions involving receivables typically generated in the exchange of goods or services for payment and from other commercial transactions.

The assignment of these types of receivables is common and relatively easy to effect in the United States when only domestic assignors and domestic receivables are involved. When these transactions cross international boundaries, however, determining whether U.S. law or the law of another country applies is fraught with uncertainty—not only as to which country's laws apply but also the nature of those laws. In addition, even if one can determine which country's laws apply and what those laws say, those laws may not be very helpful for receivables

financing. The Convention addresses both aspects of these problems—the conflict of laws problem and substantive legal rules problem.

1. The Key Conflict of Laws Provision

The Convention governs assignments of receivables that have an international dimension. In particular, the Convention applies both to assignments of receivables when the assignor and the debtor on the receivables (“account debtor” for U.S. law purposes) are located in different countries and to the assignment of receivables when the assignor and the assignee of the receivables are located in different countries. In either case, without the benefit of the Convention, the fact that the transaction involves more than one country creates uncertainty as to which country’s substantive law governs because the conflict of laws rules that would determine the answer vary significantly from one country to another. Even after determining which country’s law governs, one must determine what that law is and how it applies to the transaction. This uncertainty adds significant risk to these international transactions, making credit based on them harder to obtain and more costly.

One of the most important aspects of the Convention is Article 22, which sets forth a clear rule as to which country’s substantive law governs the priority of an assignee’s interest in receivables as against competing claimants. Competing claimants may include other assignees of the same receivable, creditors of the assignor who have obtained rights in the receivable, or a bankruptcy trustee of the assignor. Article 22 provides that the law of the country in which the assignor of the receivable is located governs the priority of the assignment against competing claimants. This is critically important because assignees are unlikely to enter into receivables financing transactions on favorable credit terms if there is uncertainty as to the priority of their claim to the receivables.

2. Substantive Rules Governing the Assignment of Receivables

In addition to the conflict of laws rule, the Convention also provides a set of clear substantive rules governing important aspects of receivables financing, including practices that facilitate receivables financing and provide for a predictable resolution of issues that follows the general approach of UCC Article 9. Those Convention rules would override limitations in effect in many countries that restrict the usefulness of receivables financing (but not United States law under UCC Article 9, because the Convention rules are largely consistent with UCC Article 9). For example, Article 8 of the Convention, consistent with UCC Article 9, makes effective (1) the assignment of existing and future receivables to secure current and future advances, (2) the bulk assignment of receivables, and (3) the assignment of partial and undivided interests in receivables even if a country’s internal law (unlike the United States) would otherwise restrict these transactions. It also reduces the need for excessive formality and documentation costs by permitting the receivables that are assigned to be described generally in the contract of assignment, which is consistent with UCC Article 9.

For assignments within the scope of the Convention, Article 9 of the Convention, like Article 9 of the UCC, overrides certain contractual limitations on assignments of trade receivables. Consistent with UCC Article 9, the treaty provides that the assignment of such a receivable is effective notwithstanding any agreement between the account debtor (i.e. the debtor on the receivable) and the assignor (i.e. the account debtor’s creditor) limiting the assignor’s right to assign that receivable. This provision is particularly useful in transactions in which a business assigns a large number of its receivables created under a number of transactions because it avoids the otherwise hefty costs of the lender examining each contract creating a receivable to see if the contract limits assignment of the receivable.

The Convention also sets out certain rights and obligations of the assignor and assignee that flow from the assignment of the receivables. For example, under Article 13, the assignee may notify the debtor and request payment. Article 14 sets out the assignee's right as against the assignor to proceeds of receivables (such as cash payments when the receivable has been collected).

Because the Convention contains rules reflecting modern receivables financing practices consistent with those in UCC Article 9, widespread ratification of the Convention will help countries outside the United States modernize their receivables financing laws and enable this type of access to credit for companies engaged in cross-border trade without causing disruption to businesses in the United States that rely on, and have mastered, the rules in UCC Article 9.

3. Relationship to U.S. Law

There is a strong correspondence between the Convention and U.S. law. Negotiation of the Convention was supported by the leadership of the Uniform Law Commission (ULC) and members of the American Law Institute (ALI) (the ULC's partner in developing the UCC). Members of both organizations participated in the U.S. delegation to the United Nations Commission on International Trade (UNCITRAL) as the Convention was being negotiated. In fact, the timing of the Convention coincided with the domestic revision of UCC Article 9, and many of the participants in the U.S. law reform project also participated in the preparation of the Convention.

After the Convention was adopted, a ULC Committee, along with experts from the ALI, reviewed the Convention for the purpose of determining its suitability for ratification by the United States. They issued a committee report, which was approved by the ULC, proposing formulations for declarations and understandings, aimed at assuring consistency with practice under UCC Article 9 and facilitating application of the Convention in the United States.

As reflected in the treaty transmittal package, the executive branch has proposed declarations and understandings to accompany the Senate's advice and consent to the Convention. These proposed declarations and understandings are consistent with the recommendations of the ULC and ALI committee of experts. They would provide additional clarity about how the United States will implement the Convention domestically and facilitate its application in a manner consistent with existing practice in the United States under UCC Article 9. Proposed understandings address the scope of the Convention (including its inapplicability to securities and to rights other than contractual rights to payment under intellectual property licenses), the ability of states to provide additional rights to an assignee with respect to the proceeds of a receivable beyond the minimum level of rights required by the Convention, and the meanings of certain terms used in the Convention. Proposed declarations address how the Convention will apply in the context of certain insolvency proceedings, how it will apply to certain contracts entered into by governmental entities or other entities constituted for a public purpose, and rules for determining which U.S. state laws will apply in circumstances where the Convention requires reference to applicable U.S. law. In addition, a proposed declaration provides that the United States will not be bound by optional provisions of the Convention addressing choice of law rules. These proposed understandings and declarations are discussed in detail in the treaty transmittal package.

The treaty would be self-executing, which is consistent with the recommendation of the ULC Committee. There is no need for federal or state implementing legislation. Ratification of the Convention would not change U.S. practice in this area in any material respect. The Convention's rules are largely based on U.S. law and will produce substantially the same results as those under the UCC Article 9.

4. Benefits of U.S. Ratification

Widespread ratification of the Convention would help businesses in the United States gain access to capital to conduct international trade. The importance of these benefits is underscored by the support the Convention has received from the U.S. business community. Industry associations that have written to the Committee to express their support for the Convention include the Financial Services Roundtable, the U.S. Chamber of Commerce, the Bankers Association for Trade and Finance, the Commercial Finance Association, the Equipment Leasing and Finance Association, and the U.S. Council for International Business. The American Bar Association and the Uniform Law Commission have also expressed their support for the Convention.

Because the Convention is based on U.S. law, and because of the leading role the United States has played in receivables financing, other countries will be less likely to join the Convention if the United States declines to ratify it. Currently, one country—Liberia—has ratified the Convention. Five countries must ratify it in order for it to enter into force. U.S. ratification could have a particularly important leadership impact in this regard. There are currently a number of regional initiatives underway focused on reforming the law of secured transactions, including in Latin America, Africa, and the Asia-Pacific region. Expanded ratification of the Convention in the near term has the potential to influence these initiatives and to expand the acceptance and use of the Convention's framework for receivables financing in these regions. In addition, the European Union (EU) is currently involved in an effort to develop an internal legal framework concerning the law applicable to third party effects of the assignment of receivables. While there is significant support in the EU for the approach taken in the Convention (and thus under U.S. law), there is also some support for alternative choice of law rules in some cases that would be inconsistent with the Convention and would thus introduce uncertainty into receivables financing governed by the alternative rules. U.S. ratification could helpfully influence the EU process to ensure that the framework adopted is consistent with the Convention (and therefore U.S. law).

In summary, ratification of the Convention is an important step to providing American businesses a significant additional source of capital at no cost to the U.S. taxpayer and no material change to existing U.S. laws. These benefits will be particularly important for small and medium sized businesses that use receivables financing. Widespread ratification of the Convention would give American businesses an additional advantage in international transactions as the Convention mirrors American law and practices.

* * * *

Deputy Assistant Attorney General for the Criminal Division Bruce Swartz also testified before the Committee at the hearing on treaties on December 13, 2017 with respect to the two extradition treaties under consideration. Mr. Swartz's testimony is excerpted below.

* * * *

Mr. Chairman and members of the Committee, I am pleased to appear before you today to present the views of the Department of Justice on extradition treaties between the United States and the Republics of Kosovo and Serbia. These historic treaties directly advance the interests of the United States in fighting terrorism and transnational crime.

At the outset, I wish to note that the decision to proceed with the negotiation of law enforcement treaties such as these is made jointly by the Departments of State and Justice, after careful consideration of our international law enforcement priorities. The Departments of Justice and State also participated together in the negotiation of each of these treaties. Accordingly, we join the Department of State today in urging the Committee to report favorably to the Senate and recommend its advice and consent to ratification.

The Departments of Justice and State have prepared and submitted to the Committee detailed analyses of the extradition treaties in the Letter of Submittal. In my testimony today, I will concentrate on why these updated extradition treaties are important instruments for United States law enforcement agencies engaged in investigating and prosecuting terrorism and other serious criminal offenses.

The U.S.-Republic of Kosovo Extradition Agreement

At the outset, I must note for this Committee that the United States and Kosovo currently operate under the 1901 extradition treaty between the United States and the Kingdom of Serbia. Kosovo is treated as a successor state under that instrument. The “list” treaty is antiquated and limited, and is not suitable for meeting 21st Century law enforcement challenges. I will further elaborate on this point later in my testimony.

Pursuant to a June 1999 United Nations Security Council resolution, the UN established an international civil and security presence in Kosovo, the UN Interim Administrative Mission in Kosovo (UNMIK), which still exists today. In September 2012, international supervision ended, and Kosovo became responsible for its own governance. While an UNMIK team had been handling prosecutions in Kosovo, the Kosovars have now assumed most of this responsibility. Despite being relatively new, Kosovar prosecutors are competent, establishing fair jurisprudence, and observing fundamental due process.

To fully empower both Kosovar and U.S. law enforcement officials with the tools that they need to combat global crime, a new extradition treaty is necessary. The Extradition Treaty before this Committee includes both substantive and procedural “improvements” from the 1901 treaty. Allow me now to highlight a few of these critical improvements.

Substantive Improvements

The Extradition Treaty before this Committee contains new substantive provisions that did not exist in the 1901 extradition treaty. Perhaps most importantly, the new Extradition Treaty accommodates the requirements of the Kosovar constitution to permit extradition of nationals. The Kosovo Supreme Court has ruled that citizens of Kosovo cannot be extradited under the language of the 1901 treaty, because the treaty provides that neither country is bound to extradite its nationals, and the Kosovo constitution prohibits the extradition of nationals in the absence of a bilateral extradition treaty requiring such extraditions. As a consequence, in recent years, Kosovo denied a U.S. extradition request where the U.S. sought a fugitive for murder. The denial was premised on the fugitive’s Kosovo citizenship. Under the new Extradition Treaty, extradition can no longer be refused solely on the basis of the nationality of the person sought.

Moreover, the new Extradition Treaty not only allows for the extradition of nationals, but expands the types of crimes for which extradition can be sought. While the existing 1901 extradition treaty defines extraditable offenses by reference to a list of crimes enumerated in the treaty itself, the treaty before this Committee reflects the reality that crimes have become increasingly complex over the last century. A “list treaty” may present limits to extradition for newly emerging forms of criminality that the United States has a strong interest in pursuing, such as cybercrime and environmental offenses. The new Extradition Treaty will replace the old list of offenses with a modern “dual criminality” provision. This means that the obligation to extradite applies to all offenses that are punishable in both countries by a minimum term of imprisonment of more than one year. This is a critical improvement, since extradition will be possible in the future with respect to the broadest possible range of serious offenses, without the need to repeatedly update treaties as new forms of criminality are recognized.

This expansive provision is material to our extradition requests for extraterritorial offenses. For the United States, extraterritorial jurisdiction is important in two areas of particular concern: drug trafficking and terrorism. Under the 1901 treaty, Kosovo recently denied our extradition request for a fugitive wanted for prosecution on charges of providing material support for terrorism—having facilitated the travel of foreign fighters—although communicating from Kosovo with other facilitators via the Internet. The Supreme Court of Kosovo held that the language of the 1901 extradition treaty did not provide for extradition of a person for a crime committed in the requested state. Under the new Extradition Treaty, Kosovo will no longer be able to deny our extradition requests on the sole basis that a criminal act occurred in Kosovo, not in the United States.

Furthermore, the new Extradition Treaty ensures that the only applicable statute of limitations is that of the country making the extradition request. Accordingly, this provision ensures that the U.S. prosecutors will maintain procedural control over the viability of their cases, rather than being at the mercy of foreign statutes of limitations.

Procedural Improvements

In addition to the substantive improvements, the Extradition Treaty before this Committee includes procedural enhancements, which streamline the extradition process. For example, the Treaty contains a “temporary surrender” provision, which allows a person found extraditable, but already in custody abroad for another criminal charge, to be temporarily surrendered for purposes of trial. Absent temporary surrender provisions, we face the problem of delaying the fugitive’s surrender, sometimes for many years, while the fugitive serves out a sentence in another country. As a result, during this time, the U.S. case against the fugitive becomes stale, and the victims are delayed justice for the crimes committed against them.

Further, the Extradition Treaty also allows the fugitive to waive extradition, or otherwise agree to immediate surrender, thereby substantially speeding up the fugitive’s return in uncontested cases. The Treaty also streamlines the channels for seeking “provisional arrest”—the process by which a fugitive can be immediately detained while documents in support of extradition are prepared, translated, and submitted through the diplomatic channel—and the procedures for supplementing an extradition request that already has been presented to the requested country.

Together, the procedural and substantive improvements to the Extradition Treaty will ensure that U.S. prosecutors and law enforcement officials are better positioned to combat crime in an ever globally integrated and interdependent world.

The U.S.-Republic of Serbia Extradition Agreement

The United States and Serbia also operate pursuant to the same 1901 extradition treaty between the United States and the Kingdom of Serbia.

However, unlike Kosovo, as applied to Serbia, the 1901 treaty is augmented by the extradition provisions applicable under multilateral conventions to which Serbia and the United States are parties. As a practical matter, this permits both countries to extradite fugitives for a broader scope of conduct apart from the enumerated list of crimes in the 1901 treaty. For example, both countries are party to the United Nations Transnational Organized Crime Convention, the UN Convention against Corruption, and the 1988 Vienna Drug Convention, all of which serve to augment the provisions in existing bilateral extradition treaties.

Nevertheless, none of these multilateral treaties addresses one of the most important aspects of modern extradition practice: allowing for the extradition of nationals. In contrast, much like the proposed U.S.-Kosovo Extradition Treaty, the U.S.-Serbia Extradition Treaty before this Committee, allows for the extradition of nationals.

Furthermore, unless the U.S. and Serbia become parties to an exhaustive list of multilateral conventions that cover every possible crime, we leave ourselves vulnerable to the possibility of gaps. The U.S.-Serbia Extradition Treaty before this Committee minimizes the possibility of these gaps. As is found in the proposed U.S.-Kosovo Extradition Treaty, the U.S.-Serbia Treaty under consideration includes a “dual criminality” provision, which allows extradition with regards to all offenses that are punishable in both countries by a minimum term of imprisonment of more than one year.

In addition to the provision which allows extradition of nationals, and the inclusion of the critical “dual criminality” method, the U.S.-Serbia Extradition Treaty before this Committee includes all of the substantive and procedural improvements as contained in the proposed U.S.-Kosovo Extradition Treaty.

Conclusion

In conclusion, Mr. Chairman, we appreciate the Committee’s support in our efforts to strengthen the framework of treaties that assist us in combatting international crime. For the Department of Justice, modern extradition treaties are particularly critical law enforcement tools. To the extent that we can update our existing agreements in a way that enables cooperation to be more efficient and effective, we are advancing the protection of our citizens. Accordingly, we join the State Department in urging the prompt and favorable consideration of these law enforcement treaties. I would be pleased to respond to any questions the Committee may have.

* * * *

2. ILC Work on the Law of Treaties

See Chapter 7 of this *Digest* for U.S. remarks at the General Assembly Sixth Committee meeting on the work of the International Law Commission (“ILC”) at its 69th session, which include discussion of the topic of provisional application of treaties.

On October 20, 2017, U.S. Minister Counselor to the UN Mark Simonoff addressed a Sixth Committee meeting on the effects of armed conflicts on treaties and in particular what should be done with the ILC’s draft articles on the subject. Mr. Simonoff’s remarks are excerpted below and available at <https://usun.state.gov/remarks/8045>.

* * * *

The United States once again extends its congratulations to the International Law Commission, ILC, for completing, in 2011, its work on the draft articles and commentaries on the effects of armed conflicts on treaties. As the United States has noted previously, the draft articles reflect the continuity of treaty obligations during armed conflict when reasonable, take into account particular military necessities, and provide practical guidance to states by identifying factors relevant to determining whether a treaty should remain in effect in the event of armed conflict.

The Sixth Committee and the General Assembly have considered the future of these draft articles on several occasions. In December 2011, the General Assembly in resolution 66/99 took note of and commended to the attention of governments the draft articles contained in the annex to that resolution, without prejudice to the question of future adoption of the draft articles or other appropriate action. Three years later, in resolution 69/125, the General Assembly again commended the draft articles to the attention of governments, also without prejudice to future action on them.

It has been and remains the United States' view that the draft articles are best used as a resource that states may consider when determining the effect of particular armed conflicts on particular treaties. Moreover, in light of our continued concerns about aspects of the draft articles, we do not support the elaboration of a convention on this topic. For example, we continue to have concerns about the definition of "armed conflict" in draft article 2(b). Rather than defining the term, the better approach would have been to make clear that armed conflict refers to the set of conflicts covered by common articles 2 and 3 of the 1949 Geneva Conventions (i.e., international and non-international armed conflicts), which enjoy nearly universal acceptance among States. Additionally, with respect to draft article 15, we do not believe that it should be interpreted to suggest that illegal uses of force that fall short of aggression would necessarily be exempt from this provision.

The United States believes the action of the General Assembly in 2011 and again in 2014 commending the draft articles to the attention of governments with no further action was the right course. We continue to believe that no further action with regard to the draft articles is necessary.

* * * *

B. LITIGATION INVOLVING TREATY LAW ISSUES

1. *Water Splash*: Hague Service Convention

See Chapter 15 for discussion of the *Water Splash* case, involving interpretation of the Hague Service Convention.

2. *Republic of the Marshall Islands*: Litigation Alleging Breach of Non-Proliferation Treaty

In *Republic of the Marshall Islands v. United States*, No. 15-15636, the Republic of the Marshall Islands alleged that the United States was in breach of Article VI of the Non-

Proliferation Treaty (“NPT”). As discussed in *Digest 2016* at 872, the district court dismissed the case. On July 31, 2017, the Court of Appeals for the Ninth Circuit issued its decision, affirming the dismissal, among other reasons, because Article VI is non-self-executing and therefore not enforceable in federal court. Excerpts follow from the decision (with footnotes omitted).

* * * *

This is not your average treaty case. Unlike the typical treaty-enforcement actions brought by private individuals, this case involves one state party seeking to enforce its treaty rights in the domestic court of another state party. This unorthodox effort fails because the claims are nonjusticiable.

Whether examined under the rubric of treaty self-execution, the redressability prong of standing, or the political question doctrine, the analysis stems from the same separation-of-powers principle—enforcement of this treaty provision is not committed to the judicial branch. Although these are distinct doctrines for addressing treaty enforcement, there is significant overlap. For example, considerations applicable to self-execution, such as whether the judiciary is the appropriate branch for direct enforcement, also play out in the standing and political question analysis. ... As the Supreme Court explained long ago, a treaty will often “depend[] for the enforcement of its provisions on the interest and the honor of governments which are parties to it.” *Head Money Cases*, 112 U.S. 580, 598 (1884). If a state party breaches a non-self-executing treaty provision, “its infraction becomes the subject of international negotiations and reclamations,” and “the judicial courts have nothing to do and can give no redress.” *Id.*

I. Self-Executing Treaties

A. The Doctrine of Self-Execution

Much ink has been spilled on the question of treaty self-execution, which has been called “one of the most confounding in treaty law.” *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979). In simple terms, a self-executing treaty is one that is judicially enforceable upon ratification. In contrast, a non-self-executing treaty requires congressional action via implementing legislation or, in some cases, is addressed to the executive branch.

Nearly a decade ago, the Supreme Court finally brought some clarity to this issue in *Medellín v. Texas*, noting that the “Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law” enforceable in domestic courts. 552 U.S. 491, 504 (2008); *see also Bond v. United States*, 134 S. Ct. 2077, 2084 (2014) (recognizing that the Convention on Chemical Weapons “creates obligations only for State Parties and ‘does not by itself give rise to domestically enforceable federal law’” (quoting *Medellín*, 552 U.S. at 505 n.2)).

The Supremacy Clause establishes the legal status of all treaties: they are the supreme law of the land, on equal footing with the Constitution and federal statutes. *See* U.S. Const. art. VI, cl. 2. But this elevated status does not answer the question whether a treaty may be enforced in domestic courts. *See United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992). Indeed, “[t]he key is to recognize that the question whether a treaty is supreme law is separate from the question whether its provisions create a rule of decision (meaning a rule capable of resolving disputes) for U.S. Courts.” Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-*

Execution, 2015 BYU L. Rev. 1639, 1648 (2016). The Marshall Islands conflates these two issues, arguing that “precedent confirms it ‘is emphatically the duty’ of the federal courts to interpret the [Treaty], and, because it is a valid law, the Executive ‘must’ be ordered to comply with it.” This approach skims over the fundamental and threshold inquiry of whether the Treaty is self-executing.

The very idea of non-self-execution might at first seem inimical to both Article III and the Supremacy Clause, which unite to extend “[t]he judicial Power ... to all Cases ... arising under ... Treaties,” U.S. Const. art. III, § 2, cl. 1, and to make “all Treaties ... the supreme Law of the Land,” *id.* art. VI, cl. 2. “[B]ut the power to enforce the law of the land was constitutionally allocated to the courts only in ‘cases of a Judiciary nature.’” Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int’l L. 695, 713 (1995) (quoting 2 Records of the Federal Convention of 1787, at 430 (Max Farrand ed., rev. ed. 1966)) (emphasis added). Claims seeking to enforce non-self-executing treaties are thus nonjusticiable precisely because their resolution would exceed the court’s “judicial Power.” See U.S. Const. art. III, § 1.

At its core, the question of self-execution addresses whether a treaty provision is directly enforceable in domestic courts. *Cornejo v. Cty. of San Diego*, 504 F.3d 853, 856 (9th Cir. 2007); Restatement (Fourth) of the Foreign Relations Law of the United States: Treaties § 110 cmt. b (Am. Law Inst., Tentative Draft No. 2, 2017) (draft approved at Annual Meeting on May 22, 2017) (“Restatement”) (“When a treaty provision is invoked as a rule of decision in a judicial proceeding, the self-execution inquiry focuses on whether the provision is directly enforceable in court.”). When courts are asked to enforce a treaty provision, they must determine whether the provision “addresses itself to the political, not the judicial department.” *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.), *overruled on other grounds by United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). Only if the provision serves as a “directive to domestic courts” may the judiciary enter the fray to enforce it. *Medellín*, 552 U.S. at 508. By contrast, “[a] treaty that is not self-executing . . . is not enforceable in the courts at the behest of anyone, presumably including other nations.” Carlos Manuel Vázquez, *Laughing at Treaties*, 99 Colum. L. Rev. 2154, 2179 n.96 (1999).

Because non-self-executing treaty provisions are not judicially enforceable, claims seeking to enforce them are nonjusticiable.

B. Article VI is Non-Self-Executing

“The interpretation of a treaty, like the interpretation of a statute, begins with its text.” *Medellín*, 552 U.S. at 506. We may also look to “the negotiation and drafting history of the treaty as well as ‘the postratification understanding’ of signatory nations” as “aids to . . . interpretation.” *Id.* at 507 (citation omitted). This text-focused approach helps answer the ultimate self-execution question: whether the treaty provision is directly enforceable in domestic courts.

Various textual considerations guide our inquiry, depending on the nature of the provision. Apart from the Supreme Court’s reference to “aids to . . . interpretation,” there is no laundry list of factors to consider. See *id.* (citation omitted). Rather, courts have gleaned interpretive clues from the text and context of treaties. See *Air France v. Saks*, 470 U.S. 392, 397 (1985) (examining “the context in which the written words are used” when construing a treaty). In addition, the recently adopted Restatement lays out “relevant considerations” for evaluation. Some treaties reveal their self-execution by expressly calling for direct judicial enforcement. The Warsaw Convention, which addresses international air travel, provides a well-recognized example. See Convention for the Unification of Certain Rules Relating to International Carriage

by Air art. 28, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (specifying how and where an “action for damages” may be brought against air carriers). Because self-execution is not always so explicit, we also assess whether the treaty’s text indicates that the provision would have immediate effect or instead anticipates future action by a political branch. *See Doe v. Holder*, 763 F.3d 251, 255 (2d Cir. 2014). Future-oriented provisions are often non-self-executing because they require another branch to take action within its discretion to implement or honor the treaty obligation. *See, e.g., Sanjaa v. Sessions*, – F.3d –, – (9th Cir. 2017); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). Another consideration is whether the treaty provision fails to provide a rule of decision for courts because it contains indeterminate, vague, or aspirational language. *See Doe*, 763 F.3d at 255. Lastly, we must be wary of textual interpretations that would have the judiciary exercise powers constitutionally assigned to another branch; thus, we look for indications of the President’s and the Senate’s intentions regarding self-execution. *See Medellín*, 552 U.S. at 517, 519, 521. To assist with this textual analysis, we may look to evidence of how the treaty’s enforceability was understood both before and after ratification. *Id.* at 507.

Article VI has all the trappings of a non-self-executing treaty provision. The Treaty’s text does not explicitly call for direct judicial enforcement of Article VI, and nothing in Article VI suggests that it “was designed to have immediate effect” in domestic courts. *See* Restatement § 110(2). Under Article VI, the United States “undertakes to pursue” future negotiations on “effective measures” to end “the nuclear arms race at an early date” and ultimately “on a treaty on general and complete disarmament.” This provision is a prime example of language that offers no “directive to domestic courts” and instead calls for future action by a political branch. *See Medellín*, 552 U.S. at 508.

Foremost, Article VI is addressed to the executive, urging further steps only the executive can take—negotiation with other nations. Even the Marshall Islands appears to recognize as much, admitting that “[t]he text of Article VI placed a legal obligation *upon the Executive* running to” other Treaty parties. Article VI is also addressed implicitly to the Senate because it calls for “a treaty on general and complete disarmament,” which would, under the Constitution, require both the President’s signature and the Senate’s consent. *See* U.S. Const. art. II, § 2, cl. 2 (providing that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”). In context, Article VI’s use of the phrase “undertakes to pursue,” like the phrase “undertakes to comply” in *Medellín*, is “a *commitment* on the part of [the Treaty parties] to take *future* action through their political branches.” *See* 552 U.S. at 508 (citation omitted).

Even if Article VI in some sense created an imminent obligation to negotiate in good faith, the essential details of the negotiations—their time, their place, their nature—was unspecified upon ratification. Thus, the provision is “framed as a promise of future action by the member nations.” *Fujii v. California*, 242 P.2d 617, 622 (Cal. 1952). That Article VI also calls for satisfactory results “at an early date”—textbook “language of futurity,” *see Robertson v. Gen. Elec. Co.*, 32 F.2d 495, 500 (4th Cir. 1929)—only underscores that it is a non-self-executing provision. *See also* Sloss, *supra*, at 24 (“[I]f a treaty obligates the United States to take unspecified steps toward achieving an agreed objective at an unspecified future time . . . then action by the political branches is necessary to execute the treaty.”).

Quite apart from Article VI’s prospective focus, the provision’s indeterminate language does not provide a rule of decision for courts. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J.) (distinguishing between rules of decision for courts and political questions that involve the exercise of nonjudicial discretion). “[A]s the Supreme Court explained

in *Medellín v. Texas*, the absence of mandatory language (i.e., ‘must’ or ‘shall’) indicates that a particular provision is not a self-executing directive.” *United States v. Bahel*, 662 F.3d 610, 629–30 (2d Cir. 2011) (citation omitted). In context, the state parties’ meek agreement that they “undertake[] to pursue” good-faith negotiations is at most a hortatory directive, much like the provision at issue in *Medellín*. See 552 U.S. at 500 (interpreting Article 94 of the United Nations Charter, which provides that each state “undertakes to comply with the decision[s]” of the International Court of Justice).

Article VI is also chock-full of vague terms that do not “provide specific standards” for courts to apply. See *Diggs*, 555 F.2d at 851. For example, it calls for negotiations on “effective measures” to cease the nuclear arms race and achieve disarmament, yet what constitutes “effective” is in the eyes of nuclear experts and negotiators. “[T]he use of the nebulous term ‘effective’—which is never defined in the treaty—further demonstrates that Article [VI] is not a ‘directive to domestic courts’ that ‘by itself give[s] rise to domestically enforceable federal law.’” *Sanjaa*, – F.3d at – (third alteration in original) (quoting *Medellín*, 552 U.S. at 505 n.2, 508). Although the Treaty’s goal of universal nuclear disarmament may be clear, the path to achieving it is perilously uncertain. See Carlos Manuel Vázquez, *Four Problems with the Draft Restatement’s Treatment of Treaty Self-Execution*, 2015 BYU L. Rev. 1747, 1750 (2016) (pointing to “treaties that require parties to use their best efforts to accomplish certain goals” as examples of those “too vague for judicial enforcement”).

Likewise, Article VI’s hopeful plea for successful negotiations to culminate “at an early date” is not indicative of self-execution. Nor is the Marshall Islands’ position bolstered by the Treaty’s preamble, in which the state parties “[d]eclar[e]” their “intention” to end the arms race “at the earliest possible date” and to move “in the direction of nuclear disarmament.” “Aspirational language is the hallmark of a non-self-executing treaty” *Doe*, 763 F.3d at 255. Article 34 of the Refugee Convention, for example, provides that state parties “shall as far as possible facilitate the assimilation and naturalization of refugees.” *INS v. Stevic*, 467 U.S. 407, 417 (1984) (citation omitted). The Supreme Court had no trouble concluding that this provision was “precatory and not self-executing.” *Id.* at 429 n.22. The same can be said about Article VI. Indeed, the provision’s wishful tenor reflects the reality of the Treaty itself: the state parties could agree only that they hoped to usher in a nuclear-free future.

Article VI also has a key hallmark of non-self-execution because the “consequences” of permitting enforcement by domestic courts, especially in the manner urged by the Marshall Islands, would implicate grave constitutional concerns that should “give [us] pause.” See *Medellín*, 552 U.S. at 517. A provision cannot be judicially enforced if doing so would compel the courts to assume a role constitutionally assigned to the executive or the legislature. There is perhaps nothing more prototypically political than the negotiation of a multilateral international instrument. Deciding when, where, and whether to negotiate with foreign nations is within the exclusive authority of the executive. See generally U.S. Const. art. II, §§2, 3 (assigning the President powers over foreign affairs). Granting the Marshall Islands’ requested relief would essentially appoint the district court as a Special Master overseeing the United States’ nuclear treaty negotiations. To construe Article VI as self-executing and approve the Marshall Islands’ claims would thus violate core separation- of-powers principles.

Last but not least, nothing about Article VI suggests that the President and the Senate intended it to be enforceable in domestic courts. A “treaty that does not evince such executory intentions is non-self-executing.” *Cardenas v. Stephens*, 820 F.3d 197, 202 n.5 (5th Cir. 2016); see also *Medellín*, 552 U.S. at 519, 521. Even if we look beyond the text of Article VI itself, there is no hint that domestic enforcement was envisioned. The Treaty’s preamble notes the

“intention” of the parties to accomplish nuclear disarmament, towards which the “cooperation of all States” is “[u]rg[ed].” But the Treaty is “silent as to any enforcement mechanism” in the event of noncompliance. *See Medellín*, 552 U.S. at 508. That silence is significant in the context of this treaty and this lawsuit, not least because, in the absence of a specific treaty directive, having states open their domestic courts to other treaty parties would be extraordinary. *See Woolhandler, supra*, at 765 (“[F]oreign nations were generally unable to sue in United States courts to enforce general treaty obligations. Indeed, they rarely if ever tried.” (footnote omitted)); *cf. The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (Marshall, C.J.) (“One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another . . .”).

Preratification evidence confirms our interpretation of the text. Although the parties have not enlightened us to any specific intentions of President Johnson or President Nixon, contemporaneous testimony tells us something about the Senate’s views on the subject. Senator Fulbright, then-Chairman of the Senate Foreign Relations Committee, implied that the entire Treaty was unenforceable as he exhorted his colleagues to give their consent during the ratification debate. *See* 115 Cong. Rec. 6198, 6199–6200, 6204–05 (1969). When pressed on what might happen if the United States breached the Treaty, he replied that, “since we do not belong to a world of law but only of the jungle law, the effect of [breach] would be the same as withdrawal” from the Treaty “because nobody is going to be able to enforce the [T]reaty against us.” *Id.* at 6199. He continued to reassure his fellow senators: “A treaty may create certain obligations in the mind of a foreign country, but domestically it does not.” *Id.* at 6204. Senator Fulbright’s testimony does not “convey[] an intention” that either the Treaty generally, or Article VI specifically, are self-executing or were “ratified on these terms.” *See Medellín*, 552 U.S. at 505 (quoting *Igartúa-De La Rosa*, 417 F.3d at 150).

The postratification history is consistent with these contemporaneous comments on the Treaty. Following the Treaty’s ratification, Congress explicitly provided that “[t]he Secretary of State, under the direction of the President, shall have primary responsibility for the preparation, conduct, and management of United States participation in all international negotiations and implementation fora in the field of arms control, nonproliferation, and disarmament.” *See* 22 U.S.C. §2574(a). “In furtherance of these responsibilities,” Congress granted the President power to appoint representatives to conferences and activities “relat[ed] to the field of nonproliferation, such as the preparations for and conduct of the review relating to the Treaty on the Non-Proliferation of Nuclear Weapons.” *Id.* In short, the political branches have worked hand in hand to fulfill the United States’ obligations under Article VI—and they have done so without giving the slightest hint that the judiciary should play a Big Brother role by supervising negotiations. That same legislation requires the President and the Secretary of State to submit a report to Congress that details the United States’ “adherence . . . to obligations undertaken in arms control, nonproliferation, and disarmament agreements” and “any ongoing . . . negotiations.” 22 U.S.C. § 2593a(a)(2)–(3).

Similarly, ongoing Treaty review conferences have given no indication that the United States or other state parties contemplate any domestic enforcement mechanism for alleged Article VI violations. In fact, state parties have specifically indicated that “responses to concerns over compliance with any obligation under the Treaty by any State party should be pursued by *diplomatic means*.” 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, pt. I, p. 3 ¶7, *available at*

https://www.nonproliferation.org/wp-content/uploads/2015/04/2010_fd_part_i.pdf (emphasis added). And in conjunction with a 1990 Treaty review conference, the Senate agreed to a concurrent resolution to reaffirm support for the Treaty's objectives only after Senator Boschwitz, the resolution's sponsor, affirmed that the Treaty "is not self-executing." 136 Cong. Rec. 12,723 (1990). Although this congressional interpretation reflects the view of only a single member of Congress, it accords with the executive's present position, to which we give "great weight." See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982).

The Marshall Islands would have us ignore the self-execution question entirely, asserting that it is "[i]rrelevant" because Article VI creates "direct rights" that run from one treaty party to another and does not "concern[] alleged third- party treaty rights." Standing alone, this statement is partially true—the Treaty lays out obligations that run between treaty parties. But this approach evades the threshold issue of *where* and *how* these asserted "rights"—direct or otherwise—may be enforced. Article VI, as a treaty provision for which no domestic enforcement was explicitly or implicitly contemplated, does not provide a basis for justiciable claims in federal court.

II. Redressability

Having done the analytical heavy-lifting in addressing Article VI's status as a non-self-executing provision, we turn briefly to a related reason that the Marshall Islands' claims are nonjusticiable: under standing analysis, the asserted injuries are not redressable. Like the concept of self-execution, the standing requirement springs "[f]rom Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014). To establish standing, a plaintiff must show injury in fact, causation, and redressability. See *id.* Although the parties and *amici* devote much attention to whether the Marshall Islands established injury in fact, we need not go down that road. Lack of redressability alone deprives the Marshall Islands of standing.

Simply put, the asserted injuries are not redressable because Article VI may not be enforced in federal court. "Redressability requires an analysis of whether the court has the power to right or to prevent the claimed injury." *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (Kennedy, J.). Even assuming that the Marshall Islands has suffered injury in fact, the federal courts have no power to right or to prevent that injury. See *id.* When a state party violates a non-self-executing treaty provision, "the judicial courts have nothing to do and can give no redress." *Head Money Cases*, 112 U.S. at 598.

III. Political Question Doctrine

As with self-execution and redressability in the context of treaty enforcement, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). The Marshall Islands' claims present inextricable political questions that are nonjusticiable and must be dismissed. See *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 977 (9th Cir. 2007).

It is well settled that not all cases involving foreign relations raise political questions. See *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229–30 (1986). However, the Supreme Court has recognized that decisions concerning foreign relations are often inherently political: "Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." *Baker*, 369 U.S. at 211 (footnotes omitted). It should be no surprise that

the self-execution inquiry in treaty cases will frequently track the analysis of whether the claims raise political questions.

* * * *

The district court relied on the first two *Baker* factors, and we primarily do the same. Indeed, we have recognized that the first two are likely the most important. *See Alperin*, 410 F.3d at 545. Under the first factor, the Marshall Islands' claims involve "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker*, 369 U.S. at 217—namely, the decision of when, where, whether, and how the United States will negotiate with foreign nations to end the nuclear arms race and accomplish nuclear disarmament. *See* U.S. Const. art. II, §§ 2, 3. "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). We simply cannot square "the 'primacy of the Executive in the conduct of foreign relations' and the Executive Branch's lead role in foreign policy," *Taiwan v. U.S. Dist. Court for the N. Dist. of Cal.*, 128 F.3d 712, 718 (9th Cir. 1997) (citation omitted), with an injunction that compels the United States to "call[] for and conven[e] negotiations for nuclear disarmament in all its aspects."

The second *Baker* factor offers an additional impediment: the "lack of judicially discoverable and manageable standards for resolving" key issues inextricably intertwined with the relief the Marshall Islands seeks. *See Baker*, 369 U.S. at 217. As we have said, Article VI contains an array of vague terms and a dearth of applicable standards. Our self-execution analysis applies with equal force under this *Baker* factor. *See generally* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599, 631 (2008) (explaining that treaties that are non-self-executing because they are "too vague for judicial enforcement" are "no different from constitutional and statutory provisions that are regarded as nonjusticiable" under the political question doctrine).

The Marshall Islands and *amici* seek to narrow the scope of our inquiry by focusing only on the part of the complaint that concerns the United States' obligation to negotiate in "good faith," a term they argue is frequently applied by courts in other contexts, such as labor negotiations. This surgical attempt would read that term in isolation and out of context. The question is not just what constitutes "good faith," but also what measures are "effective," what qualifies as the "cessation" of the nuclear arms race, what counts as "an early date," and even what it means to "pursue" these kinds of complex and multilateral negotiations. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc) ("The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion."). Here, only a second's thought brings embedded political questions to the surface, and the remaining *Baker* factors also counsel in favor of demurring.

* * * *

3. ***Arias Leiva*: Litigation Regarding U.S.-Colombia Extradition Treaty**

As discussed in *Digest 2016* at 153-56, the U.S. government submitted evidence (including declarations by Assistant Legal Adviser Tom Heinemann) to counter claims by an individual sought for extradition that the extradition treaty between the United States and Colombia was not in force. *In the matter of the extradition of Andres Felipe Arias Leiva*, No. 16-23468 (S.D. Fla.). On January 13, 2017, the U.S. government filed its supplemental reply brief in further opposition to the motion of defendant Arias Leiva to dismiss the complaint and vacate his arrest warrant. Excerpts follow (with footnotes omitted) from the January 13, 2017 brief regarding claims by the defendant that the court should find the extradition treaty not to be in force. The brief is available in full at <https://www.state.gov/s/l/c8183.htm>.

* * * *

In his response, Arias Leiva fails to address directly the government’s argument that whether a treaty was properly ratified is a nonjusticiable political question. Instead, he attempts to divert the Court’s attention by arguing that whether a court has jurisdiction over a case is a justiciable question. . . . That argument misses the point. The government agrees that this Court must decide whether it has jurisdiction over this case. The government also agrees with Arias Leiva that whether the Court has jurisdiction over this case turns on whether the United States has a valid extradition treaty with Colombia. But, in deciding that issue, the Court must defer to the view of the U.S. Department of State. See *Meza v. U.S. Attorney General*, 693 F.3d 1350, 1358 (11th Cir. 2012). By stating in this case that the United States has a valid extradition treaty with Colombia, the government is not “manufacturing” jurisdiction, as Arias Leiva claims. . . . Rather, jurisdiction exists because, as evidenced by the declarations submitted by the Department of State (and by the Ministry of Foreign Affairs), the Treaty is in force.

In addition, Arias Leiva suggests that the Supreme Court’s decision in *Doe ex dem. Clark v. Braden*, which holds that the issue of ratification is nonjusticiable, and similar decisions by other federal courts, are not on point because they involved “private litigants” claiming that a treaty was not in force. . . . This contention is flawed. Arias Leiva overlooks *Kastnerova v. United States*, an extradition case cited by the government, in which the Eleventh Circuit quoted the Supreme Court’s pronouncement in *Terlinden v. Ames* that the question of “whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and . . . the courts ought not . . . interfere with the conclusions of the political department in that regard.” . . . Moreover, here, it is a private individual—Arias Leiva himself, and not the states—who claims the Treaty is not in force.

Arias Leiva also posits that, because courts may properly interpret a treaty, they may also decide whether a treaty has been duly ratified. But treaty interpretation (what a treaty means) and treaty ratification (whether a treaty has been formally consented to) are decidedly distinct issues, which are treated as such by the courts. *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 690 F.2d 303, 311 (2d Cir. 1982) (“While federal courts are necessarily called upon to interpret treaties, they must observe the line between treaty interpretation on the one hand and negotiation,

proposal and advice and consent and ratification on the other.”). Moreover, Arias Leiva is wholly incorrect that even in the area of treaty interpretation, courts are free to ignore the view of the Executive Branch. See, e.g., *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (“It is well settled that the Executive Branch’s interpretation of a treaty ‘is entitled to great weight.’”) (citation omitted).

II. The Treaty Is Not One-Sided, But Even If It Were, It Would Remain in Force

Arias Leiva’s assertion that the Treaty is one-sided, and thus invalid, is erroneous as matters of both fact and law. The Treaty obligates both countries to “extradite to each other, subject to the provisions described in this Treaty, persons found in [their] territor[ies]” Art. 1 of the Treaty. As a legal matter, the nullification of Colombia’s implementing legislation does not affect this obligation at the international level, and, as a practical matter, it has not affected Colombia’s extradition of fugitives to the United States. Colombia accepts U.S. extradition requests, extradites fugitives to the United States in response to those requests, and understands that its own extradition requests are based on the Treaty and that those requests will be processed in accordance with the Treaty. . . . Arias Leiva disputes none of these points—nor can he.

Arias Leiva, instead, cherry-picks a handful of cases in which Colombia has denied U.S. extradition requests and offers those in support of the notion that Colombia fails to observe the Treaty. But he offers no explanation as to why those denials actually represent a failure to observe the Treaty. The requests could have been denied for any of the numerous reasons expressly authorized under the Treaty, such as where the offense is of a political character and/or punishable by death, where the statute of limitations has run, and where the fugitive is a citizen of the requested country.

For example, according to the news article provided by Arias Leiva, Colombia denied the United States’s request for the extradition of drug kingpin Walid Makled because Venezuela had submitted an earlier request for his extradition. . . . Such a denial is expressly permitted under Article 14 of the Treaty, which allows “[t]he Executive Authority of the Requested State, upon receiving requests from the other Contracting Party and from a third State . . . for the extradition of the same person . . . [to] determine to which of the Requesting States it will extradite that person.” Even if Colombia denies some U.S. extradition requests, it is possible for denials to be consistent with the Treaty, and Colombia thus cannot be said to be failing to observe the Treaty. Even if Colombia did deny U.S. extradition requests for reasons not permitted under the Treaty, such action would not invalidate the Treaty. At most, Colombia would be violating its Treaty obligations. As the Supreme Court stated in *Charlton v. Kelly*, “[w]here a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party” 229 U.S. 447, 474 (1913) (citation omitted). There, the Supreme Court held that the extradition treaty between the United States and Italy remained in force notwithstanding Italy’s refusal to surrender its own citizens because doing so violated its domestic law. *Id.* at 476. The Court reasoned that “extradition treaties need not be reciprocal.” *Id.* Arias Leiva’s suggestion that Colombia’s failure to abide by the Treaty automatically renders it void is nonsensical and, if adopted, could have sweeping implications for all of the United States’s treaty relationships, as it would mean that our partners could terminate their treaty obligations simply by failing to comply with them.

III. Under International Law, the Treaty Is in Force

As the Department of State has explained, international law and practice as reflected in the Vienna Convention on the Law of Treaties (the “Vienna Convention”), May 23, 1969, 1155 U.N.T.S. 331, compels the conclusion that the Treaty is in force. . . . See *United States v. Martinez*, 755 F. Supp. 1031, 1033 (N.D. Ga. 1991) (citing to the Vienna Convention in support

of the conclusion that the Treaty “remains in force under principles of international law”). Arias Leiva’s argument to the contrary is incorrect.

First, the Vienna Convention demonstrates that the Treaty entered into force. Under Article 24, “[a] treaty enters into force... upon such date as it may provide,” which in this case, under Article 21(2) of the Treaty, is March 4, 1982, “the date of the exchange of the instruments of ratification.” Article 2(1)(b) provides that “ratification” is “an international act ... whereby a State establishes on the international plane its consent to be bound by a treaty” (it is not that ratification “occurs when” a state establishes such consent, as Arias Leiva represents Colombia’s exchange of instruments of ratification of the Treaty thus expressed its consent to be bound by the Treaty. Arias Leiva asserts that, because Colombia’s ratification was later deemed unconstitutional in Colombia, Colombia has not expressed its consent to be bound, and the Treaty is not in force. But the Vienna Convention provides otherwise.

As a threshold matter, under Article 46, a state “may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest ...” meaning “objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.” Here, there was certainly no manifest violation; indeed, the Colombian ratification law was not deemed unconstitutional until over six years after its enactment. Thus, Article 46 prohibits Colombia from seeking to invalidate its consent to be bound by the Treaty (or the Treaty itself) based on the nullification of its ratification law. See U.S. DEP’T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 251-52 (2003) (quoting U.S. diplomatic note, which rejected Peru’s assertion that its consent to be bound by a multilateral agreement was invalid under Article 46 because its ratification of the agreement violated its political constitution). Furthermore, under Articles 65(1) and 67(1) of the Vienna Convention, if Colombia had wanted to “invoke” a purported “defect in its consent to be bound by [the T]reaty or a ground for impeaching the validity of [the T]reaty [or] terminating it,” it would have had to “notify the [United States] of its claim” in writing. It has not done so. ...

Second, the Vienna Convention also establishes that the Treaty has never been terminated. Article 54 provides two straightforward options for terminating a treaty: (1) exercising the termination procedures set forth in the applicable treaty (here, Article 21 of the Treaty, requiring that one party notify the other of termination), or (2) obtaining the consent of the other party to terminate the treaty. Colombia has pursued neither option. ... The extemporaneous statements of the Colombian President and others regarding the invalidity of the Treaty do not in any way affect the operation of the Treaty because, as described above, under Articles 65(1) and 67(1) of the Vienna Convention a party seeking to invalidate or terminate a treaty must do so by notifying the other party in writing.

Thus, as a matter of international law, the Treaty continues in force despite the fact that the Colombian Supreme Court struck down the ratification law, consequently preventing Colombia from applying the Treaty under its domestic law. This situation is analogous to a non-self-executing treaty that lacks implementing legislation in the United States, which cannot be given domestic effect, but the treaty obligations still exist internationally. For example, the Supreme Court in *Medellin v. Texas* held that, even though obligations of the United States under the non-self-executing United Nations Charter, Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, and International Court of Justice (“ICJ”) Statute were not enforceable domestically, the United States remained bound by those obligations as a matter of international law. 552 U.S. 491, 522 (2008) (“[W]hile the ICJ’s

judgment . . . creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions.”). Likewise, Colombia remains bound by the Treaty even though it does not enforce the Treaty domestically. There is, therefore, no question the Treaty remains in force.

* * * *

On February 6, 2017, the U.S. district court magistrate judge denied the motion to dismiss the complaint and vacate the arrest warrant in the case of Arias Leiva. Excerpts follow (with footnotes omitted) from the judge’s analysis of the claims regarding the effectiveness of the extradition treaty. The court’s order and opinion is available in full at <https://www.state.gov/s/l/c8183.htm>.

* * * *

The official positions of the government of the United States and the government of Colombia—that the Extradition Treaty remains in effect—have been established through the declaration of Mr. Heinemann and the Diplomatic Note. Nonetheless, Dr. Leiva insists that there is no extradition treaty in effect between the United States and Colombia. . . . Dr. Leiva argues that the Extradition Treaty is not in force because, among other things, extradition requests presented by the United States to Colombia are not processed under the Extradition Treaty. . . . Dr. Leiva insists that this is evidence that the Extradition Treaty, at best, is one-sided and notes that one-sided treaties do not exist.

As evidence that the Extradition Treaty is not in effect, Dr. Leiva cites to several instances where the Colombian government has denied the United States’ requests for extradition. . . . The Court rejects Dr. Leiva’s argument that Colombia’s denials of these extradition requests is evidence that the Extradition Treaty is an impermissible, one-country treaty. The fact that the Colombian government has, at times, refused some of the United States’ requests for extradition is immaterial. It is not out of the ordinary that a country, for a multitude of reasons, refuses an extradition request. In the United States, even after a certificate of extraditability is issued by a United States Magistrate Judge, the Secretary of State retains broad discretion and may ultimately refuse the extradition request. See *Martin v. Warden, Atlanta Pen*, 993 F.2d 824, 829 (11th Cir. 1993). Moreover, it is not for this Court to decide whether Colombia has been complying in good faith with its treaty obligations. See *Charlton v. Kelly*, 229 U.S. 447, 471 (1913).

In *Charlton*, the government of Italy sought the extradition of an American citizen for the murder of his wife. The petitioner filed a writ of habeas corpus arguing, among other things, that because Italy refused to extradite Italian nationals to the United States, “the treaty ha[d] thereby ceased to be of obligation on the United States.” *Charlton*, 229 U.S. at 469. The Secretary of State in a memorandum took the position that:

since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy, even though Italy should not, by reason of the provisions of her municipal law, be able to surrender its citizens to us.

Id. at 476. In light of the Secretary of State's position, the Supreme Court affirmed the dismissal of the petition for writ of habeas corpus, stating:

The Executive Department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the [petitioner] as one imposed by the treaty [as] the supreme law of the land, and as affording authority for the warrant of extradition.

Id. In the instant case, the United States government has never taken the position that Colombia is in breach of its treaty obligations. To the contrary, it is the position of the executive branches of both governments that the Extradition Treaty remains in effect. Accordingly, the Court will not find that the Extradition Treaty is not in effect on the basis that Colombia has purportedly not complied with its obligations under the Extradition Treaty.

Dr. Leiva also relies on statements made by this Court and the Eleventh Circuit concerning the status of the Extradition Treaty. ...

The statements in the[se] ...cases concerning the validity of the Extradition Treaty constitute dicta and have no binding effect on this Court. See *United States v. Eggersdorf*, 126 F.3d 1318, 1322 n. 4 (11th Cir. 1997) ... None of the cases cited by Dr. Leiva concern the extradition of an individual from the United States to Colombia pursuant to the Extradition Treaty. Thus, in the cases cited by Dr. Leiva, the courts did not have the opportunity to address the issue before this Court: whether the Extradition Treaty is in effect to permit the extradition of a Colombian citizen from the United States to Colombia.

Unlike the cases cited by Dr. Leiva, the government has filed *In the Matter of the Extradition of Mauricio Pardo-Hasche*, No. 01-Misc.Cr.-49-A, Decision & Order (W.D.N.Y. Aug. 30, 2002) which is factually on point because it concerned an individual being extradited to Colombia pursuant to the Extradition Treaty. For this reason and based on *Pardo-Hasche's* sound analysis, the Court finds the *Pardo-Hasche* decision persuasive.

In *Pardo-Hasche*, a Colombian national (hereinafter "extradite") challenged the validity of the extradition treaty between Colombia and the United States. *Pardo-Hasche*, Decision & Order, at 1. The court presumed that the extraditee had standing to raise that challenge and ruled against the extraditee on the merits. ... Despite the Colombian Supreme Court's rulings finding that the treaty had never been ratified, the court in *Pardo-Hasche* concluded that the Extradition Treaty was in effect.... Importantly, the court noted that both the executive branch of the United States and the executive branch of Colombia (through a Memorandum from the Embassy of Colombia) had taken the position that the extradition treaty was valid. In light of the consensus by both countries, the Court ruled that the treaty was in full effect. The fact that Colombia also extradited individuals through means other than the Extradition Treaty did not alter the court's ruling that the treaty was still in effect because:

[a]s noted in [*United States v.*] *Mitchell*, [No. 83-CR-86, 1990 WL 132573 (E.D.Wis. 1990)] it is not for the United States judiciary to assess the validity of such actions taken by the government of Colombia in this context. The existence of an internal political power struggle which may interfere with the ability of Colombia to effectuate certain terms of the Extradition Treaty relating to the extradition of persons *from* Colombia does not, without more, invalidate the treaty.

Id. at 8 (emphasis in original). Similarly here, the executive branches of the United States and Colombia have stated that it is the understanding of both sovereigns that the Extradition Treaty is currently in effect. Thus, the Extradition Treaty remains in full force and effect.

Finally, Dr. Leiva relies on the Vienna Convention on the Law of Treaties (“Vienna Convention”) to support his argument that the Extradition Treaty is not in effect. ... The Court finds that the Vienna Convention would not support a finding that the Extradition Treaty remains in effect because neither party has given notice of its intent to terminate the Extradition Treaty.

In sum, the record evidence establishes that it is the official position of the executive branches of the United States and Colombia that the Extradition Treaty remains in full force and effect. ...

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Cross References

Draft General Comment on Article 6 of the ICCPR, **Ch. 6.A.2.b.**

U.S. notice of withdrawal from UNESCO, **Ch. 7.A.1.**

ILC's Work at its 69th Session: Provisional Application of Treaties, **Ch. 7.C.1.**

Air transport agreements, **Ch. 11.A.**

Air Line Pilots Ass'n, et al. v. Chao (U.S.-U.K. Air Transport Agreement), **Ch. 11.A.2.**

Interpretation of NAFTA, **Ch. 11.B.**

U.S. notice of intention not to join Trans-Pacific Partnership, **Ch. 11.D.1.**

Cuba maritime boundary agreements, **Ch. 12.A.4.a.**

U.S. notice of intent to withdraw from Paris Agreement, **Ch. 13.A.1.**

Entry into force of Minamata Convention on Mercury, **Ch. 13.A.3.**

U.S. acceptance of amendments to transboundary air pollution convention, **Ch. 13.A.4.**

U.S. ratification of international fisheries agreements, **Ch. 13.B.3.**

U.S.-Mexico water treaty, **Ch. 13.C.2.**

Cultural property MOUs, **Ch. 14.A.**

U.S. rejoining convention relating to international exhibitions, **Ch. 14.E.2**

Securities Convention entry into force, **Ch. 15.A.3.**

Water Splash case (regarding Hague Service Convention), **Ch. 15.C.1.**

U.S. ratification of protocol for Montenegro to join NATO, **Ch. 18.A.3.a.**

Cooper v. TEPCO (Convention on Supplementary Compensation for Nuclear Damage), **Ch. 19.B.2**

CHAPTER 5

Foreign Relations

A. LITIGATION INVOLVING NATIONAL SECURITY AND FOREIGN POLICY ISSUES

1. *Al-Tamimi v. United States*

On January 27, 2017, the United States filed a brief in support of its motion to dismiss claims against defendant Elliott Abrams in a case brought by plaintiffs, a group of Palestinians seeking \$1 billion in damages for alleged unlawful actions by members of the Israel Defense Forces (“IDF”); actions which they allege defendants conspired to enable. *Al-Tamimi v. United States*, No. 1:16-cv-00445 (D.D.C.). The United States substituted itself as defendant in place of Mr. Abrams, former Senior Director for Near East and North African Affairs on the National Security Council and Deputy National Security Adviser for Middle East Affairs. Excerpts below from the January 27 brief demonstrate that the plaintiffs’ Federal Tort Claims Act (“FTCA”) counts in their complaint are barred by sovereign immunity under explicit provisions of the FTCA. The sections of the brief discussing the Torture Victim Protection Act (“TVPA”) and Alien Tort Statute (“ATS”) and the political question doctrine are excerpted in this chapter, *infra*. The full text of the brief is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The United States, as a sovereign, is immune from suit except to the extent it waives its immunity. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *see also Settles v. U.S. Parole Comm’n*, 429 F.3d 1098, 1105 (D.C. Cir. 2005) (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). Such a waiver must be “unequivocally expressed” and “cannot be implied.” *Mitchell*, 445 U.S. at 538 (citation and quotation omitted). For no less than four independent reasons, sovereign immunity bars Plaintiffs’ FTCA claims against the United States: (1) Plaintiffs have failed to exhaust their administrative remedies; (2) the United States has not

waived sovereign immunity for claims based on customary international law or the law of nations; and the claims are precluded by both (3) the foreign-country exception and (4) the discretionary-function exception to the FTCA.

a. Plaintiffs have not exhausted their administrative remedies.

Plaintiffs' claims against the United States are barred because Plaintiffs failed to exhaust their administrative remedies, a necessary prerequisite to any FTCA claim. The FTCA requires that, before bringing a claim against the United States in district court, an individual must present his or her claim to the "appropriate Federal agency" and either receive a denial of the claim in writing, or wait six months since submitting the claim without receiving a response. 28 U.S.C. § 2675(a). *See also Simpkins v. D.C. Gov't*, 108 F.3d 366, 370 (D.C. Cir. 1997) (quoting § 2675(a)). This requirement is "straightforward." *McNeil v. United States*, 508 U.S. 106, 112 (1993). It is also jurisdictional. *See Simpkins*, 108 F.3d at 371 (citation omitted). Plaintiffs have not alleged that they submitted their claims to the "appropriate Federal agency," as § 2675(a) requires, or indeed to any federal agency. Accordingly, this Court lacks jurisdiction over their claims against the United States and should dismiss Counts I through III on that basis.

b. The United States has not waived sovereign immunity for alleged violations of the law of nations.

Even if Plaintiffs had properly exhausted their administrative remedies—which they have not—their claims against the United States would still fail because those claims are based on alleged violations of customary international law, or "the law of nations." The ATS, a "strictly jurisdictional" statute, does not provide an independent basis for asserting a claim against the United States. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004). Plaintiffs' claims against the United States are under the FTCA. Through the FTCA, as amended by the Westfall Act, the United States has waived its immunity for tort claims arising from the negligent or wrongful acts or omissions of federal employees that occurred within the scope of their employment. *See* 28 U.S.C. § 1346(b)(1). This waiver, however, is limited. It waives immunity only under circumstances where the United States, if a private person, would be liable "in accordance with the law of the place" where the act or omission occurred. *Id.*

Courts have repeatedly held that "the law of the place" refers to state law only. *See, e.g., FDIC v. Meyer*, 510 U.S. 471, 477 (1994) ("[W]e have consistently held that § 1346(b)'s reference to the 'law of the place' means law of the State—the source of substantive liability under the FTCA) (citing cases); *see also Delta Savings Bank v. United States*, 265 F.3d 1017, 1024-25 (9th Cir. 2001) (barring FTCA claim brought under federal law because FTCA action must be based on violation of state law). *Cf. Sosa*, 542 U.S. at 707-08 (explaining that Congress exempted from the FTCA claims arising in foreign countries because it sought "to avoid application of substantive foreign law" in claims against the United States); *United States v. Spelar*, 338 U.S. 217, 221 (1949) (noting that Congress "was unwilling to subject the United States to liabilities depending upon the laws of a foreign power").

Accordingly, an FTCA claim cannot be based on alleged violations of customary international law. *See Al Janko v. Gates*, 831 F. Supp. 2d 272, 283 (D.D.C. 2011), *aff'd on other grounds*, 741 F.3d 136 (D.C. Cir. 2014); *Bansal v. Russ*, 513 F. Supp. 2d 264, 280 (E.D. Pa. 2007). In *Al Janko*, the court dismissed plaintiff's claims for violations of the ATS after substituting the United States as defendant. *Al Janko*, 831 F. Supp. 2d at 283. In doing so, the court emphasized that the United States had not waived its immunity for claims based on customary international law: "the United States has not waived sovereign immunity under the FTCA as it relates to the alleged conduct—such as violations of customary international law, the

Third and Fourth Geneva Conventions, and other international standards.” *Id.* See also *Bansal*, 513 F. Supp. 2d at 280 (“[T]he United States has not waived its sovereign immunity with respect to [customary international law] claims.” (quotation and citation omitted)).

All of Plaintiffs’ claims against the United States are for alleged violations of customary international law or the law of nations. Indeed, Plaintiffs labelled Count II as a claim for “violation of the law of nations,” Am. Compl. at p. 145, and explicitly refer in that claim to various international laws, treaties, and standards. See *id.* ¶ 184 (referring to “Nuremberg Principles,” “Genocide Convention,” and “Article 73 of the UN Charter”). Count III is for allegedly “aiding and abetting” the purported violations mentioned in Count II. See *id.* ¶ 228 (“This Count relies upon and specifically tracks the allegations made in Count II . . .”). And the alleged conspiracy in Count I—“to expel all non-Jews” from East Jerusalem, the West Bank, and the Gaza Strip, *id.* at p. 103—also involves purported violations of customary international law. See, e.g., *id.* ¶¶ 119, 173, 180 (referring to “Customary International Law”).

That Plaintiffs’ conspiracy claim nominally involves a common-law tort does not alter this analysis. Although “civil conspiracy” is a domestic common-law tort, it provides no independent cause of action. See *Hall v. Clinton*, 285 F.3d 74, 82 (D.C. Cir. 2002). Rather, it is a vehicle through which “vicarious liability for the underlying wrong” may attach to all who are party to a conspiracy, “where the requisite agreement exists among them.” *Id.* (quoting *Riddell v. Riddell Wash. Corp.*, 866 F.2d 1480, 1493 (D.C. Cir. 1989)). Because the “underlying wrong” alleged in Count I involves purported violations of customary international law—for which the United States has not waived its immunity—Count I, like Counts II and III, is barred. See *Daisley v. Riggs Bank, N.A.*, 372 F. Supp. 2d 61, 73 (D.D.C. 2005).

Nor does Plaintiffs’ passing invocation of a federal statute or other federal sources alter the above analysis. See, e.g., Am. Compl. ¶¶ 146 (invoking an unspecified “1995 Executive Order”); 184 (invoking “U.S. War Crimes Statute” and “America’s 1863 Lieber Code”); 185 (invoking 18 U.S.C. § 2441). First, as noted above, the United States has not waived its immunity for claims for damages based on purported violations of federal law. See *Meyer*, 510 U.S. at 478; *Liranzo v. United States*, 690 F.3d 78, 86 (2d Cir. 2012) (“The FTCA does not waive sovereign immunity for claims based solely on alleged violations of federal law.” (citing *Meyer*, 510 U.S. at 478)); *Delta Savings*, 265 F.3d at 1024-25. Second, the United States has waived its immunity only to the extent it would be liable if it were a private person. 28 U.S.C. § 1346(b)(1). None of these federal sources provides a private right of action or creates the requisite form of liability. See, e.g., *Jawad v. Gates*, 113 F. Supp. 3d 251, 259 (D.D.C. 2015) (noting that 18 U.S.C. § 2441 does not create a private cause of action), *aff’d*, 832 F.3d 364 (D.C. Cir. 2016). Therefore, they cannot form the basis for an FTCA claim. In short, Counts I through III are based on bodies of law for which the United States has not waived its immunity. Thus, those claims must be dismissed.

c. The foreign-country exception bars Plaintiffs’ claims.

Furthermore, Plaintiffs’ claims against the United States regarding alleged injuries in the Middle East are barred under the FTCA’s exception for claims “arising in a foreign country.” See 28 U.S.C. § 2680(k). Plaintiffs’ claims regarding alleged wrongs committed against Palestinians in East Jerusalem, the West Bank, and the Gaza Strip indisputably arose abroad. Moreover, as the Supreme Court has made clear, the reason for this exception is to prevent subjecting the United States to the application of substantive foreign law. See *Sosa*, 542 U.S. at 707-08. Foreign sources of law apply in East Jerusalem, the West Bank, and the Gaza Strip—the areas in which Plaintiffs’ claims arose. Those claims thus fall squarely within the foreign-country exception.

Furthermore, the foreign-country exception extends to claims arising in any territory over which the United States does not claim sovereignty. *See Smith v. United States*, 507 U.S. 197, 198 n.1, 204 (1993) (applying foreign-country exception to bar FTCA claims arising in Antarctica, a continent over which the United States “itself does not assert a sovereign interest” (citation omitted)). The United States certainly does not claim sovereignty over East Jerusalem, the West Bank, or the Gaza Strip. Therefore, the foreign-country exception also applies to Plaintiffs’ claims on this basis.

Additionally, even to the minimal extent Plaintiffs allege events occurring in the United States, their claims still fall within the foreign-country exception. The foreign-country exception applies to claims whenever the alleged *injuries* occurred abroad, even if alleged planning that led to the injuries occurred within the United States. The Supreme Court made that clear in *Sosa*: “We therefore hold that the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.” 542 U.S. at 712. *See also Gross v. United States*, 771 F.3d 10, 12-13 (D.C. Cir. 2014). In sum, the foreign-country exception applies to Plaintiffs’ claims. They must be dismissed.

d. The discretionary-function exception applies to Plaintiffs’ claims.

Lastly, Plaintiffs’ claims against the United States are barred because they involve the alleged exercise of a discretionary function by Mr. Abrams, a former government official, and in turn, the United States. Under 28 U.S.C. § 2680(a), the United States has not waived its immunity for claims based on “the exercise or performance or the failure to exercise or perform a discretionary function” on the part of a federal employee. *Id.* This exception, known as the discretionary-function exception, applies “whether or not the discretion involved be abused.” *Id.* The Supreme Court has developed a two-part test to determine whether the discretionary-function exception applies to an FTCA claim. *See United States v. Gaubert*, 499 U.S. 315, 322-23 (1991). First, a court assesses whether a “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.” *Id.* at 322. Because the discretionary-function exception covers only acts that “involve an element of judgment or choice,” *id.*, any such statute, regulation, or policy would preclude an employee from exercising his or her “judgment or choice.”

Second, where an act involves “an element of judgment or choice,” a court asks whether the “judgment or choice” is “of the kind that the discretionary-function exception was designed to shield.” *Id.* As the Supreme Court explained, because Congress included the exception “to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy” through an FTCA claim, the exception applies to “governmental actions and decisions based on considerations of public policy.” *Id.* at 323. Indeed, “the most important modern policy basis for sovereign immunity is that under ‘principles of separation of powers, courts should refrain from reviewing or judging the propriety of the policymaking acts of coordinate branches.’” *Wells v. United States*, 851 F.2d 1471, 1476 (D.C. Cir. 1988) (applying discretionary-function exception to FTCA claims) (citation and quotation omitted). *See also Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154, 1156 (D.D.C. 1991) (noting the discretionary-function exception “embodies the separation of powers”).

This exception plainly applies to Plaintiffs’ claims against the United States. No federal statute, regulation, or policy precluded Mr. Abrams from exercising his “judgment or choice” in the course of his alleged actions in the manner Plaintiffs suggest. Moreover, Plaintiffs’ complaint against the United States focuses on alleged communications and interactions between Mr. Abrams—in his role as a Deputy National Security Advisor in the White House—and former

Israeli Prime Minister Ariel Sharon, aides to Sharon, and aides to former Israeli Prime Ministers Ehud Olmert and Ehud Barak regarding Israeli settlements and the alleged treatment of Palestinians in the region. *See, e.g.*, Am. Compl. at p. 20, ¶¶ 41, 134, 142. In other words, Plaintiffs’ claims challenge judgments and choices Mr. Abrams allegedly made regarding United States foreign policy in the Middle East, a highly geopolitically sensitive area of the world that long has and continues to present numerous foreign policy and national security challenges for the United States.

Litigating any such choices is precisely the sort of “second-guessing” that the discretionary-function exception is meant to prevent. It is beyond peradventure that Mr. Abrams’s alleged communications and interactions with high-level Israeli officials regarding Israeli settlements in the region and purported policies regarding the Middle East would have involved “decisions grounded in . . . political policy.” *Gaubert*, 499 U.S. at 323.

Indeed, such alleged decisions—which typically would involve weighing and considering their effect on national security and foreign affairs, including the reactions of Israelis, Palestinians, and nations throughout the Middle East, Europe, and Asia—require the quintessential sort of “judgment or choice” that the discretionary-function exception covers. *See, e.g., Sanchez ex rel. D.R.-S. v. United States*, 671 F.3d 86, 103 (1st Cir. 2012) (in applying discretionary-function exception to claims based on the Navy’s allegedly negligent release of pollutants during military exercises, noting that “[t]he Navy’s choices were . . . pursuant to its judgment as to how it conducted its military operations”); *Mirmehdi v. United States*, 689 F.3d 975, 984 (9th Cir. 2012) (“Because the decision to detain an alien pending resolution of immigration proceedings is explicitly committed to the discretion of the Attorney General and implicates issues of foreign policy, . . . it falls within this exception.”); *Loughlin v. United States*, 393 F.3d 155, 164 (D.C. Cir. 2004) (barring FTCA claims based on decision to bury World War I munitions because decision “required balancing competing concerns of secrecy, and safety, national security and public health” (citation omitted)); *Industria Panificadora*, 763 F. Supp. at 1158 (applying discretionary-function exception to tort claims arising from the U.S. invasion of Panama). Thus, this Court lacks jurisdiction over Plaintiffs’ claims against the United States.

* * * *

On March 10, 2017, the United States filed a reply brief in support of its motion to dismiss in *Al-Tamimi*. Excerpts follow from the reply brief’s discussion of the FTCA claims. The reply brief is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The United States substituted itself under the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended in relevant part at 28 U.S.C. § 2679), as the defendant for Mr. Elliott Abrams because the operative allegations of Plaintiffs’ complaint related to actions he allegedly undertook while working at the White House for eight years, between 2001 and 2009, as a member of the National Security Council—first as Senior Director for Near East and North African Affairs, and then as Deputy National Security Advisory handling Middle East affairs. ...

... Plaintiffs appear to concede that the Westfall Act covers Mr. Abrams's alleged actions during those eight years: "It is undisputed that Defendant Abrams worked in the White House under President Bush, and because he was a Federal employee at the time, the Westfall Act would have applicability to the activity he engaged in during those four [*sic*] years." Doc. 112, Pls.' Opp'n, at 6. They cannot credibly argue otherwise.

Under the Westfall Act, substitution of the United States as defendant is appropriate for claims based on alleged acts or omissions taken within the scope of a federal employee's employment. See 28 U.S.C. § 2679(b)(1). For events occurring abroad that involve a White House official, the District of Columbia provides the law for determining whether the official was acting within the scope of his or her employment. *Cf. Kashin v. Kent*, 457 F.3d 1033, 1037-38 (9th Cir. 2006) (applying District of Columbia law to determine whether State Department employee acted within scope of employment while driving in Russia). Given that jurisdiction's expansive view of the scope of employment, there is no question that Mr. Abrams was acting within scope when he allegedly met with senior officials of the Israeli government to discuss United States policy in the Middle East and allegedly took other actions regarding that policy. See, e.g., *Harbury v. Hayden*, 522 F.3d 413, 422 (D.C. Cir. 2008); *Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976); *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 8-9 (D.D.C. 2004); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 265 (D.D.C. 2004); *Weinberg v. Johnson*, 518 A.2d 985, 988 (D.C. 1986); *Howard Univ. v. Best*, 484 A.2d 958, 987 (D.C. 1984). Thus, to the extent Plaintiffs attempt to argue that Mr. Abrams acted outside the scope of his employment while at the White House, see Doc. 112, Pls.' Opp'n, at 7, their argument, which is based on nothing more than a blanket, conclusory assertion, must fail. Accordingly, the United States is the proper defendant for the operative allegations against Mr. Abrams.

The United States also demonstrated that three explicit provisions of the FTCA bar Plaintiffs' claims: (1) the requirement to exhaust administrative remedies, 28 U.S.C. § 2675(a); (2) the foreign-country exception, 28 U.S.C. § 2680(k); and (3) the discretionary-function exception, 28 U.S.C. § 2680(a). See Doc. 104, United States' Mot. to Dismiss, at 4-11. Plaintiffs offer no response to the United States' showing regarding the first two provisions. See generally Doc. 112, Pls.' Opp'n. They therefore effectively concede that those provisions apply. See *Kone v. District of Columbia*, 808 F. Supp. 2d 80, 83 (D.D.C. 2011) ("An argument in a dispositive motion that the opponent fails to address in an opposition may be deemed conceded." (quoting *Rosenblatt v. Fenty*, 734 F. Supp. 2d 21, 22 (D.D.C. 2010) (internal alterations omitted))).

And Plaintiffs' one-line statement opposing the United States' showing that the discretionary-function exception applies, see Doc. 112, Pls.' Opp'n, at 7, is wholly inadequate to rebut that showing. First, Plaintiffs did not accuse Mr. Abrams of "classic money laundering," *id.*, in their amended complaint. They alleged he was a "Settlement and IDF Advocate/Promoter," and even separated him from other defendants who were alleged to have donated to certain causes related to purported events occurring abroad. Compare Am. Compl. ¶ 41 with *id.* ¶¶ 31-40, 42-54. Second, unsupported, conclusory allegations of criminal activity or the encouragement of such activity on the part of a federal employee cannot, under basic pleading standards, rebut a showing that the actual factual allegations fall within the discretionary-function exception. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Third, and most notably, Plaintiffs make no effort whatsoever to address—let alone grapple with—the substantial and relevant case law the United States cited in its motion to dismiss that demonstrates that Mr. Abrams's alleged actions regarding United States policy in the Middle East are precisely the sort of activity that the discretionary-function exception covers. See Doc. 104, United States' Mot. to

Dismiss, at 11 (citing cases from the First, Ninth, and D.C. Circuits). Accordingly, Plaintiffs' FTCA claims against the United States must be dismissed.

Plaintiffs' references to other allegations in their amended complaint regarding Mr. Abrams's alleged actions before and after his eight years at the White House are of no moment. As the United States explained in its motion to dismiss, (and as any reasonable construction of the amended complaint supports), it views those allegations as offering context to Mr. Abrams's alleged motivations while acting as Deputy National Security Advisor, not as the operative allegations of customary international law violations with respect to Mr. Abrams's conduct. *See* Doc. 104, United States' Mot. to Dismiss, at 22 n.8. The Attorney General's designee's certification "is conclusive unless challenged." *Gutierrez de Martinez v. Drug Enf't Admin.*, 111 F.3d 1148, 1153 (4th Cir. 1997). Plaintiffs' recitation of conclusory allegations that, in any event, do not state a plausible claim of Mr. Abrams's purported involvement in some ill-defined financial conspiracy, fails to rebut that conclusion. Moreover, Plaintiffs offer no response to the United States' showing that much of Mr. Abrams's alleged actions are core First Amendment-protected activities because they involve debate on public issues. *See* Doc. 104, United States' Mot. to Dismiss, at 22-23. Indeed, one of the cases Plaintiffs cite in their opposition relating to another issue indicates that where First Amendment protections apply, they would apply to limit claims for alleged violations of customary international law. *See Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 328 (D. Mass. 2013) (noting in case involving ATS claims that "Defendant is correct that the First Amendment places limits on the imposition of tort liability linked to offensive speech, and that the protection of free expression, including the protection of 'thought we hate,' is a centerpiece of our democracy." (citing and quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011))).

Furthermore, Plaintiffs' conclusory assertion in their opposition that Mr. Abrams is a "donor" who financed money laundering, Doc. 112, Pls.' Opp'n, at 7-8, is contrary to the allegations in their amended complaint, which, as explained above, paint Mr. Abrams as a "Settlement and IDF Advocate/Promoter," not as a donor to Israeli settlement causes. In any event, given that this Court has ordered briefing on subject-matter jurisdiction only, *see* Doc. 97, Dec. 15, 2016 Order, at 1, and given the United States' other dispositive jurisdictional arguments explained below, there is no need at this juncture to determine whether Plaintiffs' allegations regarding Mr. Abrams's supposed involvement in a conspiracy to finance Israeli settlements are operative and, even if so, whether they are sufficient to state a claim.

* * * *

2. *Detroit International Bridge Co. v. Canada*

On November 21, 2017, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *Detroit International Bridge Co. v. Canada*, No. 16-5270. For discussion of the proceedings at the U.S. district court level, *see Digest 2013* at 104-10; for discussion of a claim based on the same set of facts, brought pursuant to NAFTA Chapter 11, *see Digest 2014* at 461-63. The Detroit International Bridge Company ("the Company") challenged the approval by Under Secretary of State for Economic Growth, Energy and the Environment Robert Hormats of the Crossing Agreement between Canada and the State of Michigan under the International Bridge Act ("IBA"), and the issuance of a Presidential Permit for the construction of a second bridge within two miles of the

Company's existing bridge (the Ambassador Bridge). The lower court dismissed as to most counts in the complaint and granted summary judgment on the remaining count. The Court of Appeals affirmed, noting that the determination of whether to issue the Presidential Permit was not subject to judicial review. Excerpts follow from the opinion.*

* * * *

Under IBA Section 4, no international bridge may be constructed without Presidential approval. 33 U.S.C. § 535b. By Executive Order in 1968, as amended in 2004, the President authorized the Secretary of State to issue permits approving bridges under Section 4 unless there is disagreement among consulted agencies, in which event the matter is returned to the President “for consideration and a final decision.” Exec. Order 13,337, 69 Fed. Reg. 25,299, § 1(g)-(i). Challenging the dismissal of Count 6, the Company acknowledges that Presidential action is not subject to judicial review under the Administrative Procedure Act (“APA”), 5 U.S.C. § 704. Applt’s Br. 51-52 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992)). Rather, it maintains that the issuance of a Presidential Permit by the Secretary of State is final agency action, regardless of whether this authority was delegated by the President, and thus it is reviewable pursuant to the APA. But even if the Presidential Permit issuance were agency action, it is unreviewable under the APA because it is “committed to agency discretion by law,” 5 U.S.C. § 701(a)(2).

The 1968 Executive Order on Presidential Permits stated that “the *proper conduct of the foreign relations* of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities connecting the United States with a foreign country.” Exec. Order 11,423, 33 Fed. Reg. 11,741, pmble. (emphasis added). The 2004 Executive Order affirmed that the Secretary should issue a Presidential Permit if doing so “would serve the national interest.” Exec. Order 13,337, 69 Fed. Reg. 25,299, § 1(g); see Exec. Order 11,423, 33 Fed. Reg. 11,741, § 1(d). In the foreign affairs arena, the court lacks a standard to review the agency action. As the court explained in *Dist. No. 1, Pac. Coast Dist., Marine Engineers’ Beneficial Ass’n v. Marine Admin., et al.*, 215 F.3d 37, 42 (D.C. Cir. 2000), generally “judgments on questions of foreign policy and national interest ... are not subjects fit for judicial involvement.” “By long-standing tradition, courts have been wary of second-guessing executive branch decision[s] involving complicated foreign policy matters.” *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1353 (D.C. Cir. 1997).

The Company offers no persuasive argument for adopting a different approach with respect to issuance of the Section 4 Presidential Permit here. Its reliance on *Dickson v. Sec’y of Def.*, 68 F.3d 1396 (D.C. Cir. 1995), and *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221 (D.C. Cir. 1993), is misplaced. The issue in those cases arose in the context of military discharge classifications and Medicare reimbursement, respectively. By contrast, the context surrounding issuance of a Section 4 Presidential Permit under the IBA involves a determination rife with executive discretion in an area that the U.S. Constitution principally vests in the

* Editor’s note: The opinion was corrected and reissued on March 6, 2018 by order of the U.S. Court of Appeals for the District of Columbia Circuit, en banc.

political branches. *See e.g., Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). Because the challenged issuance is not subject to judicial review, the court need not decide whether the issuance is presidential action under *Franklin*, 505 U.S. 788.

* * * *

3. Sokolow

As discussed in *Digest 2015* at 144-45, the United States filed a statement of interest in a case against the Palestinian Authority (“PA”) and the Palestinian Liberation Organization (“PLO”) urging the court to take into account national security and foreign policy interests in deciding whether to stay execution of a judgment against the PA and whether to impose a bond requirement pending appeal. On August 31, 2016, the U.S. Court of Appeals for the Second Circuit decided that the district court lacked general or specific personal jurisdiction over the PA and PLO in the case and vacated the judgment of the district court. *Waldman v. PLO*, 835 F.3d 317 (2d. Cir. 2016). Plaintiffs filed a petition for certiorari on March 3, 2017. On June 26, 2017, the Supreme Court invited the United State to file a brief expressing its views.**

B. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Statute (“ATS”), sometimes referred to as the Alien Tort Claims Act (“ATCA”), was enacted as part of the First Judiciary Act in 1789 and is 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, for torture and/or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

The following entries discuss 2017 developments in a selection of cases brought under the ATS and the TVPA in which the United States participated.

** Editor’s note: The U.S. brief was filed on February 22, 2018 and will be discussed in *Digest 2018*. On April 2, 2018, the Supreme Court denied the petition for certiorari.

2. ATS and TVPA Cases 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.”

a. Al-Tamimi

As discussed in Section I, *supra*, the United States filed briefs in support of its motion to dismiss claims against a U.S. government official for allegedly enabling unlawful acts against Palestinians by Israel Defense Forces (“IDF”). The section of the January 27, 2017 U.S. brief regarding the TVPA and ATS is excerpted below. Other sections of the brief regarding the FTCA and the political question doctrine are excerpted *supra* and *infra*.

* * * *

Even without the above threshold barriers facing Plaintiffs’ claims, this Court should dismiss their claims against the United States brought under the TVPA and the ATS because those statutes do not provide jurisdiction for those claims.

a. **The Torture Victim Protection Act does not provide jurisdiction for Plaintiffs’ claims against the United States.**

Plaintiffs’ claims related to alleged war crimes must be dismissed because the two statutes Plaintiffs invoke—the TVPA and the ATS, *see* Am. Compl. ¶¶ 1-3—do not provide jurisdiction over their claims against the United States. The TVPA does not provide jurisdiction because Mr. Abrams, a former United States government official, was not acting under the authority of a “foreign nation.” *See Saleh v. Titan Corp.*, 580 F.3d 1, 13 n.9 (D.C. Cir. 2009) (“In the TVPA . . . Congress exempted American government officers and private U.S. persons from the statute.”); *Jerez v. Republic of Cuba*, 777 F. Supp. 2d 6, 18 (D.D.C. 2011) (explaining that a cause of action under the TVPA is available only against an individual acting “under actual or apparent authority, or color of law, of any *foreign nation*” (emphasis added)).

b. **This Court does not have jurisdiction over Plaintiffs’ Alien Tort Statute claims.**

For the reasons stated above in Parts I and II, Plaintiffs’ ATS claims must be dismissed because the United States has not waived its sovereign immunity and because those claims raise political questions. Additionally, those claims involve alleged events, including injuries occurring abroad, that do not “touch and concern” the territory of the United States “with sufficient force to displace the presumption against extraterritorial application” of federal statutes to claims brought under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). *Cf. Smith*, 507 U.S. at 203-04 (discussing the “presumption against extraterritorial application of United States statutes” in dismissing FTCA claim for events in Antarctica).

In *Kiobel*, the Supreme Court held that the presumption against the extraterritorial application of federal statutes applies to claims brought under the ATS. *See Kiobel*, 133 S. Ct. at 1669. There, the Court dismissed a case against foreign corporations based on foreign conduct and added 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.” *Id.* Since *Kiobel*, several circuit courts have struggled with developing a legal framework to determine precisely when claims “touch and concern” United States territory “with sufficient force to displace the presumption,” largely in the context of claims against corporations. *See, e.g., Adhikari v. Kellogg Brown & Root, Inc.*, No 15-20225, 2017 WL 33556, *4-5 (5th Cir. Jan. 3, 2017) (adopting framework based on *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010)); *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 586-93 (11th Cir. 2015) (surveying approaches of other circuits and adopting its own framework), *cert. denied*, 136 S. Ct. 1168 (2016); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 181-94 (2d Cir. 2014) (adopting framework based on *Morrison*); *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528 (4th Cir. 2014) (adopting framework based on a fact-based inquiry).

That debate, however, is irrelevant here. In addition to the United States’ sovereign immunity and the political question doctrine, which provide ample grounds to dismiss Plaintiffs’ claims against the United States, those claims as pled here do not “touch and concern” the territory of the United States with “sufficient force.” Plaintiffs’ complaint against the United States alleges that Palestinians suffered various injuries abroad at the hands of Israeli soldiers and citizens, who were somehow encouraged by a United States official. On its face, and absent any other United States interest sufficient to support jurisdiction here, such a claim does not displace the presumption against extraterritorial application of federal statutes to claims brought under the ATS. This is so because most of the allegations against Mr. Abrams are either conclusory or irrelevant to the purported ATS claims; the nexus between Mr. Abrams and the alleged torts is highly attenuated; the specific acts pled against Mr. Abrams primarily occurred abroad; the alleged torts by the IDF and by Israeli settlers—including the purported injuries and the commission of the tortious acts—occurred abroad; acceptance of Plaintiffs’ theory of liability here risks rendering the Supreme Court’s holding in *Kiobel* academic, at least at the pleadings stage; and no United States interest is sufficient to support jurisdiction over Plaintiffs’ claims against the United States.

At the outset, the vast majority of Plaintiffs’ allegations against Mr. Abrams are either conclusory or have no bearing on their claims. *See, e.g.,* Am. Compl. pp. 19 (conclusory allegation that Abrams “encouraged . . . wholesale violence”); 27 (conclusory allegation that Abrams “encouraged and justified” settlement expansions and ethnic cleansing); ¶¶ 1 (conclusory allegation that Abrams “formulated” his plan to conspire while in the United States); 17 (allegation that Abrams has been a featured speaker at AIPAC conferences, which has no bearing on claim); 41 (conclusory allegation that Abrams has been unofficial paid spokesman of settlements); 86 (conclusory allegation that Abrams “encouraged” illegal land seizures by Israeli settlers); 186 (conclusory allegation that Abrams “encouraged” war crimes). Such conclusory or irrelevant allegations are insufficient to displace the presumption against extraterritorial application of the ATS. *See Mastafa*, 770 F.3d at 190 (“[O]ur jurisdictional analysis need not take into account allegations that, on their face, do not satisfy basic pleading requirements.”).

As for Plaintiffs’ allegations regarding Mr. Abrams’s purported testimony to Congress and articles in news publications, *see, e.g.,* Am. Compl. p. 20, ¶¶ 24, 125, 123, those allegations do not form the basis of Plaintiffs’ claims against the United States, and instead simply offer

context to Plaintiffs' claims in terms of Mr. Abrams's alleged motivations during his purported interactions with Israeli officials, discussed below. Moreover, Mr. Abrams's testimony to Congress and authorship of opinion pieces regarding prominent issues and policies in international affairs are core First Amendment-protected activities that do not constitute an actionable tort. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982) (emotional speech supporting civil rights boycott and threatening "discipline" to boycott violators protected by First Amendment and could not form basis for tort claim). Indeed, testimony to Congress and authorship of opinion pieces presenting a perspective on political issues "is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("debate on public issues should be uninhibited, robust, and wide-open").

The remaining allegations regarding purported interactions between Mr. Abrams and Israeli officials are insufficient to displace the presumption against extraterritorial application of federal statutes to claims brought under the ATS. Those allegations involve alleged events occurring abroad that are far too attenuated and removed from the supposed war crimes to be relevant to Plaintiffs' claims. For example, Plaintiffs' allegation that Mr. Abrams met abroad with former Prime Minister Sharon in Rome and with aides to Israeli Prime Ministers in Europe, Am. Compl. p. 20, do not displace the presumption. In any event, Mr. Abrams's alleged interactions with Israeli government officials regarding Israeli settlement policy, wherever they occurred, are too attenuated from the purported actions of Israeli settlers themselves or from Plaintiffs' allegations of injury, and are, as a general matter, insufficient to displace the presumption. *See, e.g., Drummond Co.*, 782 F.3d at 598 (holding that allegations regarding decision-making, funding, and policy choices occurring in the United States insufficient to displace presumption where agreement, planning, and execution of purported crimes occurred abroad).

Moreover, the injuries Plaintiffs allege clearly occurred abroad. In conjunction with the other factors discussed above regarding Plaintiffs' claims against the United States, this weighs against displacing the presumption in this case. At bottom, Plaintiffs allege that a United States official was in some highly attenuated and ill-defined manner involved in the conduct of foreign agents who allegedly caused harm abroad. Under basic tort principles, those foreign agents' alleged torts occurred abroad, the location of the alleged injuries is abroad, and the jurisdiction with the more substantial interest in the resolution of this litigation is abroad. *Cf. Sosa*, 542 U.S. at 711 (holding that for purposes of the foreign-country exception to the FTCA, 28 U.S.C. § 2680(k), a tort "aris[es]" where the injury occurs); *Jaffe v. Pallotta Teamworks*, 374 F.3d 1223, 1227 (D.C. Cir. 2004) (noting that in tort cases, D.C. courts apply "the law of the jurisdiction with the more substantial interest in the resolution of the issue," which considers "(1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship is centered" (internal citations and quotations omitted)); *see also Adhikari*, 2017 WL 33556, at *7-8. Indeed, the substantial implications of the resolution of Plaintiffs' claims for the conduct of United States foreign relations buttresses the fact that those claims raise non-justiciable political questions. ...

Furthermore, to the extent Plaintiffs' claims are based on the alleged conspiracy between Mr. Abrams and other defendants, such a claim does not automatically rebut the presumption against extraterritorial application of federal statutes to claims brought under the ATS. In effect, that claim echoes the "headquarters doctrine" that the *Sosa* Court rejected in the context of tort

claims brought under the FTCA. *See* 542 U.S. at 702-03. As with the foreign-country exception, allowing such claims automatically to overcome the presumption against extraterritoriality would “swallow” that presumption whole, “certainly at the pleadings stage.” *Id.* at 703.

Lastly, there is no United States interest sufficient to support exercising jurisdiction over Plaintiffs’ claims. *See supra*, note 6. In sum, regardless of which legal framework applies to determining when claims brought under the ATS “touch and concern” the United States with sufficient force to rebut the presumption against extraterritorial application of federal statutes, Plaintiffs’ claims certainly do not. Their claims against the United States should be dismissed.

* * * *

Excerpts below come from the section of the March 10 reply brief of the United States discussing the TVPA and ATS.

* * * *

Lastly, Plaintiffs have failed to rebut the United States’ showing that neither of the statutes Plaintiffs invoke provides jurisdiction for their claims against the United States. Plaintiffs fail to address at all the United States’ showing regarding the Torture Victim Protection Act, *see* Doc. 104, United States’ Mot. to Dismiss, at 19. They therefore have conceded that point. *See Kone*, 808 F. Supp. 2d at 83.

And their efforts to grapple with the United States’ showing regarding the ATS and its extraterritorial scope as to the alleged actions of the United States through Mr. Abrams are insufficient. In response to that showing, Plaintiffs cite outdated or irrelevant case law. For example, Plaintiffs’ heavy reliance on *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009), a case involving ATS claims for events in South Africa, is of no moment. *See* Doc. 112, Pls.’ Opp’n, at 16, 18-20. That case preceded *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Indeed, *In re South African* rejected the defendants’ extraterritoriality argument in large part because of “the inapplicability of the presumption against extraterritorial application of statutes” to the plaintiffs’ ATS claims. *In re South African*, 617 F. Supp. 2d at 247. That portion of the opinion is no longer good law. *See Kiobel*, 133 S. Ct. at 1669. And that is the portion that Plaintiffs effectively rely on when they refer to *In re South African*. Similarly, the discussion in *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992), regarding extraterritoriality on which Plaintiffs rely, *see* Doc. 112, Pls.’ Opp’n, at 18, preceded *Kiobel*. Moreover, both *Marcos* and *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), involved claims against former foreign officials who had committed torture and were enjoying safe haven in the United States. *See Marcos*, 978 F.2d at 496; *Filártiga*, 630 F.2d at 878. Those officials had “become . . . an enemy of all mankind.” *Sosa*, 542 U.S. at 732 (quoting *Filártiga*, 630 F.2d at 890). Those cases are readily distinguishable from this one. Plaintiffs make no suggestion, let alone a plausible one, that the United States official whose alleged actions underlie their claims against the United States committed torture.

Furthermore, Plaintiffs’ reliance on *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016), is misplaced. *See* Doc. 112, Pls.’ Opp’n, at 19. That case supports the United States’ position—not that of Plaintiffs. In *Simon*, Holocaust survivors from Hungary brought claims under the ATS and under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604-05 (FSIA),

against the Hungarian government and Hungarian companies for events of the Holocaust. *See Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 386 (D.D.C. 2014), *rev'd in part*, 812 F.3d 127. The district court dismissed plaintiffs' ATS claims under *Kiobel* because they did not "touch and concern" the United States with sufficient force to rebut the presumption against extraterritoriality. *See Simon*, 37 F. Supp. 3d at 442-43. The *Simon* plaintiffs did not appeal that ruling. *See* 812 F.3d 127. Accordingly, *Simon* supports the United States' showing that under *Kiobel*, Plaintiffs' claims against it must be dismissed.

Lastly, and contrary to Plaintiffs' suggestion, *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75 (D.D.C. 2014), did not decide whether the plaintiffs' allegations overcame the presumption against extraterritoriality that applies to claims brought under the ATS. Instead, that court granted plaintiffs leave to amend their complaint in light of *Kiobel*. *See id.* at 97 ("For this reason, the Court is of the view that plaintiffs should have the opportunity to file for leave to amend their complaint in light of the intervening change in the law created by *Kiobel*."). Based on a review of the docket in *Doe*, it appears that the plaintiffs did not file an amended complaint within the time prescribed by the court. *See id.* at 106; *id.*, No. 1:07-cv-1022, ECF Nos. 83-87. Accordingly, that lone district court case does not conclusively address the question of whether the claims there "touched and concerned" the United States with sufficient force to rebut the presumption against extraterritoriality. In sum, none of the cases Plaintiffs cite rebuts the United States' showing that neither the TVPA nor the ATS provides jurisdiction for Plaintiffs' claims against it. This Court should dismiss those claims.

* * * *

b. Saleh v. Bush

On February 10, 2017, the U.S. Court of Appeals for the Ninth Circuit filed its opinion in *Saleh v. Bush*, No. 15-15098. The Court of Appeals affirmed the district court's dismissal of an action brought against former U.S. government officials alleging that the war against Iraq during the administration of President George W. Bush was in violation of the Alien Tort Statute. Excerpts follow from the court's opinion (with most footnotes omitted).

* * * *

The Alien Tort Statute grants "district courts . . . original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Not every violation of the law of nations gives rise to a claim that can be brought under the ATS. Rather, "any claim based on the present-day law of nations [must] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" that the drafters of the ATS had in mind—"violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004). The set of "ATS torts"—violations of norms of international law giving rise to claims cognizable under the ATS—is, therefore, not frozen in time, but the Supreme Court has instructed us to be wary of adding to

that set. See *id.* at 729 (“[T]he door to further independent judicial recognition of actionable international norms . . . is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”). Perhaps not surprisingly, only a few new ATS torts have been recognized by federal appellate courts since *Sosa* was decided. See, e.g., *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014) (holding that a violation of the “prohibition against slavery” gives rise to a claim under the ATS); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169 (2d Cir. 2009) (concluding that a violation of the “prohibition . . . against nonconsensual human medical experimentation” is an ATS tort).

Plaintiff asks us to recognize a violation of the norm against aggression as an ATS tort. We need not decide that issue. Assuming, without deciding, that engaging in aggression constitutes an ATS tort, Plaintiff’s claims against Defendants nonetheless fail, because Congress has granted Defendants official immunity from those claims. The only proper defendant in this case is therefore the United States, and Plaintiff’s claims against the United States are barred because Plaintiff failed to exhaust administrative remedies as required by the FTCA.

We first address the question whether Defendants are entitled to immunity under the terms of the Westfall Act. We then address Plaintiff’s argument that, even if the Westfall Act purports to confer immunity on Defendants, immunity cannot attach because Plaintiff has alleged that Defendants violated a *jus cogens* norm of international law.

A. *Defendants’ Official Immunity Under the Westfall Act*

“The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the ‘King can do no wrong’—did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability.” *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). “[T]he scope of absolute official immunity afforded federal employees is a matter of federal law, to be formulated by the courts in the absence of legislative action by Congress.” *Westfall v. Erwin*, 484 U.S. 292, 295 (1988) (internal quotation marks omitted), *superseded on other grounds by* Pub. L. No. 100-694, 102 Stat. 4563 (1988), codified at 28 U.S.C. § 2679(d). “The purpose of such official immunity is not to protect an erring official, but to insulate the decision-making process from the harassment of prospective litigation.” *Id.*

The Westfall Act, which was enacted in response to the Supreme Court’s decision in *Westfall*, “accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties.” *Osborn v. Haley*, 549 U.S. 225, 229 (2007). The immunity extends to both “negligent” and “wrongful” “act[s] or omission[s] of any employee . . . acting within the scope of his office or employment.” 28 U.S.C. § 2679(b)(1). The Act does not set out a test to determine whether an employee was “acting within the scope of his office or employment”; rather, Congress intended that courts would apply “the principles of *respondeat superior* of the state in which the alleged tort occurred” in analyzing the scope-of-employment issue. *Pelletier v. Fed. Home Loan Bank of S.F.*, 968 F.2d 865, 876 (9th Cir. 1992). The same analysis was employed before passage of the Westfall Act to determine whether the United States could be liable for an employee’s torts under the FTCA. *Id.* at 875–76.

The Westfall Act provides a procedure by which the federal government determines whether an employee is entitled to immunity. When a current or former federal employee is sued and the employee believes that he is entitled to official immunity, he is instructed to “deliver . . . all process served upon him . . . to his immediate supervisor” or other designated official, who

then “furnish[es] copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.” 28 U.S.C. § 2679(c). The Attorney General then determines whether “the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose.” *Id.* § 2679(d)(1). If so, the Attorney General issues a “scope certification,” which “transforms an action against an individual federal employee into one against the United States.” *Hui v. Castaneda*, 559 U.S. 799, 810 (2010). The “United States shall be substituted as the party defendant,” 28 U.S.C. § 2679(d)(1), and the employee is released from any liability: “The remedy against the United States . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee’s estate is precluded without regard to when the act or omission occurred.” *Id.* § 2679(b)(1).

The Westfall Act does not provide immunity to an official from a suit “brought for a violation of the Constitution of the United States.” *Id.* § 2679(b)(2)(A). That preserves claims against federal officers under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Hui*, 559 U.S. at 807. The Act also does not provide immunity from a suit “brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.” 28 U.S.C. § 2679(b)(2)(B). Neither exception applies here.

But Plaintiff argues that Defendants’ actions were not taken within the scope of their employment and that, therefore, they are not entitled to immunity under the Westfall Act in the first place. Plaintiff’s argument embraces two distinct theories. The first theory is that Defendants in this case acted outside the scope of their employment because they (1) started planning the attack on Iraq before they ever took office, (2) attacked Iraq out of personal motives, and (3) were not employed to instigate an unlawful war. The second theory is that the scope-of-employment inquiry under the Westfall Act must be conducted with an eye toward the United States’ treaty obligations. That is, the statute should not be construed to allow an act to be deemed “official” when the United States has entered into treaties condemning that same act. We will address those two theories in turn, and we will then address Plaintiff’s challenge to the district court’s denial of her request for an evidentiary hearing concerning the scope certification.

1. The Scope-of-Employment Test

* * * *

Plaintiff claims that Defendants (particularly Wolfowitz and Rumsfeld) were not acting within the scope of their employment in carrying out the Iraq War because they started planning the war before taking office. There are at least two problems with this argument. First, the alleged tortious acts of aggression—the invasion of Iraq—took place after Defendants occupied public office, and what took place in the late 1990s was not planning, but only advocacy. During most of that time, neither Wolfowitz nor Rumsfeld could have known that he would soon be in a position to help implement his policy preferences. Second, pre-employment statements of intent or belief do not take the later acts of public officials outside the scope of their employment. . . .

* * * *

In summary, reading the Westfall Act in a straightforward manner and applying District of Columbia respondeat superior law to the facts alleged in the operative complaint, we hold that Defendants' alleged actions fell within the scope of their employment.

2. *Construing the Westfall Act With an Eye Toward Treaty Obligations*

Plaintiff next argues that the Westfall Act should not be interpreted so as to regard as "official" an act condemned by treaty. Plaintiff cites as support for this proposition the United Kingdom case of *Regina v. Bartle & the Commissioner of Police for the Metropolis & Others ex parte Pinochet* (No. 3), [2000] 1 A.C. 147 (H.L.) (appeal taken from Q.B. Div'l Ct.) (U.K.), reprinted in 38 I.L.M. 581 (1999), in which the House of Lords ruled that former Chilean leader Augusto Pinochet was not entitled to official immunity for the role that he played in ordering acts of torture and other violations of international law. Many of the Law Lords reasoned that Pinochet's acts could not be considered official because the Convention Against Torture⁷ forbade such acts, and Chile was a party to that treaty. 38 I.L.M. at 595 (opinion of Lord Browne-Wilkinson); *id.* at 626–27 (opinion of Lord Hope); *id.* at 638–39 (opinion of Lord Hutton); *id.* at 642–43 (opinion of Lord Saville). The United States has signed several treaties and other international agreements condemning aggressive war, and Plaintiff argues that interpreting the Westfall Act to allow for immunity in this case would conflict with those agreements.

This argument suffers from at least two fatal flaws. First, the equivalent of the "scope of employment" test in the Pinochet case was a creature of international law, not a test set out by a domestic statute. The Law Lords were tasked with determining whether Pinochet's actions could be considered "official" as a matter of international law. The effect of a treaty on that international-law analysis has little bearing on that same treaty's effect on the scope-of-employment analysis under domestic law.

Second, although we have suggested that ambiguous statutes should be interpreted to avoid conflicts even with non-self-executing treaties, *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001), the Westfall Act is not, in any relevant way, ambiguous. With the Westfall Act—which was enacted after the passage of each of the treaties and agreements to which Plaintiff cites—Congress clearly intended to grant federal officers immunity to the same extent that the United States would have been liable for those employees' tortious acts under the FTCA (subject to exceptions that are not relevant to today's analysis). *Pelletier*, 968 F.2d at 876. When the Westfall Act was passed, it was clear that this immunity covered even heinous acts. See, e.g., *Hoston v. Silbert*, 681 F.2d 876, 877–80 (D.C. Cir. 1982) (per curiam) (holding that United States Marshals were acting in the scope of their employment when they allegedly beat an unarmed, shackled prisoner and left him to die in a holding cell).

In short, the treaties and charters cited by Plaintiff do not alter our conclusion that the Westfall Act, by its plain terms, immunizes Defendants from suit.

* * * *

B. *Jus Cogens Violations and Domestic Official Immunity*

Finally, Plaintiff argues that Defendants cannot be immune under the Westfall Act because she alleges violations of a *jus cogens* norm of international law. "[A] *jus cogens* norm, also known as a 'peremptory norm' of international law, 'is a norm accepted and recognized by

⁷ United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

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.”” *Siderman de Blake v. Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332). “Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent.” *Id.* at 715. “Because *jus cogens* norms do not depend solely on the consent of states for their binding force, they enjoy the highest status within international law.” *Id.* (internal quotation marks omitted). “International law does not recognize an act that violates *jus cogens* as a sovereign act.” *Id.* at 718.

Plaintiff contends that Congress simply cannot immunize a federal official from liability for a *jus cogens* violation. In effect, Plaintiff argues that (1) there is a *jus cogens* norm prohibiting the provision of immunity to officials alleged to have committed *jus cogens* violations and, (2) insofar as the Westfall Act violates that norm, it is invalid. The argument is premised on the idea that “[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act,” so that an official who is alleged to have engaged in such an act cannot cloak himself in the immunity of the sovereign. *Siderman de Blake*, 965 F.2d at 718.

We assume, without deciding, that the prohibition against aggression is a *jus cogens* norm. But even assuming that the prohibition against aggression is a *jus cogens* norm, Plaintiff’s argument that Congress cannot provide immunity to federal officers in courts of the United States for violations of that norm is in serious tension with our case law. In *Siderman de Blake*, we held that Congress could grant a foreign government immunity from suit for alleged violations of the *jus cogens* norm against torture. *Id.* at 718–19. After recognizing that immunity might not be available as a matter of customary international law, we noted that we were dealing “not only with customary international law, but with an affirmative Act of Congress”—in that case, the Foreign Sovereign Immunities Act. *Id.* at 718.

Siderman de Blake dealt with foreign sovereign immunity, whereas this case concerns the official immunity of domestic officers. But, if anything, that difference cuts against Plaintiff. The immunity of foreign officials in our courts flows from different considerations than does the immunity of domestic officials. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 n.5 (D.C. Cir. 1985); accord *Universal Consol. Cos. v. Bank of China*, 35 F.3d 243, 245 (6th Cir. 1994) (“[D]omestic sovereign immunity and foreign sovereign immunity are two separate concepts, the first based in constitutional law and the second in customary international law.”). Given those different origins, it should be easier for the violation of a *jus cogens* norm to override foreign sovereign immunity than domestic official immunity. Therefore, our holding in *Siderman de Blake*—that Congress can provide immunity to a foreign government for its *jus cogens* violations, even when such immunity is inconsistent with principles of international law—compels the conclusion that Congress also can provide immunity for federal officers for *jus cogens* violations.

* * * *

c. Jesner v. Arab Bank

On June 27, 2017, the United States filed a brief in the U.S. Supreme Court as *amicus curiae* supporting neither party in *Jesner v. Arab Bank*, No. 16-499. The question presented to the Supreme Court was whether a corporation can be a defendant in an

action under the ATS. Petitioners in the case are victims of terrorism in Israel, Gaza, and the West Bank. Respondent is a multinational bank, which petitioners alleged financed and facilitated terrorist attacks. The district court dismissed the case based on the 2010 decision of the U.S. Court of Appeals for the Second Circuit in *Kiobel*, categorically precluding claims against corporations under the ATS. But, as discussed *supra*, the Supreme Court later decided *Kiobel* without reaching the issue of whether a corporation can be a defendant under the ATS. The court of appeals affirmed the dismissal in *Jesner* based upon circuit precedent and denied rehearing en banc. Excerpts follow (with footnote omitted) from the brief of the United States before the U.S. Supreme Court, which argues that a corporation can be a defendant in an action under the ATS. The U.S. brief also urges that the Supreme Court remand to the court of appeals to address extraterritoriality and other threshold issues. ***

* * * *

Enacted by the First Congress in 1789, the Alien Tort Statute, 28 U.S.C. 1350, grants federal district courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” See Act of Sept. 24, 1789 (1789 Judiciary Act), ch. 20, § 9, 1 Stat. 77 (providing that federal district courts “shall * * * have cognizance * * * of all causes where an alien sues for a tort only in violation of the law of nations”). In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court construed the ATS to permit district courts, in appropriate circumstances, to “recognize private claims under federal common law” for the violation of sufficiently universal and specific international-law standards of conduct. *Id.* at 732. Claims under federal common law traditionally include claims against corporations, and respondent’s corporate status is therefore not a basis for dismissing petitioners’ claims here. Those claims, however, may be subject to dismissal on remand, in whole or in part, on the alternative ground that they fail to satisfy the extraterritoriality standard identified by this Court in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

I. A CORPORATION CAN BE A DEFENDANT IN A FEDERAL COMMON-LAW ACTION UNDER THE ALIEN TORT STATUTE FOR THE VIOLATION OF A WELL-ESTABLISHED INTERNATIONAL-LAW NORM

The ATS permits a federal district court, in appropriate circumstances, to hear a “civil action” for a “tort * * * in violation of the law of nations.” 28 U.S.C. 1350. A corporation is capable of being named as a defendant in a common-law “civil action,” and such an action may involve a “tort,” including a “tort * * * in violation of the law of nations” committed by the corporation or its agent. A corporation can therefore be a proper defendant in a civil action based on an otherwise-valid claim under the ATS.

A. A Federal Common-Law “Civil Action” May Name A Corporation As A Defendant

A “civil action” under the ATS, 28 U.S.C. 1350, arises under federal common law. Since the time of the ATS’s enactment, the common law has authorized actions against corporations.

*** Editor’s note: The Supreme Court decided the case on April 24, 2018, affirming the decision of the Court of Appeals. The Supreme Court’s opinion will be discussed in *Digest 2018*.

1. A claim under the ATS is a “cause of action under U.S. law to enforce a norm of international law.” *Kiobel*, 133 S. Ct. at 1666. The task of “defining a cause of action” includes, *inter alia*, “specifying who may be liable,” *id.* at 1665—*i.e.*, the set of permissible defendants. See, *e.g.*, *United States v. Bormes*, 568 U.S. 6, 15 (2012) (describing definition of the defendant class as part of the statute’s “remedial scheme”).

For some types of actions based on international-law violations, Congress has directly spoken to that question. The Torture Victim Protection Act of 1991 allows damages suits for certain acts of torture and extrajudicial killing only against an “individual”—*i.e.*, a natural person. Pub. L. No. 102-256, 106 Stat. 73; see *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 451-452 (2012); see also *Kiobel*, 133 S. Ct. at 1665.

The text of the ATS, in contrast, “does not distinguish among classes of defendants.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). Rather, in enacting the ATS, the First Congress understood that “the common law would provide a cause of action” in appropriate cases. *Sosa*, 542 U.S. at 724, 732; see *Kiobel*, 133 S. Ct. at 1663.

2. It has long been “unquestionable” under domestic law that corporations are “deemed persons” for “civil purposes” and can be held civilly liable. *United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826); see *Beaston v. Farmers’ Bank*, 37 U.S. (12 Pet.) 102, 134 (1838). Both at the time of the ATS’s enactment and now, corporations have been capable of “suing and being sued.” ...

As particularly relevant here, corporations have long been capable of being sued in tort. “At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety.” *Philadelphia, Wilmington, & Balt. R.R. v. Quigley*, 62 U.S. (21 How.) 202, 210 (1859); see *Chestnut Hill & Spring House Tpk. Co. v. Rutter*, 4 Serg. & Rawle 6, 17 (Pa. 1818) (“[F]rom the earliest times to the present, corporations have been held liable for torts.”). In 1774, for example, Lord Mansfield’s opinion for the Court of King’s Bench held that a corporation could be held liable in damages for failing to repair a creek that its actions had rendered unnavigable. See *Mayor of Lynn v. Turner*, (1774) 98 Eng. Rep. 980. Early American courts followed suit. See, *e.g.*, *Chestnut Hill*, 4 Serg. & Rawle at 17; *Riddle v. Proprietors of Locks & Canals on Merrimack River*, 7 Mass. (6 Tyng) 168 (1810); *Gray v. Portland Bank*, 3 Mass. (2 Tyng) 363 (1807); *Townsend v. Susquehannah Tpk. Road*, 6 Johns. 90 (N.Y. Sup. Ct. 1810).

3. A rule excluding corporations as defendants in actions under the ATS would not only be inconsistent with the common law, but would also be in considerable tension with the understanding that corporations can be party to such actions as plaintiffs. In 1795, Attorney General William Bradford addressed a situation in which “U.S. citizens joined a French privateer fleet and attacked and plundered the British colony of Sierra Leone.” *Kiobel*, 133 S. Ct. at 1667. “In response to a protest from the British Ambassador,” Bradford expressed the view that “‘there can be no doubt that *the company* or individuals who have been injured * * * have a remedy by a civil suit’ ” under the ATS. *Id.* at 1668 (quoting 1 Op. Att’y Gen. 57, 59 (1795)) (emphasis added); see *Sosa*, 542 U.S. at 721.

If the set of potential plaintiffs under the ATS—which is textually limited to “alien[s],” 1789 Judiciary Act § 9, 1 Stat. 77—was understood to include corporations, then the set of potential defendants—which is not textually limited at all, see *Argentine Republic*, 488 U.S. at 438—would naturally have been as well. Indeed, a later Attorney General, opining on a boundary dispute over the diversion of waters from the Rio Grande, stated that citizens of

Mexico would have a claim under the ATS against the “Irrigation Company.” 26 Op. Att’y Gen. 250, 251 (1907).

B. A “Civil Action” Against A Corporation Under The Alien Tort Statute May Be Premised On A “Tort In Violation Of The Law Of Nations”

A “tort * * * in violation of the law of nations,” 28 U.S.C. 1350, can provide a valid basis for an action against a corporate defendant under the ATS. Such a tort is a type of injury or wrong. The phrase does not impose a limitation on who may be held responsible for the wrongdoing. And a common-law claim against a corporation may involve such a tort.

1. Both in 1789 and now, the term “tort” has been defined as an “injury or wrong.” ...

Under *Sosa*, a tort is “in violation of the law of nations,” 28 U.S.C. 1350, for purposes of the ATS when a certain kind of international-law “norm”—*i.e.*, a particular kind of “standard for right or wrong behavior,” *Black’s Law Dictionary* 1223—is transgressed. See *Sosa*, 542 U.S. at 725, 728-732, 738; see also *Kiobel*, 133 S. Ct. at 1664-1666, 1668. *Sosa* explained that, in enacting the ATS, Congress “understood that the district courts would recognize * * * torts corresponding to * * * three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Sosa*, 542 U.S. at 724; see *id.* at 715, 720. *Sosa* further explained that a modern court might construe the relevant “law of nations,” 28 U.S.C. 1350, also to include a standard of conduct defined by “present-day” international law. *Sosa*, 542 U.S. at 725. Any such standard, however, must be a “norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th- century paradigms.” *Ibid.*

2. Both corporations and their agents are capable of committing a “tort * * * in violation of the law of nations,” 28 U.S.C. 1350. A tort by either type of actor could thus support a federal common-law cause of action against a corporation under the ATS.

No principle of international law precludes the existence of a norm for the conduct of private actors that applies to the conduct of corporations. “In the past it was sometimes assumed that individuals and corporations, companies or other juridical persons created by the laws of a state, were not persons under (or subjects of) international law. In principle, however, individuals and private juridical entities can have any status, capacity, rights, or duties given them by international law or agreement, and increasingly individuals and private entities have been accorded such aspects of personality in varying measures.” 1 Restatement (Third) of Foreign Relations Law pt. II intro. note (1986) (footnote omitted). A U.S. Military Tribunal at Nuremberg, for example, observed that certain action by “private individuals, including juristic persons,” would be “in violation of international law.” 10 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals: The I.G. Farben and Krupp Trials* 44 (1949). Other international-law norms likewise neither require nor necessarily contemplate a distinction between natural and juridical actors. See, *e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), art. 1, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 1, 19 (1988), 1465 U.N.T.S. 85, 113, 114 (defining “torture” to include “any act by which severe pain or suffering * * * is intentionally inflicted on a person” for certain reasons, “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”) (emphasis added); Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art. II, *adopted* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 280 (defining genocide to include “any of the following acts” committed with intent to destroy a group, without regard to the type of perpetrator); Geneva Convention Relative to the Treatment of

Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 (Common Article 3) (prohibiting “the following acts,” without regard to the type of perpetrator).

A distinction between natural and juridical actors for purposes of common-law actions under the ATS would also be at odds with the longstanding treatment of common-law actions based on piracy, “a violation of the law of nations familiar to the Congress that enacted the ATS,” *Kiobel*, 133 S. Ct. at 1667. It was historically “not an uncommon course in the admiralty, acting under the law of nations,” including in piracy cases, “to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof.” *Harmony v. United States (The Malek Adhel)*, 43 U.S. (2 How.) 210, 233 (1844). “[T]his [wa]s done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party.” *Ibid.* The principle that a juridical person (a ship) may be held liable for piracy in violation of the law of nations, and the logic underlying that principle, cannot readily be squared with a categorical bar against juridical corporate defendants under the ATS.

That is particularly so because vicarious liability for corporations is itself a well-pedigreed feature of the common law. As Blackstone explained, “the master is answerable for the act of his servant, if done by his command, either expressly given, or implied.” Blackstone 417; see Tucker 429-430 (same). That “maxim of ‘*respondeat superior*’ ” has long applied to corporate and noncorporate defendants alike. *Philadelphia & Reading R.R. v. Derby*, 55 U.S. (14 How.) 468, 487 (1853); see *id.* at 485-487 (applying principle to railroad company).

Accordingly, even if a particular norm were not understood to apply directly to the actions of a corporation as such, a corporation could still be named as a defendant in a common-law action based on a violation of that norm by a natural person acting as the corporation’s agent or employee.

3. The history of the ATS reinforces that it permits courts, in appropriate cases, to recognize common-law claims against corporations for law-of-nations violations.

The First Congress enacted the ATS following the well-documented inability of the Continental Congress to provide redress for law-of-nations and treaty violations for which the United States might be held accountable. See *Sosa*, 542 U.S. at 715-717. That deficiency was exposed by events like the “so-called Marbois incident of May 1784, in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Leg[ation] in Philadelphia.” *Id.* at 716-717; see William R. Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed In Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491-492 & n.136 (1986) (Casto); see also *Kiobel*, 133 S. Ct. 1666. “The assault led the French Minister Plenipotentiary to lodge a formal protest with the Continental Congress and threaten to leave the country unless an adequate remedy were provided.” *Kiobel*, 133 S. Ct. 1666.

A “reprise of the Marbois affair,” *Sosa*, 542 U.S. at 717, occurred in 1787, during the Constitutional Convention, when a New York City constable entered the residence of a Dutch diplomat with a warrant for the arrest of one of his domestic servants. Casto 494; see *Kiobel*, 133 S. Ct. at 1666-1667. Again, the “national government was powerless to act.” Casto 494. The United States was “embarrassed by its potential inability to provide judicial relief to foreign officials injured” within its borders. *Kiobel*, 133 S. Ct. at 1668. “Such offenses against ambassadors violated the law of nations, ‘and if not adequately redressed could rise to an issue of war.’ ” *Ibid.* (quoting *Sosa*, 542 U.S. at 715). The First Congress addressed that concern both by criminalizing certain law-of-nations violations (piracy, violation of safe conducts, and

infringements on the rights of ambassadors), see Act of Apr. 30, 1790 (1790 Act), ch. 9, §§ 8, 28, 1 Stat. 113-114, 118, and by providing jurisdiction under the ATS over actions by aliens seeking civil remedies. Not only a public remedy, but also “a private remedy,” was “thought necessary for diplomatic offenses under the law of nations,” *Sosa*, 542 U.S. at 724, and “[t]he ATS ensured that the United States could provide a forum for adjudicating such incidents,” *Kiobel*, 133 S. Ct. at 1668.

In undertaking to provide that forum, Congress did not have a good reason to distinguish between foreign entanglements for which natural persons were responsible and foreign entanglements for which organizations of natural persons, such as corporations, were responsible. Nor did Congress have a good reason to allow a suit to proceed only against a potentially judgment-proof individual actor while barring recovery against the corporation on whose behalf he was acting. Take, for example, the 1787 incident involving the Dutch diplomat. If entry were made into his residence by the agent of a private process-service company for the purpose of serving a summons, the international affront could perhaps best be vindicated (and compensation paid) through a private suit against that company. Cf. 1790 Act §§ 25-26, 1 Stat. 117-118 (providing that “any writ or process” that is “sued forth or prosecuted by any person” against an ambassador or “domestic servant” of an ambassador shall be punished criminally and would constitute a violation of “the laws of nations”).

C. A Common-Law Action Against A Corporation Under The Alien Tort Statute For Violation Of A Well-Established Norm Is Consistent With International Law

The ATS permits a common-law “civil action” against a corporate defendant for a qualifying “tort * * * in violation of the law of nations,” 28 U.S.C. 1350, irrespective of whether international law would itself provide a remedy against a corporation in such circumstances. An individual nation’s recognition of such a claim accords with international law, which establishes substantive standards of conduct but generally leaves each nation with substantial discretion as to the means of enforcement within its own jurisdiction. See *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014) (“[I]nternational law defines norms and determines their scope, but delegates to domestic law the task of determining the civil consequences of any given violation of these norms.”), cert. denied, 136 S. Ct. 798 (2016); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 152 (2d Cir. 2010) (Leval, J., concurring only in the judgment) (“[I]nternational law says little or nothing about how those norms should be enforced. It leaves the manner of enforcement * * * almost entirely to individual nations.”), aff’d on other grounds, 133 S. Ct. 1659 (2013); Louis Henkin, *Foreign Affairs and the United States Constitution* 245 (2d ed. 1996) (“International law itself * * * does not require any particular reaction to violations of law.”)

1. In creating its corporate-defendant bar, the court of appeals construed the ATS to “leave[] the question of the nature and scope of liability—who is liable for what—to customary international law.” *Kiobel*, 621 F.3d at 122. It thus surveyed whether “corporate liability for a ‘violation of the law of nations’ is a norm ‘accepted by the civilized world and defined with a specificity.’ ” *Id.* at 130 (citations omitted). That inquiry was misconceived.

The phrase “of the law of nations” in the ATS modifies “violation,” not “civil action.” 28 U.S.C. 1350. The “norm” analysis under *Sosa* thus focuses on whether the international community specifically and universally condemns the underlying *conduct*, not whether the international community specifically and universally imposes civil *liability*. See, e.g., *Sosa*, 542 U.S. at 738 (concluding that particular “*illegal detention* * * * violate[d] no norm of customary international law”) (emphasis added); see also, e.g., *Kiobel*, 133 S. Ct. at 1665

(describing claims under the ATS as premised on “alleged violations of international law norms”); *Sosa*, 542 U.S. at 732 (favorably citing description of ATS as limited to “heinous actions” that “violate[] definable, universal, and obligatory norms”) (citation omitted; emphasis added). “The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law.” *Kiobel*, 133 S. Ct. at 1666. It is “instead whether the court has authority to recognize a cause of action *under U.S. law* to enforce a norm of international law.” *Ibid.* (emphasis added); see, e.g., *id.* at 1663 (citing *Sosa*, 542 U.S. at 714, 724).

The court of appeals’ confusion stemmed in large part from its misreading of footnote 20 in the *Sosa* opinion. See, e.g., *Kiobel*, 621 F.3d at 127; see also Pet. App. 52a-54a (Pooler, J., dissenting from the denial of rehearing en banc). In that footnote, this Court explained that a “consideration” that is “related” to “the determination whether a norm is sufficiently definite to support a cause of action” is “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” *Sosa*, 542 U.S. at 732 & n.20. That footnote references international law’s state-action doctrine, under which “the distinction between conduct that does and conduct that does not violate the law of nations can turn on whether the conduct is done by or on behalf of a State or by a private actor independently of a State.” *Kiobel*, 621 F.3d at 177 (Leval, J., concurring only in the judgment). Under the Torture Convention, for example, conduct qualifies as “torture,” and thus violates the international-law norm against “torture,” only when done “by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.” Torture Convention art. 1, S. Treaty Doc. No. 20, at 19; 1465 U.N.T.S. 114; compare, e.g., Genocide Convention art. II, 102 Stat. 3045, 78 U.N.T.S. 280 (no requirement of state involvement); Common Article 3, 6 U.S.T. 3318, 75 U.N.T.S. 136 (same). Such a distinction between state and private action in international law can be analogized to the similar distinction in domestic constitutional law, under which a private party is subject to constitutional norms only when it can “fairly be said to be a state actor,” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

The state-action footnote in *Sosa* does not support transposition of the *Sosa* requirements of specificity and universality from the question of conduct to the question of corporate liability. Although the footnote uses the phrase “scope of liability” to describe the state-action inquiry, it subsequently clarifies through examples that the inquiry turns on the existence of a “sufficient consensus” that particular *conduct*—e.g., “torture” or “genocide”—“violates international law” when undertaken “by private actors.” *Sosa*, 542 U.S. at 732 n.20; see *ibid.* (discussing *Kadic v. Karadžić*, 70 F.3d 232, 239-241 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996), and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring), cert. denied, 470 U.S. 1003 (1985)). Reliance on the footnote to support a distinction between natural and corporate defendants is particularly misplaced in light of its reference to “a private actor *such as a corporation or individual*,” which expressly affiliates corporations and natural persons for ATS purposes. *Ibid.* (emphasis added).

Respondent defends the court of appeals’ approach on the alternative ground that “[u]nder normal choice-of-law rules, the types of defendants who may be held liable for violating a legal rule is a question of substance, not procedure.” Br. in Opp. 29 (emphasis omitted). But the distinction drawn by the ATS is not between substance and procedure; it is between the “civil action” (which is defined by federal common law) and the underlying “violation of the law of nations” (which is defined by international law). 28 U.S.C. 1350; see

Kiobel, 133 S. Ct. at 1665-1666. As this Court has explained, “identifying” an “international law norm[] that [is] specific, universal, and obligatory * * * is only the beginning of defining a cause of action,” which encompasses additional decisions such as “specifying who may be liable.” *Kiobel*, 133 S. Ct. at 1665 (citations and internal quotation marks omitted). The application of domestic law to those decisions may result in a cause of action either narrower or broader in certain respects than it might be if international law controlled. See *ibid.* It also gives federal courts the tools—and the obligation—to apply uniquely domestic considerations in determining whether a claim against any kind of defendant is warranted in the circumstances of a particular case.

2. Although international law does not control nations’ domestic means of enforcing international-law norms within its jurisdiction, it may nevertheless be relevant to enforcement questions. Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (explaining that although “the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders,” it is, “of course, true that United States courts apply international law as a part of our own in appropriate circumstances”). There are, for example, internationally accepted rules on jurisdiction and immunities. See, e.g., 1 Restatement (Third) of Foreign Relations Law §§ 421, 423 (1986) (international law on jurisdiction to adjudicate); *id.* §§ 451-456 (international law on foreign sovereign immunity); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), Judgment, I.C.J. 3, 20-21 (Feb. 14) (head-of-state immunity).

International law may also inform a U.S. court’s exercise of its domestic common-law authority under the ATS. The limitation of the strict *Sosa* test to the question of the standard of conduct, rather than the question of liability for that conduct, does not prevent federal courts from taking international law into account in the development of federal common law on issues to which international law relates. If, for example, international law were clearly to discountenance the imposition of liability on corporations for violating the law of nations, or a particular norm under the law of nations, federal courts might be well-served by declining to recognize a federal common-law claim against corporations under the ATS, even though common-law claims against corporations have a long historical pedigree. But no such situation is presented here.

The fact that no international tribunal has been created for the purpose of holding corporations civilly liable for violations of international law does not counsel against federal common-law actions against corporations under the ATS. Each international tribunal is specially negotiated, and limitations are placed on the jurisdiction of such tribunals that may be unrelated to whether such limitations are required by or reflective of customary international law. See, e.g., Rome Statute of the International Criminal Court (Rome Treaty), art. 10, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 98 (“Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”). That is why, even though no international tribunal has been created for the purpose of holding natural persons civilly liable, it is nevertheless well-accepted that natural persons can be defendants in civil actions under the ATS. See, e.g., *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1019 (7th Cir. 2011) (“If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the [ATS] could ever be successful, even claims against individuals.”).

Limitations on the jurisdiction of international *criminal* tribunals to natural persons (see *Kiobel*, 621 F.3d at 132-137) appear to be based on reasons unique to criminal punishment—*e.g.*, the view under some legal regimes that “criminal intent cannot exist in an artificial entity” or that “criminal punishment does not achieve its principal objectives when it is imposed on an abstract entity.” *Kiobel*, 621 F.3d at 167 (Leval, J., concurring only in the judgment) (emphasis omitted). In any event, international tribunals are not intended to be the sole (or even the primary) means of enforcing international-law norms. At least until the twentieth century, domestic law and domestic courts were the primary means of implementing customary international law. And, notably, several countries (including the United Kingdom and the Netherlands) that have incorporated the three crimes punishable by the International Criminal Court (genocide, crimes against humanity, and war crimes) into their domestic jurisprudence themselves impose criminal liability on corporations and other legal persons for such offenses. See, *e.g.*, Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law—A Survey of Sixteen Countries—Executive Summary* 13-16, 30 (2006), http://www.biiicl.org/files/4364_536.pdf.

Furthermore, a number of current international agreements (including some that the United States has ratified) affirmatively require signatory nations to impose liability on corporations for certain actions. See, *e.g.*, United Nations Convention Against Transnational Organized Crime, art. 10(1), *adopted* Nov. 15, 2000, S. Treaty Doc. No. 16, 108th Cong., 2d Sess. 1, 7 (2004), 2225 U.N.T.S. 209, 279; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, *adopted* Nov. 21, 1997, S. Treaty Doc. No. 43, 105th Cong., 2d Sess. 1, 4 (1998), 37 I.L.M. 1, 3. As a noted scholar has explained, “all positions now accept in some form or another the principle that a legal entity, private or public, can, through its policies or actions, transgress a norm for which the law, whether national or international, provides, at the very least damages * * * and other remedies such as seizure and forfeiture of assets.” M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 379 (2d rev. ed. 1999).

II. THE COURT OF APPEALS SHOULD ADDRESS EXTRATERRITORIALITY AND OTHER THRESHOLD ISSUES DIRECTLY ON REMAND

Although the court of appeals’ erroneous application of a corporate-defendant bar requires vacatur of the judgment below, it does not require that petitioners’ claims be allowed to proceed in district court. Respondent has raised a number of alternative arguments for dismissing those claims, at least one of which—extraterritoriality—has been fully briefed and presented by both parties for the court of appeals’ decision. See, *e.g.*, Br. in Opp. 20-26; p. 4, *supra*. Because petitioners’ claims raise serious extraterritoriality questions, and because prompt appellate resolution of those questions would further foreign-policy and judicial-efficiency interests, the court of appeals should address those questions directly upon remand.

A. The Automated Clearance Of Dollar-Denominated Transactions In The United States Would Not Alone Provide A Sufficient Domestic Nexus Under *Kiobel*

1. The “presumption against extraterritoriality” requires courts to construe federal statutes to “have only domestic application,” unless Congress has “clearly expressed” a contrary intent. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2097, 2100 (2016). Applying that presumption helps to “ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.” *Kiobel*, 133 S. Ct. at 1664.

In *Kiobel*, this Court held that the “principles underlying the presumption against extraterritoriality * * * constrain courts exercising their power under the ATS.” 133 S. Ct. at 1665. The Court emphasized that “the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do” in recognizing causes of action under federal common law. *Id.* at 1664. The Court explained that concerns about judicial intrusion into the realm of foreign policy “are implicated in any case arising under the ATS,” and that courts asked to recognize claims under the ATS should be “‘particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.’” *Id.* at 1664, 1665 (quoting *Sosa*, 542 U.S. at 727).

The Court stated that “even where” claims asserted under the ATS “touch and concern the territory of the United States,” they will be actionable only if they “do so with sufficient force to displace the presumption against extraterritorial application” of U.S. law. *Kiobel*, 133 S. Ct. at 1669 (citing *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 266-273 (2010)). The requisite claim-specific inquiry necessarily takes place against the backdrop of the ATS’s function of providing redress in situations where the international community might consider the United States accountable. See *RJR Nabisco*, 136 S. Ct. at 2101; *Kiobel*, 133 S. Ct. at 1668-1669; *Sosa*, 542 U.S. at 714-718, 722-724 & n.15; pp. 15-17, *supra*.

2. The claims in this case all involve foreign plaintiffs seeking recovery from a foreign defendant based on injuries incurred at the hands of foreign terrorist organizations acting on foreign soil. See Pet. App. 1a, 4a, 9a. The court of appeals viewed the argument for application of U.S. law to those claims as centering on respondent’s alleged “clearing of foreign dollar-denominated payments” related to the terrorist activities “through [its] branch in New York.” ... Petitioners contend (Pet. 6, 7 n.1) that dollars are “the preferred currency” for terrorist-related payments and that banking standards incentivize the routing of “international U.S. dollar fund transfers” through a bank’s U.S. branch or affiliate. See Pet. Br. 5, 8.

In some non-ATS contexts, automated clearance activity in the United States would alone be sufficient to support the application of U.S. law that is not explicitly extraterritorial. For example, the government could potentially rely on such activity as the basis for a criminal indictment or a civil enforcement action. Cf., e.g., *United States v. Prevezon Holdings, Ltd.*, No. 13-cv-6326, 2017 WL 1951142, at *1 (S.D.N.Y. May 10, 2017) (civil forfeiture action for laundering proceeds of foreign fraud); *United States v. Zarrab*, No. 15-cr-287, 2016 WL 6820737, at *5 (S.D.N.Y. Oct. 17, 2016) (federal prosecution for evading U.S. sanctions against Iran). A domestic statute that focuses, in whole or in part, on foreign misuse of domestic instrumentalities may properly be invoked to defend the integrity of the U.S. financial system. See *RJR Nabisco*, 136 S. Ct. at 2101; cf., e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796-797 & n.24 (1993) (recognizing antitrust claims arising from foreign conduct that produces a substantial intended effect in the United States). And given “the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government,” *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004) (parenthetically quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 194 (1999)), Congress may be presumed not to require as substantial a domestic nexus in a statute enforced by the government as it might require in one enforced through private civil actions. See *RJR Nabisco*, 136 S. Ct. at 2110.

In the context of the ATS, however, the automated domestic clearance of dollar-denominated transactions in isolation does not in itself constitute a sufficient domestic nexus for

recognizing a common-law claim. The “need for judicial caution” about “foreign policy concerns” when “considering which claims c[an] be brought under the ATS” may counsel forbearance even in circumstances where an express statutory cause of action under domestic law, reflecting the considered judgment of Congress and the Executive, might be found applicable. *Kiobel*, 133 S. Ct. at 1664; see *id.* at 1664-1665; see also *Sosa*, 542 U.S. at 727-728. Courts must therefore consider whether, in light of the particularized role of the ATS, a proposed common-law claim exhibits a domestic connection of “sufficient force to displace the presumption against extraterritorial application.” *Kiobel*, 133 S. Ct. at 1669 (citing *Morrison*, 561 U.S. at 266-273); see *RJR Nabisco*, 136 S. Ct. at 2101. A foreign actor’s preference for dollar-denominated transactions, and the consequent likelihood that a transaction will be automatically routed through a bank’s U.S. branch or affiliate, are not generally circumstances for which the international community might validly deem the United States to be responsible. Congress did not intend the ATS to “make the United States a uniquely hospitable forum for the enforcement of international norms.” *Kiobel*, 133 S. Ct. at 1668. That limitation is difficult to reconcile with an approach under which a claim under the ATS may be premised on the popularity of the dollar as a currency for remunerating foreign illegal activity. Such an expansive remedial scheme for law-of-nations violations would undermine the ATS’s goal of “avoiding diplomatic strife,” and instead “could * * * generate[] it.” *Id.* at 1669.

3. Although automated clearance activities alone would not support claims under the ATS, petitioners have made other allegations that might affect the extraterritoriality inquiry in this case. They have alleged, for example, that respondent “knowingly laundered” money, using its New York Branch, for an organization in Texas that raised funds within the United States for Hamas. C.A. App. 207-208. It is not clear that such allegations, even in combination with clearance activities, would support any, let alone all, of petitioners’ claims seeking recovery for injuries suffered in particular foreign terrorist activity. But particularly because a portion of the record and briefs in this case are under seal, the government is not currently in a position to assess whether, or to what extent, such allegations might provide a sufficient domestic connection for some of petitioners’ claims. The court of appeals, however, would be able on remand to review the relevant filings and address that question.

B. Diplomatic And Efficiency Concerns Warrant Direct Consideration Of Threshold Issues By The Court Of Appeals On Remand

Claims by petitioners and others, which have been in litigation for well over a decade, have already caused significant diplomatic tensions. Should respondent, the major financial institution in Jordan, have to stand trial before the remaining threshold issues are decided by the court of appeals, the adverse foreign-policy consequences would be considerable.

1. The underlying actions are subject to an order, entered when they were consolidated with other actions for pretrial purposes, that was imposed as a sanction for respondent’s insistence on adhering to foreign bank-secrecy laws by withholding certain documents from discovery. See *Linde v. Arab Bank, PLC*, 269 F.R.D. 186 (E.D.N.Y. 2010), appeal dismissed, 706 F.3d 92 (2d Cir. 2013), cert. denied, 134 S. Ct. 2869 (2014). Under that order, the jury would be instructed that it would be free to infer that respondent provided financial services to terrorist organizations and that it did so “knowingly and purposefully.” *Id.* at 205. The order also precludes respondent from “making any argument or offering any evidence regarding its state of mind or any other issue that would find proof or refutation in withheld documents.” *Ibid.* The sanctions order has previously been the subject of an unsuccessful petition for a writ of certiorari, which followed the court of appeals’ denial of respondent’s request for mandamus relief from the

order in a related case involving statutory claims by U.S. citizens under the Antiterrorism Act of 1990, 18 U.S.C. 2331 *et seq.*, that are similar in substance to petitioners' claims here. See *Arab Bank PLC v. Linde*, 134 S. Ct. 2869 (2014). At the Court's invitation, the United States filed a certiorari-stage amicus brief in that matter. The United States recommended that, notwithstanding the "several significant" errors committed by the lower courts with respect to the order, the Court should decline to review it in that posture at that time. U.S. Amicus Br. (U.S. *Linde* Br.) at 8, *Linde*, *supra* (No. 12-1485). The United States explained, however, that Jordan viewed the order "as a 'direct affront' to its sovereignty." *Id.* at 19 (quoting Hashemite Kingdom of Jordan Amicus Br. at 14, *Linde*, *supra*) (No. 12-1485)). And it further explained that the 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." *Ibid.*

2. Since that filing, the United States' cooperation with Jordan has strengthened. According to the Department of State, Jordan is a key counterterrorism partner, especially in the global campaign to defeat the Islamic State in Iraq and Syria (ISIS). The Department of State has informed this Office that, in furtherance of that campaign, Jordan regularly conducts air missions over Iraq and Syria, cooperates with measures to thwart the financing of terrorist activities, and plays a critical role in international efforts to stem the flow of foreign terrorist fighters. Jordan is also an important partner in advancing a range of broad U.S. interests in the region, including efforts to forge a lasting peace between Israelis and Palestinians. The President has recently reiterated Jordan's longstanding status as "a valued partner, an advocate for the values of civilization, and a source of stability and hope." Remarks by President Trump and His Majesty King Abdullah II of Jordan in Joint Press Conference (Apr. 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/04/05/remarks-president-trump-and-his-majesty-king-abdullah-ii-jordan-joint>.

The sanctions order has already affected litigation of the U.S. citizens' related statutory claims, see Br. in Opp. 25-26 & n.5, and its effect here could be even greater. There are "roughly 6000" alien petitioners in this case, Pet. ii, whose combined damages claims threaten to have an overwhelming impact on respondent's financial condition. Because respondent is "Jordan's leading financial institution," "plays a significant role in the Jordanian and surrounding regional economies," and is "a constructive partner with the United States in working to prevent terrorist financing," U.S. *Linde* Br. 1, 20 (citation and internal quotation marks omitted), unwarranted continuation of petitioners' claims would undercut U.S. foreign policy interests in both direct and indirect ways. Cf. *Sosa*, 542 U.S. at 733 n.21 (noting "a strong argument that federal courts should give serious weight to the Executive Branch's view of [a] case's impact on foreign policy" in ATS contexts).

Such effects could be avoided by ensuring appellate consideration of potentially dispositive issues, including the viability of petitioners' claims under *Kiobel*, at the earliest possible opportunity. Remanding the claims for a potential trial, at which respondent's chances of prevailing would be impeded by the sanctions order, would prolong the uncertainty and attendant diplomatic tensions, and could therefore produce significant and undesirable consequences even if the court of appeals were ultimately to reverse on extraterritoriality grounds. Given that both parties viewed the extraterritoriality issue to have been properly before the court of appeals for decision, sound considerations of diplomatic comity and judicial economy favor its resolution by that court at the first possible opportunity following a remand.

d. Warfaa v. Ali

As discussed in *Digest 2016* at 162-63, the United States did not express a view on defendant's entitlement to immunity in either the district court or court of appeals in *Warfaa v. Ali*. However, after Ali petitioned for certiorari and Warfaa filed a conditional cross-petition, the Supreme Court asked for the views of the United States. The United States filed its briefs as *amicus curiae* on May 23, 2017, recommending certiorari be denied. The Supreme Court denied certiorari on June 26, 2017. Excerpts follow from the U.S. brief filed in *Warfaa v. Ali*, No. 15-1464.

* * * *

In *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), this Court left open the possibility that ATS claims involving conduct occurring outside the United States may “touch and concern the territory of the United States * * * with sufficient force” to “displace the presumption against extraterritorial application.” *Id.* at 1669. The court of appeals found that cross-petitioner Warfaa's ATS claims do not satisfy that standard, because they involve conduct in a foreign country by a foreign national. In the court's view, the fact that Ali later moved to this country does not mean that Warfaa's claims sufficiently touch and concern the territory of the United States to displace the presumption against extraterritoriality.

That ruling does not warrant further review for several reasons. The cross-petition is conditional on a grant of certiorari in No. 15-1345, and the United States is filing, simultaneously with this brief, an amicus brief at the Court's invitation recommending that the petition in No. 15-1345 be denied. In addition, the decision below does not conflict with any decision of this Court or of any other court of appeals, and this case would be a poor vehicle for consideration of the question presented in any event. In the view of the United States, the cross-petition should be denied.

A. The Cross-Petition Is Conditional In Nature And Is Not The Subject Of Any Conflict In Authority

1. As a threshold matter, the cross-petition is expressly “conditional in nature,” and Warfaa seeks this Court's review of the question presented “only if the Court is disposed to grant the initial petition” in No. 15-1345. Cross-Pet. 1. For the reasons set forth in the brief filed by the United States, the Court should deny that petition. Accordingly, the Court should deny the cross-petition as well.

2. Contrary to Warfaa's assertion (Cross-Pet. 11-21), the decision below does not conflict with any decision of this Court or of another court of appeals. First, Warfaa incorrectly contends (Cross-Pet. 11-15) that the decision below conflicts with this Court's decision in *Kiobel* and is in tension with the decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Kiobel* did indicate that a claim involving foreign conduct could “touch and concern the territory of the United States” with “sufficient force” to displace the presumption against extraterritoriality. 133 S. Ct. at 1669. But the Court did not elaborate on that possibility in concluding that no cause of action was available under federal common law in the circumstances of that case, which involved foreign corporations having a U.S. presence. See *id.* at 1662, 1664, 1669. The court of appeals' decision here, in a case involving an individual defendant and conduct abroad, is not inconsistent with anything in the opinion in *Kiobel*. And *Sosa* resolved a question about what *categories* of

common-law claims may be asserted under the ATS, not any question about whether and under what circumstances the presumption against extraterritoriality may bar a claim of the requisite type. See *Sosa*, 542 U.S. at 732; see also *Kiobel*, 133 S. Ct. at 1666-1668 (stating that the “principal offenses against the law of nations” recognized when the ATS was enacted could occur entirely within the United States or “beyond the territorial jurisdiction” of any country). Accordingly, nothing in the decision below is inconsistent with *Sosa* either.

Second, Warfaa incorrectly contends (Cross-Pet. 15-21) that the decision below conflicts with *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014), cert. denied, 136 S. Ct. 690 (2015), and *Doe v. Drummond Co.*, 782 F.3d 576 (11th Cir. 2015), cert. denied, 136 S. Ct. 1168 (2016). Those cases differ from this one in a number of important respects. In *Mujica*, Colombian citizens brought suit under the ATS against U.S. corporations for alleged complicity in the bombing of a Colombian village. See 771 F.3d at 584. The Ninth Circuit concluded that “the fact that [d]efendants are both U.S. corporations” was “not enough,” standing alone, “to establish that the ATS claims here ‘touch and concern’ the United States with sufficient force.” *Id.* at 594; see *ibid.* (explaining that “a defendant’s U.S. citizenship or corporate status is one factor that, *in conjunction with other factors*, can establish a sufficient connection between an ATS claim and the territory of the United States”) (emphasis added). In *Drummond*, Colombian citizens brought suit under the ATS against a U.S. corporation and its officers for alleged use of paramilitaries in Colombia. See 782 F.3d at 579. The Eleventh Circuit stated that “[a]lthough the U.S. citizenship of Defendants is relevant to our inquiry, this factor is insufficient to permit jurisdiction on its own.” *Id.* at 596.

Both *Mujica* and *Drummond* involved corporations or corporate agents as defendants rather than (as here) an individual actor. In both cases the court held that a cause of action was not available under the ATS even though the defendant was a U.S. person at the time of the alleged conduct, and not (as here) a defendant who took up residence in the United States only after the conduct occurred. And neither court accepted the proposition that an action would lie under the ATS based solely on a defendant’s U.S. citizenship, and not (as here) U.S. residency.

B. The Cross-Petition Would Be A Poor Vehicle For Considering When A Claim Can Displace The Presumption Against Extraterritoriality Under The ATS

1. In urging the Court to grant certiorari, Warfaa relies on the Second Circuit’s decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), contending that recognition of a cause of action would advance the goal of preventing the United States from becoming (or being seen as) a safe haven for individuals who commit human rights violations abroad. *Filartiga* involved allegations that a former Paraguayan police inspector had tortured and killed a Paraguayan citizen in Paraguay. When the victim’s sister learned that the alleged perpetrator was living in New York, she and her father brought suit, asserting that jurisdiction over their claims was proper under the ATS. See *id.* at 878-879. The district court dismissed the suit, holding that the ATS excludes claims concerning a foreign state’s treatment of its own citizens. See *id.* at 880. On appeal, the Second Circuit reversed and remanded for further proceedings. *Filartiga*, 630 F.2d at 889. Its ruling was consistent with the argument, advanced in an amicus brief filed by the United States, that the ATS encompasses claimed violations of human rights norms that are “clearly defined” and the violation of which is “universally condemned,” U.S. Amicus Mem. at 23, *Filartiga*, *supra* (No. 79- 6090), and that the failure to recognize a claim for torture and extrajudicial killing “in these circumstances might seriously damage the credibility of our nation’s commitment to the protection of human rights,” *id.* at 22-23.

After *Filartiga*, federal courts generally assumed—and, in at least one case, expressly held—that claims asserting violation of certain specifically defined and universally accepted human rights norms could be brought in U.S. courts under the ATS, even if the violation took place in a foreign country. See *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 499-501 (9th Cir. 1992) (holding that action under the ATS was appropriate “even though the actions” of the foreign defendant “which caused” the foreign plaintiff “to be the victim of official torture and murder occurred” in the Philippines), cert. denied, 508 U.S. 972 (1993). But there was uncertainty on the question. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 788 (D.C. Cir. 1984) (Edwards, J., concurring) (interpreting the ATS to encompass claims concerning “universal crimes” wherever perpetrated), cert. denied, 470 U.S. 1003 (1985), with *id.* at 816 (Bork, J., concurring) (construing the ATS to exclude claims founded on “disputes over international violence occurring abroad”).

Congress concluded that the interests of the United States would be served by allowing a private right of action for extraterritorial violations of the norms at issue in *Filartiga*. Accordingly, it enacted an express but carefully circumscribed cause of action, available only against an individual acting under color of foreign law, for acts of “torture” or “extrajudicial killing.” TVPA § 2(a), 106 Stat. 73. The TVPA thus provides a statutory basis for claims like the ones in *Filartiga*.

But for claims that fall outside the scope of the TVPA, courts may recognize such claims under the ATS only if they involve the violation of specifically defined and universally accepted human rights norms, see *Sosa*, 542 U.S. at 728, 732-733, and if they have a sufficient connection to the United States to displace the presumption against extraterritoriality, see *Kiobel*, 133 S. Ct. at 1669.

2. In this case, Warfaa attempted to bring claims under the ATS for violation of international-law norms in addition to the norms against torture and extrajudicial killings. As explained above, there is no post-*Kiobel* circuit conflict on whether claims against individual foreign nationals who subsequently came to reside in the United States are cognizable under the ATS. In addition, this case would be a poor vehicle for the Court to address when ATS claims have a sufficient connection to the United States to displace the presumption against extraterritoriality. Some of Warfaa’s ATS claims are not cognizable because they have been displaced by the TVPA, and all of his ATS claims arise out of the same set of facts and injuries as his TVPA claims. Because Warfaa has filed only a conditional cross-petition, he is content to proceed in the district court solely on his TVPA claims, which would afford him an adequate remedy for the conduct that he has alleged.

a. Warfaa’s amended complaint asserts six claims. It includes two claims alleged to be actionable under both the TVPA and the ATS: attempted extrajudicial killing and torture. See D. Ct. Doc. 89, at 11-18.⁷ The court of appeals affirmed the district court’s determination that Warfaa had adequately pleaded claims against Ali under the TVPA and that those claims could proceed because Ali is not immune from suit. See Pet. App. 40a-42a, 47a-49a, 78a-79a. Because Warfaa may bring those claims under the TVPA, he may not bring them under the ATS as a matter of federal common law. As this Court explained in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), if “Congress addresses a question previously governed by a decision rested on federal common law,” then “the need for such an unusual exercise of law-making by federal courts disappears.” *Id.* at 423 (citation omitted). “The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speak[s] directly to [the] question at issue.” *Id.* at 424 (brackets in original; citation and

internal quotation marks omitted). Because Congress has the principal responsibility to “prescribe national policy in areas of special federal interest,” evidence of a “clear and manifest” congressional purpose to supplant judicial fashioning of federal common law is not required. *Id.* at 423-424.

In enacting the TVPA, which establishes a federal cause of action for torture or extrajudicial killing by an individual acting “under actual or apparent authority, or color of law, of any foreign nation,” § 2(a), 106 Stat. 73, Congress spoke “directly” to the question of a remedy for certain conduct that violates universally accepted and specifically defined human rights norms, *American Elec. Power Co.*, 564 U.S. at 424. The TVPA thus “excludes” the possibility, *ibid.*, of bringing a claim for the same conduct under the ATS as a matter of federal common law. See *ibid.*; see also *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring) (“Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the [TVPA], and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted.”).

Under that analysis, the TVPA has rendered non-cognizable under the ATS Warfaa’s common-law claims for torture and attempted extrajudicial killing. Those claims allege conduct that, if proven, would give rise to TVPA liability. See *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring). Accordingly, there is no reason for the Court to grant review to consider whether Warfaa’s claims based on allegations of torture and attempted extrajudicial killing touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application of federal common law causes of action under the ATS.

b. Warfaa’s complaint also includes four claims alleged to be actionable only under the ATS: arbitrary detention, crimes against humanity, war crimes, and cruel, inhuman, or degrading treatment. See D. Ct. Doc. 89, at 11-18. The TVPA does not provide a cause of action for those claims. But it is not clear whether Warfaa has adequately pleaded a claim for arbitrary detention that would be actionable under the ATS. Compare *id.* at 5-7, 15 (alleging that Warfaa was detained for three months), with *Sosa*, 542 U.S. at 737 (observing that to be cognizable under the ATS, a claim for arbitrary detention would at a minimum have to allege prolonged detention, but not defining the requisite period of time). And Warfaa’s claims for crimes against humanity, war crimes, and cruel, inhuman, or degrading treatment appear to be largely derivative of his claims for torture and attempted extrajudicial killing. See D. Ct. Doc. 89, at 14-15, 16-18. All of those claims arise out of the same alleged period of detention and rest on the same alleged injuries.

Pursuant to the court of appeals’ judgment, only Warfaa’s TVPA claims remain live—and so by choosing to file only a conditional cross-petition, Warfaa has indicated his willingness to proceed in the trial court only on his TVPA claims. The availability of those claims under the TVPA will further the purpose he invokes in this case of preventing the United States from being viewed as harboring or providing a safe haven for human-rights abusers. Under these circumstances, it appears that a decision by this Court as to whether any of his ATS claims adequately touches and concerns the United States would, as a practical matter, be of little significance with respect to this case.

* * * *

The U.S. brief in *Ali v. Warfaa*, No. 15-1435, addresses foreign official immunity and is excerpted in Chapter 10.

e. **Doğan v. Barak**

See Chapter 10 for discussion of the U.S. amicus brief filed in the Court of Appeals for the Ninth Circuit on July 26, 2017 in this case involving claims under the TVPA and ATS.

C. **POLITICAL QUESTION DOCTRINE, COMITY, AND *FORUM NON CONVENIENS***

1. **Political Question: *Al-Tamimi***

As discussed, *supra*, in sections A and B, the United States filed two briefs in 2017 in support of its motion to dismiss claims against a former U.S. government official (Elliott Abrams) for allegedly conspiring to enable unlawful actions by Israel Defense Forces against plaintiffs. Excerpts below come from the section on the political question doctrine in the January 27, 2017 U.S. brief.

* * * *

...Plaintiffs' claims at their core ask this Court to weigh in on numerous issues surrounding the Israeli-Palestinian conflict. Those include whether alleged actions taken or statements made by a United States official with respect to United States policy in the Middle East prompted purportedly unlawful conduct by Israeli security forces and settlers against Palestinians; as well as the determination by a domestic United States court of the ownership of lands in East Jerusalem, the West Bank, and the Gaza Strip. *See, e.g.*, Am. Compl. ¶¶ 41, 124, 150, 223, 230. Such issues are "quintessential[]" sources of non-justiciable political questions. *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 111-12 (D.D.C. 2005) (dismissing on political question grounds tort claims by Palestinians that asked the court to determine, *inter alia*, "to whom the land in the West Bank actually belongs").

a. **The standard for determining whether a case raises political questions.**

The Supreme Court has long noted that certain controversies, "in their nature political," are not fit for adjudication. *Marbury v. Madison*, 1 Cranch 137, 170 (1803). "The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). The political question doctrine "recognizes the limits that Article III imposes upon courts and accords appropriate respect to the other branches' exercise of their own constitutional powers." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring). Such questions arise in "controversies which revolve around policy choices and value determinations" that are constitutionally committed to the Executive or Legislative Branches of our tripartite system of government. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). As such, the political question doctrine "is inherently jurisdictional." *Corrie v. Caterpillar*, 503 F.3d 974, 981 (9th Cir. 2007). *See also Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) ("The principle that the courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary is as old as the fundamental principle of judicial review." (citation omitted)).

In determining whether a plaintiff's claims raise political questions, "a court must first identify with precision the issue it is being asked to decide." *Zivotofsky*, 132 S. Ct. at 1434 (Sotomayor, J., concurring). Once the court has identified the specific issue or issues a plaintiff's complaint raises, the court evaluates whether any of the six factors the Supreme Court listed in *Baker v. Carr* apply. The *Baker* Court explained that courts should refrain from adjudicating suits raising issues that: (1) have a "textually demonstrable constitutional commitment" to the political branches; (2) lack "judicially discoverable and manageable standards" for resolution; (3) require "an initial policy determination of a kind clearly for nonjudicial discretion" for resolution; (4) require the court to express "lack of the respect due coordinate branches of government" through their resolution; (5) present "an unusual need for unquestioning adherence to a political decision already made"; or (6) risk embarrassing the government through "multifarious pronouncements by various departments on one question." 369 U.S. at 217. The first two factors are the "most important." *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008). To dismiss a case on political question grounds, however, a court "need only conclude that one factor is present, not all." *Schneider*, 412 F.3d at 194.

Plaintiffs' complaint against the United States is a clear example of a case that seeks to second-guess United States foreign policy decisions and is rife with issues raising political questions. Indeed, in a similar case brought over a decade ago, a judge of this Court noted, "[i]t is hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli-Palestinian conflict, which has raged on the world stage with devastation on both sides for decades." *Doe I*, 400 F. Supp. 2d at 111-13 (dismissing as non-justiciable claims brought by Palestinians against United States officials, Israeli officials, and private United States and Israeli citizens for alleged violations of the ATS, the TVPA, customary international law, and the tort laws of various states arising from purported Israeli policies in the West Bank and the Gaza Strip). Like the complaint in *Doe*, Plaintiffs' complaint against the United States raises issues implicating all the *Baker* factors.

b. Plaintiffs' complaint raises issues that have a "textually demonstrable commitment" to the political branches.

A decision by a court on any of the issues raised by Plaintiffs' claims against the United States would directly interfere with the United States' "conduct of the foreign relations of our government," which is "committed by the Constitution to the Executive and the Legislative—the 'political'—Departments of the Government." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). *See also Schneider*, 412 F.3d at 195 ("It cannot then be denied that decision-making in the areas of foreign policy and national security is textually committed to the political branches."). Article II of the Constitution states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . [and] appoint Ambassadors," and also "shall receive Ambassadors and other public Ministers." *Id.* art. II, §§ 2-3. Article I gives Congress the power to "regulate Commerce with foreign Nations" and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." *Id.* art. I, § 8. As such, the "propriety of what may be done" in the exercise of the foreign relations power "is not subject to judicial inquiry or decision." *Oetjen*, 246 U.S. at 302. *See also Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

Here, Plaintiffs' complaint urges this Court to insert itself directly into the ongoing Israeli-Palestinian conflict. It asks this Court to hold the United States liable, through the purported actions of Mr. Abrams, for the alleged theft of Palestinian land by Israeli settlers in East Jerusalem, the West Bank, and the Gaza Strip. *See, e.g.*, Am. Compl. at p. 11 & n.2 (defining "Occupied Palestinian Territories" as East Jerusalem, the West Bank, the Gaza Strip, and unspecified "other Palestinian territory"); ¶¶ 41 (alleging that Abrams, while Deputy National Security Advisor, "urged senior aides to former Prime Ministers Sharon, Barack [*sic*], and Olmert . . . to continue annexing privately-owned Palestinian property"); 124 (listing "malicious theft and property destruction" and "illegal property confiscation" as acts underlying their civil conspiracy claim against the United States). Resolution of such a request "would have this Court adjudicate the rights and liabilities of the Palestinian and Israeli people." *Doe I*, 400 F. Supp. 2d at 112.3

Their complaint also asks this Court to determine whether alleged actions taken by the Israeli military—including IDF soldiers—and settlers that Mr. Abrams purportedly supported constituted self-defense or genocide. *See, e.g.*, Am. Compl. ¶¶ 210, 221 (alleging that Abrams promoted the "false premise" that "peaceful settlers raising their families are constantly being attacked by violent Palestinian farmers [*sic*] armed with baskets to collect olives"); 124, 182-83 (alleging "criminal conduct," including the funding, promoting, encouragement, assistance, and facilitation of "wholesale violence, ethnic cleansing, arms trafficking, [and] malicious wounding of [Israeli settlers'] Palestinian neighbors," by Abrams, and alleging that "Israeli army soldiers" are included as "war criminals").

Indeed, Plaintiffs ask this Court to order compensation for damages that allegedly arose from acts of war between Israel and other non-state actors. Many of the damages listed in Plaintiffs' "Initial Damages Database" are based on purported strikes by Israeli Air Force (IAF) fighter jets against targets in the Gaza Strip during Israel's Operation Protective Edge in 2014. *See, e.g.*, Doc. 77-3, Pls.' Ex. C., at 6-10, 12-15, 17, 18, 20 (referring to alleged damages caused by "a series of Israeli bombardments by the IAF . . . during the 2014 invasion of Gaza"). Some of the damages are even based on alleged events that occurred nearly seventy years ago involving non-state militias that existed before the establishment of the State of Israel in 1948. *See id.* at 2, 4, 11 (referring to alleged damages caused by "Haganah/Palmach/Irgun/Lehi"—all groups that existed before Israel's establishment as a state—in 1948). Whatever specific role Mr. Abrams might or might not have had in such events—and none is plausibly alleged—it would be of the sort that squarely implicates the first *Baker* factor.

As the court in *Doe I* succinctly put it: "The Court can do none of this." *Doe I*, 400 F. Supp. 2d at 112. "[C]ourts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010). In sum, Plaintiffs' complaint against the United States raises numerous issues that have a "textually demonstrable commitment" to the political branches and must be dismissed.

c. Plaintiffs' complaint raises issues that "lack judicially discoverable and manageable standards."

Moreover, the issues raised by Plaintiffs' claims against the United States lack "judicially discoverable and manageable standards." As but one example, Plaintiffs invite this Court to opine on "the root cause of violence in the Middle East." Am. Compl. ¶ 221. Plaintiffs allege that in 2005, Mr. Abrams, while a federal employee, "sabotaged" an agreement regarding freedom of movement for the inhabitants of the Gaza Strip so as to "heighten tension in the area," and

thereby “convince Congress and the American people that Palestinian farmers are terrorists, not the violence-prone settlers intent on stealing their neighbors’ property.” *Id.* ¶ 223. Adjudicating such a claim would require this Court to assess Mr. Abrams’s alleged motives in purported foreign policy engagement on behalf of the United States government, and the appropriateness of any exchanges he had. Such a judgment is precisely what the political question doctrine precludes. And the Judiciary simply lacks the standards to assess and determine the “root cause of violence in the Middle East.”

Furthermore, “discoverable and manageable standards” do not exist that would enable this Court to determine adequately the status and proper ownership of land in East Jerusalem, the West Bank, and the Gaza Strip. *Cf. Zivotofsky*, 132 S. Ct. at 1428 (stating that were the issue raised by the case “whether the Judiciary may decide the political status of Jerusalem,” concerns regarding “judicially discoverable and manageable standards” would arise). For starters, resolving such issues likely would require obtaining documents from foreign governments, including the government of Israel and the Palestinian Authority, as well as deposing Israeli and Palestinian officials, along with Israelis and Palestinians living in those areas (including, but not limited to, Plaintiffs). Setting aside the comity and other politically charged issues presented in such a scenario, Plaintiffs’ claims with respect to the Gaza Strip involve an area currently under the *de facto* control of Hamas—a designated Foreign Terrorist Organization, *see* 62 Fed. Reg. 52,650 (Oct. 8, 1997)—which would make any discovery regarding damages or property in that area wholly impractical if not impossible. These very same issues arise regarding Plaintiffs’ claims that Israeli soldiers and settlers assaulted Palestinian farmers in those areas.

The presence of the first two, “most important,” *Baker* factors would require a court to dismiss a claim raised in far more routine contexts. *See, e.g., Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 408-09 (4th Cir. 2011) (barring, based on presence of first, second, and fourth *Baker* factors, negligence claim of Marine against contractor for injuries sustained during maintenance of tank in Iraq). They certainly require the Court to do so in *this* context, in which, given the sensitivities of and the deep interest in the matters at stake, pronouncements and judgments by Israelis, Palestinians, and other governments including that of the United States (be it by the Executive, Legislature, or Judiciary), could have immediate, significant, and far-reaching ramifications not only throughout the Middle East, but throughout the world.

d. Plaintiffs’ complaint raises the other *Baker* factors.

In addition to raising issues that implicate the “most important” *Baker* factors, Plaintiffs’ complaint implicates the other *Baker* factors as well. Determining the equities of both sides in the Israeli-Palestinian conflict would require an “initial policy determination of a kind clearly for nonjudicial discretion.” *See Doe I*, 400 F. Supp. 2d at 111. Similarly, any pronouncements by this Court in this case about the legality of purported IDF and Israeli settler actions against Palestinians, and the involvement of any United States officials in such alleged events, would express a “lack of the respect due” to the Executive and its efforts to address this ongoing conflict. In this respect, the context and substance of Plaintiffs’ claims also implicate the last two *Baker* factors. They present an “unusual need for unquestioning adherence to a political decision already made”—that is, the ongoing efforts to resolve the Israeli-Palestinian conflict. And, were this Court to delve into this arena, it could risk embarrassing the United States government through “multifarious pronouncements” on the nature and equities of the conflict. Given the presence of all the *Baker* factors, this Court should dismiss Plaintiffs’ complaint and allow the political branches to continue to address the Israeli-Palestinian conflict.

* * * *

Excerpts below come from the section on the political question doctrine in the March 10, 2017 U.S. brief.

* * * *

As the United States demonstrated in its motion to dismiss, Plaintiffs' amended complaint raises issues that implicate all six of the factors the Supreme Court enumerated in *Baker v. Carr*, 369 U.S. 186 (1962). *See* Doc. 104, United States' Mot. to Dismiss, at 12-19. The United States also noted that Plaintiffs' claims were similar to those in *Doe I v. State of Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005), in which another judge of this Court held that the claims raised political questions. *See id.* at 111-12; Doc. 104, United States' Mot. to Dismiss, at 13-14.

Plaintiffs' response cites inapposite and distinguishable case law. Namely, Plaintiffs rely on cases either that were brought under a federal statute specifically enacted to provide a remedy for acts of international terrorism, that did not challenge the alleged actions of the United States government with respect to foreign nations, or that did not involve a statement by the United States regarding whether the case raises non-justiciable political questions. Plaintiffs primarily rely on a string of cases in which district courts found to be justiciable claims brought under the Antiterrorism Act of 1991, 18 U.S.C. § 2333 (ATA), a federal statute enacted specifically to provide civil remedies for acts of international terrorism against United States citizens. *See Sokolow v. Palestine Liberation Org.*, 583 F. Supp. 2d 451, 456 (S.D.N.Y. 2008) (finding justiciable claims brought under the ATA); *Estate of Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153, 161-62 (D.D.C. 2006) (same); *Gilmore v. The Palestinian Interim Self-Gov't Auth.*, 422 F. Supp. 2d 96, 99-100 (D.D.C. 2006) (same); *Biton v. The Palestinian Interim Self-Gov't Auth.*, 412 F. Supp. 2d 1, 6 (D.D.C. 2005) (same); *Estates of Ungar v. Palestinian Auth.*, 315 F. Supp. 2d 165, 174 (D.R.I. 2004) (same). *Cf. Klingoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) (finding justiciable claims brought under the Antiterrorism Act of 1987, 22 U.S.C. §§ 5201-03).

The courts in those cases stated clearly that the jurisdiction Congress provided and that the Executive endorsed through the ATA was a critical factor in finding the plaintiffs' claims justiciable. *See, e.g., Gilmore*, 422 F. Supp. 2d at 99 ("Enactment of the ATA makes it clear that both Congress and the Executive have 'expressly endorsed the concept of suing terrorist organizations in federal court,' and therefore this Court need not delve into an in-depth political question analysis here." (quoting *Klingoffer*, 937 F.2d at 49)); *Biton*, 412 F. Supp. 2d at 6 ("This is a tort suit brought under a legislative scheme that Congress enacted for the express purpose of providing a legal remedy of injuries or death occasioned by acts of international terrorism." (quoting *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 280 (1st Cir. 2005))). Indeed, the ATA, passed in 1991, specifically provides jurisdiction for civil claims by United States citizens "injured ... by reason of an act of international terrorism." 18 U.S.C. § 2333; *see also id.* § 2331 (defining "international terrorism").

But here, Plaintiffs are bringing their claims under the Alien Tort Statute (ATS)—not the ATA. That statute was passed by Congress in 1789, largely lay dormant until the late-20th century, and provides jurisdiction for only clearly defined, universally accepted violations of

customary international law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, 732 (2004). It is by no means imbued with the specificity of purpose and scope, as announced by Congress and endorsed by the Executive, through which courts exercised jurisdiction in the ATA cases discussed above. *See id.* at 712 (“Judge Friendly called the ATS a ‘legal Lohengrin . . . no one seems to know whence it came.’” (internal citation omitted)). Accordingly, the ATA line of cases mentioned above is inapposite.

Moreover, the cases cited above simply did not involve challenges to the alleged foreign policy of the United States government. *See, e.g., Biton*, 412 F. Supp. 2d at 2 (ATA claims against the Palestinian Authority). In contrast, here, with respect to Plaintiffs’ claims against Mr. Abrams, they directly challenge the alleged actions of a former Deputy National Security Advisor and his interactions with high-level Israeli officials regarding United States policy in the Middle East in the course of his role as a White House official. *See Am. Compl.* ¶¶ 41, 221, 223.

Lastly, in none of the cases on which Plaintiffs rely did the United States submit a statement urging the respective court to dismiss the claims on political question grounds. Not so here. The United States has moved this Court to dismiss Plaintiffs’ claims on those very grounds. Although such a statement by the Executive Branch is not dispositive *per se*—the Judiciary determines its own jurisdiction—such a statement is a relevant factor in the Judiciary’s analysis. *See Sosa*, 542 U.S. at 733 n.21 (noting that in cases where the Government has expressed foreign policy concerns regarding the litigation, “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” (citation omitted)); *see also Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 72 n.17 (2d Cir. 2005) (“In applying this fourth *Baker* test, courts have been particularly attentive to the views of the United States Government about the consequences of proceeding with litigation.” (citing *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995))). Although other United States officials have made general statements about Israeli settlements, *see Doc. 111, Pls.’ Opp’n*, at 8, the United States’ statement in *this litigation* is what is relevant to the jurisdictional inquiry here. In sum, the *Biton* line of cases is inapposite.

Similarly, the *Arab Bank* line of cases on which Plaintiffs rely, *see Doc. 112, Pls.’ Opp’n* at 14-15, is readily distinguishable from this case. The plaintiffs in *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005), brought their claims under the ATA and under state common law. *See id.* at 575. Defendants apparently did not raise a political question argument in that case, as the *Linde* opinion makes no reference to the political question doctrine. In *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007), which involved claims under both the ATA and the ATS, defendants raised the political question doctrine for the first time at oral argument, which the court found to be untimely. *See id.* at 295 n.45. The court dismissed the argument with minimal analysis. *Id.*

And in *Lev v. Arab Bank, PLC*, No. 08-cv-3251, 2010 WL 623636 (E.D.N.Y. Jan. 29, 2010), which involved claims brought under the ATS, the court found the plaintiffs’ claims justiciable mainly because those claims did not involve the factors mentioned above. Specifically, the court highlighted that “no action by a coordinate branch of the United States government” was involved—a point that, oddly, Plaintiffs include in their opposition, *see Doc. 112, Pls.’ Opp’n*, at 15—and that “the United States government ha[d] chosen not to submit a statement of interest” in the case. *Lev*, 2010 WL 623636 at *4.4 Here, both of the above factors are clearly present. With respect to the conduct for which the United States has substituted itself, Plaintiffs challenge the action by a coordinate branch of the United States government—the alleged actions of a Deputy National Security Advisor. And the United States has moved this

Court to dismiss Plaintiffs' claims against it on political question grounds. Accordingly, the *Arab Bank* cases are of no moment.

Rather, as the United States explained in its opening motion, Plaintiffs' claims are strikingly similar to those in *Doe I*, where the court held the political question doctrine barred the claims. Contrary to Plaintiffs' assertion that *Doe I* is an "entirely different case[]," Doc. 112, Pls.' Opp'n, at 14, in *Doe I*, the plaintiffs sued United States officials under the ATS and other federal statutes for their financial support of the Israeli government. *See Doe I*, No. 1:02-cv-1431, Slip. Op. at 1-3, ECF No. 42 (D.D.C. Oct. 3, 2003). Those claims are clearly more similar to Plaintiffs' claims here than to the claims in any of the cases that Plaintiffs cite, and the United States' actions before the court in *Doe I* are similar to those here—it moved to dismiss the claims against its officials because they raised political questions. *See id.* at 3, 9-14. In sum, the cases Plaintiffs cite were brought under a statute specifically designed for the sorts of claims in those cases, did not challenge United States foreign policy, and did not involve a statement by the United States on the foreign affairs repercussions of adjudicating those cases. Here, Plaintiffs' claims against the United States for the alleged actions of a former Deputy National Security Advisor raise non-justiciable political questions. This Court should dismiss those claims.

* * * *

2. Political Question: *Center for Biological Diversity*

As discussed in *Digest 2016* at 172-80, the United States filed a brief on appeal to the U.S. Court of Appeals for the Ninth Circuit in *Center for Biological Diversity ("CBD"), et al. v. Hagel, et al.*, No. 15-15695, arguing that the court should affirm the district court's dismissal of plaintiffs' claims based on lack of standing and the political question doctrine. For further background on the case, see *Digest 2015* at 158-63. Individuals and environmental groups challenged a decision by the U.S. government and the Government of Japan to build a new military base on Okinawa (the Futenma Replacement Facility or "FRF"). Plaintiffs asserted that construction of the new base would destroy critical habitat for the Okinawa dugong, a marine mammal similar to the manatee, which is critically endangered. The U.S. government considered effects on the dugong in accordance with a previous decision by the district court relying on the National Historic Preservation Act ("NHPA"). *Okinawa Dugong, et al. v. Gates, et al.*, 543 F. Supp. 2d 1082 (N.D. Cal. 2008). The U.S. government completed its report pursuant to Section 402 of the NHPA in 2014 and took steps to begin construction of the base, prompting plaintiffs to move to reopen the case, claiming violations of the Administrative Procedure Act ("APA"). In 2017, the Ninth Circuit issued its decision, holding that the environmental organizations had standing and the political question did not bar claims for declaratory and injunctive relief. *Center for Biological Diversity v. Mattis*, 868 F.3d 803 (9th Cir. 2017). The Ninth Circuit remanded to the district court for further proceedings.

3. Political Question: *Lin v. United States*

See *Digest 2016* at 180-84 and *Digest 2015* at 154-57 for background on *Lin v. United States*. In 2017, the U.S. Court of Appeals for the D.C. Circuit issued its decision affirming the district court's dismissal of the case. *Lin v. United States*, No. 16-5149, 690 Fed.Appx. 7 (Mem) (D.C. 2017). Residents of Taiwan alleged they were unlawfully denied their Japanese nationality at the conclusion of World War II. The district court dismissed based on lack of standing, lack of redressability, and the political question doctrine. *Lin v. United States*, 177 F.Supp.3d 242, 249-55 (D.D.C. 2016). The Court of Appeals affirmed on the basis of redressability and the alternative ground that the case was untimely. The per curiam opinion does not discuss the political question doctrine.

4. Comity, *Forum Non Conveniens*, and Political Question: *Cooper v.*

As discussed in *Digest 2016* at 186-91, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit in *Cooper v. TEPCO*, No. 15-56424, a case brought by U.S. service members who allege that they were exposed to radiation during the humanitarian operation in response to the earthquake, tsunami, and ensuing meltdown at the Fukushima-Daiichi nuclear power plant in Japan, operated by TEPCO. On June 22, 2017, the Ninth Circuit issued its opinion in the case, which is excerpted below (with footnotes omitted). The Ninth Circuit affirmed the lower court's denial of TEPCO's motion to dismiss. The section of the Court's opinion discussing the impact of the Convention on Supplementary Compensation for Nuclear Damage ("CSC") on the court's jurisdiction is excerpted in Chapter 19.

* * * *

B. *International Comity*

TEPCO next contends that the district court erred by not dismissing Plaintiffs' claims on comity grounds. We review the district court's international comity determination for an abuse of discretion and will reverse only if the district court applies an incorrect legal standard or if its "application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" *Mujica v. AirScan Inc.*, 771 F.3d 580, 589 (9th Cir. 2014) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

"International 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 laws.'" *Id.* at 597 (quoting *In re Simon*, 153 F.3d 991, 998 (9th Cir. 1998)). There are two kinds of international comity: prescriptive comity (addressing the "extraterritorial reach of federal statutes") and adjudicative comity (a "discretionary act of

deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state”). *Id.* at 598–99. This case concerns the latter.

District courts deciding whether to dismiss a case on comity grounds are to weigh (1) “the strength of the United States’ interest in using a foreign forum,” (2) “the strength of the foreign governments’ interests,” and (3) “the adequacy of the alternative forum.” *Id.* at 603 (quoting *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004)). Here, the district court correctly laid out this legal standard, and the only question is whether the district court’s decision not to dismiss Plaintiffs’ claims was illogical, implausible, or unsupported by the record. Although this is a close case with competing policy interests, we hold that the district court did not abuse its discretion in deciding to maintain jurisdiction. For our convenience, we will discuss together the interests of the United States and Japan. We then consider the adequacy of a Japanese forum.

1. U.S. and Japanese interests

In *Mujica*, we expounded on how to assess the United States’ and foreign governments’ interests:

The (nonexclusive) factors we should consider when assessing [each country’s] interests include (1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the [countries], and (5) any public policy interests.

Id. at 604, 607. The district court determined that because the FNPP incident occurred in Japan, Japan has a strong interest in this litigation. On the other hand, the district court reasoned that Plaintiffs are U.S. service members, suggesting that the United States also has an interest in this litigation. In balancing the first two factors, the district court concluded that the parties’ ties to the United States outweighed the fact that the allegedly negligent conduct occurred in Japan. We agree with the district court that, at least with respect to the first two factors, there are competing interests. Under these facts, we find these considerations not particularly helpful in determining whether to dismiss Plaintiffs’ claims.

With respect to the character of the conduct in question, the district court determined that the factor was neutral. The court found that Japan had an interest in regulating its nuclear utilities and compensating those injured by the FNPP incident, but that the United States also had an “interest in the safe operation of nuclear power plants around the world, especially when they endanger U.S. citizens.” *Cooper II*, 166 F. Supp. 3d at 1138. The district court also rejected TEPCO’s argument that the foreign policy interests of Japan and the United States favored a Japanese forum. TEPCO argued that the CSC’s jurisdiction-channeling provision, even if not applicable of its own force, reflected a policy judgment of centralizing claims arising out of nuclear incidents in the courts of the country where the nuclear incident occurred. The district court gave little weight to the CSC because it saw no evidence that maintaining jurisdiction would create friction between the United States and Japan and because the CSC’s supplemental fund is unavailable to Plaintiffs. Finally, the district court found that there were public policy considerations cutting both in favor of and against dismissing the case.

One of the reasons the district court cited for maintaining jurisdiction was that neither Japan nor the United States had expressed an interest in the location of this litigation. Indeed, a foreign country’s request that a United States court dismiss a pending lawsuit in favor of a foreign forum is a significant consideration weighing in favor of dismissal. See *Jota v. Texaco*,

Inc., 157 F.3d 153, 160 (2d Cir. 1998) (“[I]nherent in the concept of comity is the desirability of having the courts of one nation accord deference to the official position of a foreign state, at least when that position is expressed on matters concerning actions of the foreign state taken within or with respect to its own territory.”). By contrast, when the country in question expresses no preference, the district court can take that fact into consideration. See *Abad v. Bayer Corp.*, 563 F.3d 663, 668 (7th Cir. 2009) (finding it relevant that neither the United States nor Argentina took a position on where litigation should proceed).

Although Japan took no position in the district court, Japan has not remained silent on appeal. The government of Japan submitted an amicus brief urging us to reverse the district court. In its amicus brief, Japan presents a compelling case that FNPP-related claims brought outside of Japan threaten the viability of Japan’s FNPP compensation scheme. In dealing with claims arising out of the FNPP incident, Japan has developed a set of universal guidelines applicable to all claims brought in Japan. If Plaintiffs’ lawsuit and others like it are permitted to proceed in foreign countries, those courts might apply different legal standards, which could result in different outcomes for similarly situated victims. That risk is especially troublesome to Japan because the Japanese government finances TEPCO’s compensation payments, which are being administered through Japanese courts. As Japan explained in its amicus brief, “The irony of the situation is that this U.S. lawsuit against TEPCO is possible only because the Government of Japan, as part of its compensation system, ensured TEPCO’s solvency, including by providing ongoing funds for damage payments.” Brief of Amicus Curiae the Government of Japan 3-4. Judgments originating in American courts may well be inconsistent with the overall administration of Japan’s compensation fund. In light of Japan’s justifiable insistence that we direct Plaintiffs to Japanese courts, we might well have either reversed the district court’s decision to maintain jurisdiction or remanded to the district court for further consideration.

Because we became aware of Japan’s position by way of an amicus brief on appeal, concerns of fairness and thoroughness led us to seek the State Department’s views. We asked for a Statement of Interest. In lieu of a Statement of Interest, the United States submitted an amicus brief in support of affirming the district court’s order. In its brief, the United States expressed that it “has no clear independent interest in Japan’s compensation scheme beyond [its] general support for Japan’s efforts to address the aftermath of Fukushima.” United States’ Brief 12, ECF No. 81. That alone would not be enough for us to conclude that the comity doctrine does not apply to this case. But the United States also makes a much more important point about U.S. interests: allowing the suit to continue in California is consistent with U.S. interests in promoting the CSC.

The United States has a strong interest in promoting the CSC’s widespread acceptance. As explained above, the CSC was designed as a global liability regime for handling claims arising out of nuclear incidents, and its effectiveness naturally depends on global, or at least widespread, adherence. The CSC creates an international compensation fund to supplant domestic funding for victims of nuclear incidents. CSC arts. III, IV. The CSC cannot provide the robust supplemental compensation fund it was intended to provide if only a few countries contribute to the fund. The CSC also grants contracting parties exclusive jurisdiction over actions concerning nuclear incidents that occur within their borders. CSC art. XIII. But this grant of exclusive jurisdiction has little value if it binds only a few countries. In short, the CSC cannot be the global liability system it was intended to be without widespread adherence, particularly from developed nations. See Letter of Transmittal for the Convention on Supplementary Compensation for Nuclear Damage at IV, Nov. 15, 2002, S. Treaty Doc. No. 107-21 (“[U]nder

existing nuclear liability conventions many potential victims outside the United States generally have no assurance that they will be adequately or promptly compensated in the event they are harmed by a civil nuclear incident, especially if that incident occurs outside their borders or damages their environment. The Convention, once widely accepted, will provide that assurance.” (emphasis added)); see also Letter of Submittal at VIII–IX (“[T]he CSC can strengthen U.S. efforts to improve nuclear safety, because, once widely accepted, the CSC will eliminate ongoing concerns on the part of U.S. suppliers of nuclear safety equipment and technology that they would be exposed to damage claims by victims of a possible future accident at a facility where they have provided assistance.” (emphasis added)).

Thus, the United States, as a party to the CSC, has a strong interest in encouraging other countries, especially those with large nuclear industries such as Japan, to join the CSC. As we have discussed, one of the perquisites of joining the CSC is the guarantee of exclusive jurisdiction over nuclear incidents vis-à-vis other contracting parties. . . . If a country knew it could receive the benefit of the exclusive jurisdiction provision by becoming a party to the CSC after a nuclear incident has occurred within its borders (as Japan did here), or even avoid foreign jurisdiction altogether by virtue of international comity, there would be less incentive to join the CSC before a nuclear incident occurs. As the State Department advised us in its brief:

The exclusive jurisdiction provision forms part of a bargain in exchange for robust, more certain and less vexatious (e.g., the application of strict liability without need to establish fault) compensation for victims of a potential incident. United States policy does not call for advancing one element of this system in isolation from the other elements of the Convention’s system.

For these two inextricably interrelated interests to be fully realized, it is essential that the Convention be as widely adhered to internationally as possible. Thus, broad international adherence to the Convention is the ultimate U.S. policy goal.

United States’ Brief 6–7. Accordingly, “[t]he United States has no specific foreign policy interest necessitating dismissal in this particular case.” *Id.* at 17. We understand the position of the United States to be that, faced with the reality that there is no guarantee of exclusive jurisdiction outside of the CSC, more countries will accede to the CSC, thus fostering the global liability regime the CSC was designed to create. Indirectly, this suit makes the case—and Japan has become the poster child—for why recalcitrant countries should join the CSC.

In its supplemental brief in response to the United States’ brief, TEPCO argues that the United States has misapprehended its own foreign policy interests. In support of this rather bold assertion, TEPCO repeats its argument made in the district court that the CSC merely codified the longstanding U.S. policy of centralizing jurisdiction over claims from nuclear accidents in a single forum. TEPCO points to State Department testimony before the Senate that, even before the CSC, the State Department “would expect that if a nuclear incident occurs overseas[,] U.S. courts would assert jurisdiction over a claim only if they concluded that no adequate remedy exists in the court of the country where the accident occurred.” Treaties: Hearing Before the S. Comm. on Foreign Relations, S. Hearing No. 109-324, 109th Cong. 27 (2005) (statement of Warren Stern, Senior Coordinator for Nuclear Safety, Department of State). This may well have been the United States’ position prior to the CSC’s ratification. In hopes that other countries would do the same, the United States may have preferred that U.S. courts not exercise jurisdiction over claims arising out of foreign nuclear incidents. But that policy appears to have

changed. Now that the United States has ratified the CSC, the State Department takes the position that it would prefer to keep exclusive jurisdiction as a bargaining chip to encourage other nations to join the CSC. We owe this view deference. See *Mujica*, 771 F.3d at 610 (“[S]hould the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.” (citation omitted)); *id.* at 607 (“[C]ourts will not extend comity to foreign proceedings when doing so would be contrary to the policies . . . of the United States.” (second alteration in original) (citation omitted)).

In light of these important, competing policy interests, we conclude that the district court did not abuse its discretion in weighing U.S. and Japanese interests. Although Japan has an undeniably strong interest in centralizing jurisdiction over FNPP-related claims, the United States believes that maintaining jurisdiction over this case will help promote the CSC, an interest that encompasses all future claims arising from nuclear incidents around the globe. Competing policy interests such as these require our district court judges to make difficult judgment calls, judgment calls committed to their sound discretion. We recognize that the district court did not have the benefit of the views of Japan and the United States. We might, in this case, have remanded to the district court to review its judgment on this question in light of the briefs filed by the two governments. We are not sure why neither government decided to weigh in when the district court was considering this question. Nevertheless, the district court had before it the facts that underlie the positions taken by Japan and the United States, and we cannot say that the district court abused its discretion.

2. Adequacy of the alternative forum

Like the district court, we have no doubt that Japan would provide an adequate alternative forum. TEPCO is certainly subject to suit in Japanese courts, and the doors of those courts are undisputedly open to Plaintiffs. See *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006) (“Generally, an alternative forum is available where the defendant is amenable to service of process and the forum provides ‘some remedy’ for the wrong at issue.” (citation omitted)). We have held that district courts have not abused their discretion in holding that Japanese courts are an adequate alternative forum, despite their procedural differences with U.S. courts. See, e.g., *Lockman Found. v. Evangelical All. Mission*, 930 F.2d 764, 768–69, 769 n.3 (9th Cir. 1991). Plaintiffs provide no evidence that Japanese courts would be inadequate aside from unsubstantiated fears of bias against foreign claimants. The district court did not abuse its discretion in finding that Japan would provide an adequate alternative forum for resolving Plaintiffs’ claims.

This is a difficult case that required the district court to weigh a number of complex policy considerations. Though there are strong reasons for dismissing Plaintiffs’ claims in favor of a Japanese forum, the district court did not abuse its discretion in maintaining jurisdiction. Comity is not a doctrine tied to our subject matter jurisdiction. As we have explained:

Comity is not a rule expressly derived from international law, the Constitution, federal statutes, or equity, but it draws upon various doctrines and principles that, in turn, draw upon all of those sources. It thus shares certain considerations with international principles of sovereignty and territoriality; constitutional doctrines such as the political question doctrine; principles enacted into positive law such as the Foreign Sovereign

Immunities Act of 1976; and judicial doctrines such as *forum non conveniens* and prudential exhaustion.

Mujica, 771 F.3d at 598 (citation omitted). Accordingly, it is a “a doctrine of prudential abstention.” *Id.* Because comity is not a jurisdictional decision, comity is not measured as of the outset of the litigation; it is a more fluid doctrine, one that may change in the course of the litigation. Should either the facts or the interests of the governments change—particularly the interests of the United States—the district court would be free to revisit this question.

C. Forum Non Conveniens

The doctrine of *forum non conveniens* allows a court to dismiss a case properly before it when litigation would be more convenient in a foreign forum. ...

1. Adequacy of the alternative forum

The analysis used in evaluating the adequacy of an alternative forum is the same under the doctrine of *forum non conveniens* as it is under the doctrine of international comity. *Mujica*, 771 F.3d at 612 n.25. As we stated in our international comity analysis, Japan provides an adequate alternative forum for resolving Plaintiffs’ claims. ...

2. Private and public interest factors

To some extent, analysis of the private and public interests factors also overlaps with the analysis under international comity. See *Mujica*, 771 F.3d at 598 (explaining the relationship between international comity and *forum non conveniens*). However, the *forum non conveniens* analysis introduces a presumption that litigation is convenient in the plaintiff’s chosen forum when a domestic plaintiff sues at home. *Carijano*, 643 F.3d at 1227. Defendants have the “heavy burden of showing that the [plaintiff’s choice of] forum results in ‘oppressiveness and vexation...out of all proportion’ to the plaintiff’s convenience.” *Id.* (second alteration in original) (quoting *Piper*, 454 U.S. at 241).

In this case, Plaintiffs are U.S. citizens, and their decision to sue in the United States must be respected. The district court properly took Plaintiffs’ choice of their home forum into consideration and did not abuse its discretion in finding that other private and public considerations did not outweigh Plaintiffs’ interest in suing at home.

The private interest factors are

(1) the residence of the parties and the witnesses; (2) the forum’s convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive. *Id.* at 1229 (citation omitted).

The district court reasonably balanced these private interest factors. The district court noted that while most of TEPCO’s witnesses reside in Japan, all Plaintiffs reside in the United States. *Cooper II*, 166 F. Supp. 3d at 1132–33. It further found that it would be more difficult for Plaintiffs to travel to Japan given their alleged medical conditions. *Id.* at 1133. The district court agreed with TEPCO that most of the relevant documents and physical proof remained in Japan, and also that litigating in the United States would make it more difficult to obtain testimony from non-party witnesses located in Japan, but did not believe that these considerations outweighed Plaintiffs’ interest in suing at home. *Id.* at 1133–35. In sum, “[b]ecause of the nature of

international litigation, each side would incur expenses related to traveling and procuring witnesses in either forum.” *Id.* at 1135 (emphasis added). This was a reasonable determination.

The public interest factors relevant to a *forum non conveniens* analysis include “(1) the local interest in the lawsuit, (2) the court’s familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular forum.” *Carijano*, 643 F.3d at 1232 (citation omitted). The district court also reasonably weighed the public interest factors and concluded that they were neutral. It balanced Japan’s interest in centralizing litigation in Japan with the United States’ interest in compensating its military servicemembers. *Cooper II*, 166 F. Supp. 3d at 1132–36. It noted that this litigation would be burdensome to either country’s courts. *Id.* at 1136. This determination was neither illogical, implausible, nor unsupported by the record.

Of course, the policy considerations addressed in the international comity discussion may also be relevant here. But as we explained above, these policy considerations did not require the district court to dismiss this case on international comity grounds. Nor do they require dismissal under *forum non conveniens*. We therefore affirm the district court’s decision not to dismiss Plaintiffs’ claims under the *forum non conveniens* doctrine.

D. The Political Question Doctrine

TEPCO next contends that the political question doctrine bars Plaintiffs’ suit. It argues that the Navy’s decision to deploy Plaintiffs near the FNPP was a superseding cause of Plaintiffs’ injuries, and that Plaintiffs, accordingly, cannot prove their claims without asking the court to review nonjusticiable military decisions. The district court found that TEPCO’s superseding causation defense did not render this case nonjusticiable. *Cooper II*, 166 F. Supp. 3d at 1119–24. We review de novo the district court’s determination that the political question doctrine does not bar Plaintiffs’ case. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007).

1. The political question doctrine framework

“The nonjusticiability of a political question is primarily a function of the separation of powers.” *Baker v. Carr*, 369 U.S. 186, 210 (1962). “The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—‘the political’—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.” *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). The Court has cautioned, however, that “it is ‘error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.’” *Corrie*, 503 F.3d at 982 (quoting *Baker*, 369 U.S. at 211). Rather, courts look to a series of factors to determine whether a case presents a nonjusticiable political question. As Baker explains:

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

369 U.S. at 217.

Typically, deciding whether a case presents a nonjusticiable political question requires the court simply to look at the complaint and apply the *Baker* factors to decide whether there are any nonjusticiable issues. Sometimes, however, and as is the case here, no political questions are apparent from the complaint's face. Plaintiffs' allegations that TEPCO, an entity unaffiliated with the United States government, was negligent in operating the FNPP do not, on their face, trigger any of the six *Baker* factors. But even when the face of a complaint does not ask the court to review a political question, issues "that are textually committed to the executive sometimes lie just beneath the surface of the case." *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 465 (3d Cir. 2013). Such may be the case when, as here, the defendant argues that the U.S. military is responsible for all or part of a plaintiff's injuries. See *id.* Because "the political question doctrine is jurisdictional in nature," we must evaluate these potential defenses and facts beyond those pleaded in the complaint to determine whether the case is justiciable. See *Corrie*, 503 F.3d at 979; see also *Harris*, 724 F.3d at 466 ("[T]o avoid infringing on other branches' prerogatives in war-time defense-contractor cases, courts must apply a particularly discriminating inquiry into the facts and legal theories making up the plaintiff's claims as well as the defendant's defenses."); *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 409 (4th Cir. 2011) ("[W]e are obliged to carefully . . . 'look beyond the complaint, and consider how [the plaintiff] might prove his claim and how [the defendant] would defend.'" (citation, emphasis, and alterations omitted)); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1285 (11th Cir. 2009) (finding the political question doctrine applicable where "any defense mounted by [defendants] would undoubtedly cite the military's orders as the reason" for defendants' actions); *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008) ("We must look beyond the complaint, considering how the Plaintiffs might prove their claims and how [the defendant] would defend.").

Thus, analyzing TEPCO's contention that the political question doctrine bars Plaintiffs' claims requires a two-part analysis. First, we must determine whether resolving this case will require the court to evaluate a military decision. Doing so requires us to consider what Plaintiffs must prove to establish their claim, keeping in mind any defenses that TEPCO will raise. If step one reveals that determining TEPCO's liability will require the court to evaluate a military decision, step two requires us to decide whether that military decision is of a kind that is unreviewable under the political question doctrine. See *Harris*, 724 F.3d at 466 ("[A] determination must first be made whether the case actually requires evaluation of military decisions. If so, those military decisions must be of the type that are unreviewable because they are textually committed to the executive."); *Lane*, 529 F.3d at 560 ("First, [the defendant] must demonstrate that the claims against it will require reexamination of a decision by the military. Then, it must demonstrate that the military decision at issue . . . is insulated from judicial review." (second alteration in original) (citation omitted)).

Although we have never expressly adopted this two-part test, it is consistent with our precedent. For example, in *Corrie*, the plaintiffs were family members of individuals who were killed or injured when the Israeli Defense Forces demolished homes in the Palestinian Territories using bulldozers manufactured by a U.S. defense contractor. 503 F.3d at 977. The plaintiffs sued the defense contractor, arguing that it knew the bulldozers would be used to demolish homes in violation of international law. *Id.* Though the complaint standing alone did not appear to raise a political question, it turned out that the United States paid for each of the bulldozers sold to the Israeli Defense Forces pursuant to a congressionally enacted program giving the executive

discretion to finance aid to foreign militaries. *Id.* at 978. We concluded that resolving the plaintiffs' claims would require us to evaluate the United States' decision to provide military aid because it was "difficult to see how we could impose liability on [the defense contractor] without at least implicitly deciding the propriety of the United States' decision to pay for the bulldozers which allegedly killed the plaintiffs' family members." *Id.* at 982. Having determined that evaluating the plaintiffs' claims would require us implicitly to evaluate the United States' decision to pay for the bulldozers, we concluded that the decision "to grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations." *Id.* at 983. In light of our conclusion that we could not "intrude into our government's decision to grant military assistance to Israel, even indirectly," we affirmed the district court's dismissal of the plaintiffs' claims under the political question doctrine. *Id.* at 983–84.

Because determining whether a case raises a political question requires a "discriminating inquiry into the precise facts and posture of the particular case," *Baker*, 369 U.S. at 217, it is not always possible to tell at the pleading stage whether a political question will be inextricable from the case, see *Lane*, 529 F.3d at 554. For example, in *Lane*, a defense contractor recruited the plaintiffs to drive trucks in Iraq. *Id.* While in Iraq, Iraqi insurgents attacked the plaintiffs' convoys resulting in deaths and injuries to the plaintiffs. *Id.* at 555. The plaintiffs argued that the contractor fraudulently induced them into employment by falsely representing that their work in Iraq would be entirely safe. *Id.* They also asserted that the defense contractor was negligent in carrying out the convoy. *Id.* The defense contractor argued that the case presented a nonjusticiable political question, and the district court agreed and dismissed the case. *Id.* at 555–56.

On appeal, the Fifth Circuit reversed. The court stressed that in order to dismiss a case on political question grounds, "a court must satisfy itself that [a] political question will certainly and inextricably present itself." *Id.* at 565. Though acknowledging the potential for a political question to arise in the case, the court was not satisfied that addressing a political question would be inevitable. The plaintiffs' fraud theory, for example, might have succeeded if the plaintiffs could establish that the defense contractor guaranteed the plaintiffs' safety while knowing that the plaintiffs were at a greater risk of harm than they were led to believe. *Id.* at 567. The court also permitted the plaintiffs' negligence claims to proceed, while noting that those claims "move precariously close to implicating the political question doctrine, and further factual development very well may demonstrate that the claims are barred." *Id.* But given the lack of clarity at the pleading stage regarding what duties the defense contractor owed toward the plaintiffs while in Iraq, it was not certain that a political question was inextricable from the case. *Id.* Accordingly, the court remanded to the district court for further factual development. *Id.* at 568; see also *Carmichael*, 572 F.3d at 1279 (noting that factual developments during discovery aided the district court in determining whether a political question existed); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1361 (11th Cir. 2007) (rejecting a defendant's arguments that the political question doctrine barred the plaintiffs' claims because it was not clear from the pleadings that a political question existed).

Another consideration that may make it difficult to determine in the early stages of litigation whether a nonjusticiable political question exists is a lack of clarity as to which state's or country's law applies. See *Harris*, 724 F.3d at 474. Deciding whether a political question is inextricable from a case necessarily requires us to know what the plaintiff must prove in order to succeed. Although there is often similarity between the tort regimes of different jurisdictions, the elements of a particular tort and the host of defenses available to the defendant can vary in

significant ways. See *id.* (contrasting the tort laws of Pennsylvania, Tennessee, and Texas). This leaves open the possibility that a political question may arise under the laws of one jurisdiction but not under the laws of another. For example, in *Harris*, the Third Circuit concluded that a political question would arise under Tennessee or Texas law because their proportional liability systems would require the court to apportion fault among all possible tortfeasors, including the military. *Id.* Doing so would require the court to determine whether a particular military decision was reasonable, which raised a political question. In contrast, under Pennsylvania's joint-and-several liability system, it would be possible to impose liability on the defense contractor without needing to apportion any fault to the military or otherwise review its decisions. *Id.* Thus, at least where the potentially applicable bodies of law differ, the district court must either decide what law applies or conclude that a political question would arise under any potentially applicable body of law before it can dismiss a case as nonjusticiable.

2. Analysis

At this stage in the litigation, we find ourselves unable to undertake the “discriminating inquiry” necessary to determine if this case presents a political question. *Baker*, 369 U.S. at 217. The parties have agreed, and we assume for present purposes, that the political question doctrine prevents us from evaluating the wisdom of the Navy's decision to deploy troops near the FNPP. See *Corrie*, 503 F.3d at 983 (“Whether to grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations.”); see also *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (“The complex[,] subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments”); *id.* (“It would be 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 Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence.”); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (“Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.”). In other words, step two is not in dispute. The dispute is whether Plaintiffs' claims or TEPCO's superseding causation defense would actually require the court to review the wisdom of the Navy's decisions during Operation Tomodachi. Several considerations make it difficult for us to tell at this stage in the proceedings whether the district court would actually need to review the Navy's decisions. First, the district court has yet to undergo a choice-of-law analysis, and the parties have briefed the issue assuming California law applies. Without knowing what body of law applies—whether it is California law, Japanese law, federal common law, or something else—we cannot know what Plaintiffs must demonstrate in order to prove their claims or what defenses are available to TEPCO. We cannot, therefore, decide with certainty that a political question is inextricable from the case. See *Harris*, 724 F.3d at 474–75.

Even assuming California law applies, we are unable to conclude at this juncture that TEPCO's superseding causation defense injects a political question into this case. “California has adopted sections 442–453 of the Restatement of Torts, which define when an intervening act constitutes a superseding cause.” *USAir Inc. v. U.S. Dep't of Navy*, 14 F.3d 1410, 1413 (9th Cir. 1994). Section 442 of the Restatement lays out several considerations used to determine whether an intervening force is a superseding cause. Restatement (Second) of Torts § 442 (Am. Law Inst. 1965). . . .

The district court ruled that it was foreseeable that Plaintiffs and other foreign responders would be in the area to provide aid in the wake of the earthquake and tsunami. *Cooper II*, 166 F. Supp. 3d at 1121. TEPCO argues, and we agree, that the proper inquiry is not whether it was foreseeable that Plaintiffs would be in the area, but whether TEPCO, in anticipation of its alleged negligence, could have foreseen the Navy's actions in response. Only if TEPCO could not have foreseen the Navy's actions and the Navy's actions caused the Plaintiffs' injuries would the Navy's conduct break the chain of proximate causation. But deciding whether a particular military action was "reasonably foreseeable" is not the same as requiring an evaluation of whether that action was itself reasonable. We cannot begin to resolve these questions at this stage in the litigation because there are basic factual disputes regarding the Navy's operations during Operation Tomodachi. We agree with the district court that it may "hear evidence with respect to where certain ships were located and what protective measures were taken" without running afoul of the political question doctrine. *Cooper II*, 166 F. Supp. 3d at 1123; see *Harris*, 724 F.3d at 473 ("[T]he submission of evidence related to strategic military decisions that are necessary background facts for resolving a case . . . is not sufficient to conclude that a case involves an issue textually committed to the executive.").

Second, TEPCO relies on § 452(2) of the Restatement (Second) of Torts, which provides: "Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause." . . . Even assuming TEPCO is correct that the duty to protect Plaintiffs shifted from TEPCO to the Navy, it is not clear that determining whether the duty shifted would raise a political question. A determination that someone other than TEPCO bore the responsibility for Plaintiffs' safety might simply absolve TEPCO of liability to Plaintiffs. The district court may not have to then decide whether the Navy fulfilled its duty to Plaintiffs.

The political question doctrine does not currently require dismissal. As the facts develop, it may become apparent that resolving TEPCO's superseding causation defense would require the district court to evaluate the wisdom of the Navy's decisions during Operation Tomodachi. But at this point, that is not clear. Further district court proceedings will help flesh out the contours of whatever law the district court finds applicable. TEPCO is free to raise the political question doctrine again if and when further developments demonstrate that a political question is inextricable from the case.

* * * *

D. EXTRATERRITORIAL APPLICATION OF U.S. CONSTITUTION

1. *Hernandez*

As discussed in *Digest 2016* at 192 and *Digest 2015* at 163-66, the U.S. Court of Appeals for the Fifth Circuit, en banc, affirmed the dismissal of all claims in *Hernandez v. Mesa et al.*, 785 F.3d 117 (5th Cir. 2015). *Hernandez* is a damages action against a U.S. Border Protection officer (Mesa) and the United States for the death of a Mexican national in a shooting across the U.S. border with Mexico. On October 11, 2016, the U.S. Supreme Court granted the petition for certiorari in the case. Excerpts follow from the U.S. brief filed in the Supreme Court on January 9, 2017, first from the "Summary of the

Argument” section and then from the section on the presumption against extraterritoriality with respect to a *Bivens* action.

* * * *

I. In granting certiorari, this Court directed the parties to address the question whether petitioners’ claims may be asserted under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). That antecedent question resolves this case: The judicially created *Bivens* remedy should not be extended to aliens injured abroad.

In *Bivens*, this Court recognized an implied private right of action for damages against federal officers alleged to have violated a citizen’s Fourth Amendment rights. But because the Court’s subsequent decisions have clarified that “implied causes of action are disfavored,” the Court has long “been reluctant to extend *Bivens* liability ‘to any new context or new category of defendants.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (citation omitted). And the Court has admonished that *Bivens* should not be extended to any new context where special factors suggest that Congress is the appropriate body to provide any damages remedy.

Petitioners seek to extend *Bivens* to injuries suffered by aliens abroad—a significant and unprecedented expansion. That expansion is inappropriate because Congress, not the Judiciary, should decide whether and under what circumstances to provide monetary remedies for aliens outside our borders who are injured by the government’s actions. An injury inflicted by the United States on a foreign citizen in another country’s sovereign territory is, by definition, an incident with international implications. This case illustrates that point: Both the problem of border violence in general and the specific incident at issue here have prompted exchanges between the United States and Mexico, and Mexico’s amicus brief confirms its sovereign interest in those issues.

The need for caution before inserting the courts into such sensitive matters of international diplomacy is reinforced by the fact that, in a variety of related contexts—including the statutory remedy for persons deprived of constitutional rights by *state* officials, 42 U.S.C. 1983—Congress has taken care not to provide aliens injured abroad with the sort of judicial damages remedy petitioners seek. Instead, where Congress has addressed injuries inflicted by the government on aliens abroad, it has relied on voluntary payments or administrative claims mechanisms. And the general presumption against extraterritoriality further confirms that *Bivens* should not apply here: It would be anomalous to extend a judicially inferred remedy to a case where the Court would not extend an express statutory cause of action absent a clear indication that Congress intended to reach injuries outside our Nation’s borders.

II. The en banc court of appeals held that the Fourth Amendment did not apply to Agent Mesa’s alleged conduct because Hernández was an alien located in Mexico who had no connection to the United States. That conclusion was compelled by *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), which held that the Fourth Amendment had “no application” to the search and seizure of an alien’s property in Mexico. *Id.* at 275. This Court reached that conclusion after a careful analysis of the Fourth Amendment’s text, purpose, and history, as well as the “significant and deleterious consequences for the United States” that would follow from extending the Fourth Amendment to aliens abroad. *Id.* at 273.

Petitioners do not deny that *Verdugo-Urquidez* forecloses their claim. Instead, they assert that *Verdugo-Urquidez* is no longer good law because it employed an approach to extraterritoriality that purportedly conflicts with Justice Kennedy’s concurring opinion in that case and with this Court’s subsequent decision in *Boumediene v. Bush*, 553 U.S. 723 (2008). But Justice Kennedy “join[ed]” the Court’s opinion in *Verdugo-Urquidez* and agreed with the “persuasive justifications stated by the Court.” 494 U.S. at 275, 278 (Kennedy, J., concurring). And nothing in *Boumediene*— which addressed the application of the right to habeas corpus in an area where the United States maintains de facto sovereignty—undermines either *Verdugo-Urquidez*’s analysis or its holding that the Fourth Amendment generally does not apply to aliens abroad.

In contrast, petitioners’ ad hoc, totality-of-the-circumstances approach to the extraterritorial application of the Fourth Amendment finds no support in *Boumediene* or in any other decision of this Court. Petitioners’ all-factors-considered test is unworkable; it would upend an understanding on which Congress and the Executive Branch have relied; and it could “significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest,” *Verdugo-Urquidez*, 494 U.S. at 273-274.

III. Agent Mesa is entitled to qualified immunity on petitioners’ substantive-due-process claim because his alleged actions did not violate any clearly established Fifth Amendment right. To overcome a motion to dismiss based on qualified immunity, a *Bivens* plaintiff must plead facts establishing that “every reasonable official” in the defendant’s position would have known that his actions violated the asserted constitutional right. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation omitted). The dispositive question here is thus whether “every reasonable official” in Agent Mesa’s position “would have understood that what he is doing violates [the Fifth Amendment].” *Ibid*.

Petitioners do not dispute the court of appeals’ unanimous conclusion that it was not clearly established that an alien in Hernández’s position had Fifth Amendment rights. Instead, petitioners maintain (Br. 28-33) that the court should have conducted the qualified-immunity analysis as if Hernández were a U.S. citizen because Agent Mesa did not know with certainty that he was an alien. Petitioners are correct that the qualified-immunity analysis focuses on facts known to the defendant at the time of the challenged conduct. But it does not follow that the analysis in this case should assume, counterfactually, that Agent Mesa knew Hernández was a U.S. citizen. Instead, the question is whether every reasonable officer in Agent Mesa’s position would have known that his alleged actions violated the Fifth Amendment, where the officer did not know Hernández’s nationality with certainty but had no reason to believe that he was a U.S. citizen.

The answer to that question is no—both because no case law addresses the application of the Fifth Amendment to uses of force against persons of unknown nationality outside the United States, and because it is not clearly established that the Fifth Amendment (rather than the Fourth Amendment) has any application to such uses of force, regardless of the nationality of the affected individual.

* * * *

3. *The presumption against extraterritoriality reinforces the inappropriateness of extending Bivens to aliens injured abroad*

The presumption against extraterritoriality further confirms that *Bivens* should not be extended to aliens injured abroad. It is a basic principle of our legal system that, in general, “United States law governs domestically but does not rule the world.” *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (citation omitted). In statutory interpretation, that presumption is reflected in the canon that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.” *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). That canon “helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.” *Kiobel*, 133 S. Ct. at 1664.

Petitioners assert (Br. 47) that the presumption against extraterritoriality is relevant only to “interpreting statutes,” not to defining the scope of a common-law remedy like *Bivens*. But this Court has held otherwise. In *Kiobel*, the Court held that although the presumption “typically” applies to statutory interpretation, “the principles underlying the canon of interpretation similarly constrain courts” recognizing common-law causes of action. 133 S. Ct. at 1664.

Kiobel involved the ATS, a jurisdictional statute that “does not expressly provide any causes of action,” but that this Court had previously held is “best read as having been enacted on the understanding that the common law would provide a cause of action for a modest number of international law violations.” 133 S. Ct. at 1663 (quoting *Sosa*, 542 U.S. at 724) (brackets omitted). Although the international-law rules asserted by the plaintiffs applied abroad, this Court held that courts recognizing causes of action under the ATS must be guided by the presumption against extraterritoriality. In fact, the Court admonished that “the danger of unwarranted judicial interference in the conduct of foreign policy is *magnified* in the context of the ATS, because the question is not what Congress has done, but instead what courts may do.” *Id.* at 1664 (emphasis added). That danger is still greater in the *Bivens* context, where courts are asked to create a common-law cause of action without even the minimal congressional guidance found in the ATS.

The presumption against extraterritoriality should thus “constrain courts exercising their power” under *Bivens*. *Kiobel*, 133 S. Ct. at 1665. And as this Court recently explained, the presumption counsels against extending a private damages remedy to injuries suffered abroad even if the underlying substantive rule has extraterritorial reach. In *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), the Court held that some provisions in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, govern foreign conduct. But “despite [its] conclusion that the presumption ha[d] been overcome with respect to RICO’s substantive provisions,” the Court “separately appl[ied] the presumption against extraterritoriality to RICO’s cause of action.” *RJR Nabisco*, 136 S. Ct. at 2106. The Court held that the private right of action did not reach injuries suffered abroad—even injuries caused by domestic conduct—because “[n]othing in [RICO] provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States.” *Id.* at 2108.

Accordingly, even if Congress had enacted a statute expressly providing a damages remedy for individuals whose constitutional rights are violated by federal officers—and even if petitioners were correct that the Fourth and Fifth Amendments apply in this extraterritorial context—this Court would not extend that statutory remedy to this case absent “clear indication” that Congress intended to reach “injuries suffered outside of the United States.” *RJR Nabisco*,

136 S. Ct. at 2108. Given this Court’s longstanding reluctance to extend *Bivens*, it would be “grossly anomalous * * * to apply *Bivens* extraterritorially when [courts] would not apply an identical statutory cause of action for constitutional torts extraterritorially.” *Meshal*, 804 F.3d at 430 (Kavanaugh, J., concurring).

* * * *

On June 26, 2017, the Supreme Court issued its decision in *Hernandez v. Mesa*, No. 15-118, 137 S.Ct. 2003 (2017). The Court vacated the judgment of the Fifth Circuit (en banc) and remanded for further proceedings. The Supreme Court had recently issued an opinion in another *Bivens* case, *Abbassi*, and reasoned that the Court of Appeals should have an opportunity to consider how *Abbassi* would apply to this case. Justice Thomas filed a dissenting opinion, writing that he “would decline to extend *Bivens* and would affirm.” Justices Breyer and Ginsburg also dissented, asserting that Hernandez was entitled to protection under the Fourth Amendment because of the significant connection to the United States of the area around the international border with Mexico and therefore should be allowed to pursue a *Bivens* action for damages. Excerpts follow from the *per curiam* opinion of the U.S. Supreme Court.

* * * *

With respect to petitioners’ Fourth Amendment claim, the en banc Court of Appeals found it unnecessary to address the *Bivens* question because it concluded that Hernández lacked any Fourth Amendment rights under the circumstances. This approach—disposing of a *Bivens* claim by resolving the constitutional question, while assuming the existence of a *Bivens* remedy—is appropriate in many cases. This Court has taken that approach on occasion. See, e.g., *Wood*, *supra*, at ____ (slip op., at 11). The Fourth Amendment question in this case, however, is sensitive and may have consequences that are far reaching. It would be imprudent for this Court to resolve that issue when, in light of the intervening guidance provided in *Abbasi*, doing so may be unnecessary to resolve this particular case.

With respect to petitioners’ Fifth Amendment claim, the en banc Court of Appeals found it unnecessary to address the *Bivens* question because it held that Mesa was entitled to qualified immunity. In reaching that conclusion, the en banc Court of Appeals relied on the fact that Hernández was “an alien who had no significant voluntary connection to . . . the United States.” 785 F. 3d, at 120. It is undisputed, however, that Hernández’s nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting. The en banc Court of Appeals therefore erred in granting qualified immunity based on those facts.

“The doctrine of qualified immunity shields officials from civil liability so long as their conduct ‘does not violate clearly established . . . constitutional rights of which a reasonable person would have known.’” *Mullenix v. Luna*, 577 U. S. ____, ____ (2015) (*per curiam*) (slip op., at 4–5) (quoting *Pearson v. Callahan*, 555 U. S. 223, 231 (2009)). The “dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier v. Katz*, 533 U. S. 194, 202 (2001). The qualified immunity analysis thus is limited to “the facts that were knowable

to the defendant officers” at the time they engaged in the conduct in question. *White v. Pauly*, 580 U. S. ___, ___ (2017) (*per curiam*) (slip op., at 3). Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant.

Mesa and the Government contend that Mesa is entitled to qualified immunity even if Mesa was uncertain about Hernández’s nationality and his ties to the United States at the time of the shooting. The Government also argues that, in any event, petitioners’ claim is cognizable only under the Fourth Amendment, and not under the Fifth Amendment. This Court declines to address these arguments in the first instance. The Court of Appeals may address them, if necessary, on remand.

The facts alleged in the complaint depict a disturbing incident resulting in a heartbreaking loss of life. Whether petitioners may recover damages for that loss in this suit depends on questions that are best answered by the Court of Appeals in the first instance.

* * * *

2. *Rodriguez*

As discussed in *Digest 2016* at 192, the United States notified the U.S. Court of Appeals for the Ninth Circuit that it should await the Supreme Court’s guidance in *Hernandez* before deciding a case involving the same issues. After the Supreme Court issued its decision in *Hernandez* in 2017, the United States filed a supplemental *amicus* brief supporting reversal in *Rodriguez v. Swartz*, No. 15-16410, in the Ninth Circuit. Excerpts follow from the U.S. supplemental brief, filed July 27, 2017.

* * * *

In *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017), the Supreme Court considered *Bivens* claims similar to the claims presented here: the plaintiffs sought to invoke *Bivens* to recover for a cross-border shooting by a U.S. Border Patrol agent that resulted in the death of an alien in Mexico. The Court vacated the Fifth Circuit’s decision holding that the plaintiffs had no Fourth Amendment claim and directed the court to consider the “antecedent” question of whether a *Bivens* remedy is available in light of *Abbasi*. *Id.* at 2006. The Court noted that resolving the underlying Fourth Amendment question “would be imprudent” and “may be unnecessary” in light of the intervening guidance provided by *Abbasi*. *Id.* at 2007.

The Court’s instruction on remand in *Hernandez*, makes clear that this Court should address the antecedent question of whether a *Bivens* remedy exists before addressing the question of whether the Fourth Amendment applies to an alien injured abroad. And the Supreme Court’s analysis of the special factors in *Abbasi* makes clear that it would not be proper to imply a non-statutory damages remedy in this case. The category of claims by aliens injured abroad, and specifically claims by those injured due to cross-border shootings, implicate foreign relations and national security policy. As the Court reiterated in *Abbasi*, the Constitution unequivocally assigns those functions to the political branches, so it would not be appropriate for the Judiciary to intrude on those powers and provide monetary remedies for aliens outside U.S. borders who

are injured by the government's actions. In addition, Congress has not provided aliens injured abroad with the sort of judicial damages remedy plaintiff seeks; instead, when it has chosen to address injuries inflicted by the government on aliens abroad, Congress has relied on voluntary payments or administrative claims mechanisms. As in *Abbasi*, Congress's failure to provide a damages remedy "is notable" and "more than 'inadvertent.'" 137 S. Ct. at 1862. Finally, the general presumption against extraterritoriality further confirms that *Bivens* should not be extended here.

* * * *

Any doubt on this question [of whether to recognize a *Bivens* action when an injury was inflicted on a foreign citizen in another country's sovereign territory] is resolved by *Hernandez*, which also involves a cross-border shooting. In *Hernandez*, the Court remanded and directed the Fifth Circuit to address whether a *Bivens* remedy exists in light of *Abbasi*'s clarification of the special factors analysis. That disposition presupposed that the claims in *Hernandez* arose in new contexts. Like the Fifth Circuit in *Hernandez* therefore, this Court must determine whether special factors weigh against implying a damages remedy in this new context.

B. The Court in *Abbasi* clarified that whether "special factors counselling hesitation" are present "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." 137 S. Ct. at 1857-58; *see also Hernandez*, 137 S. Ct. at 2006. Indeed, if there are "sound reasons to think Congress *might doubt* the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts *must refrain* from creating the remedy in order to respect the role of Congress." *Abbasi*, 137 S. Ct. at 1858 (emphasis added). "In a related way," the Court explained, "if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Id*

These separation of powers concerns strongly weigh against implying a damages remedy here.

First, claims by aliens injured abroad implicate foreign affairs and national security. The Constitution commits these areas to the political branches. *See, e.g., Abbasi*, 137 S. Ct. at 1861; *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016). Accordingly, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981); *see Abbasi*, 137 S. Ct. at 1861.

Consistent with these principles, the Court's decisions make clear that *Bivens* should not be expanded to an area that the Constitution commits to the political branches. In *Chappell v. Wallace*, the Court declined to extend *Bivens* to claims by military personnel against superior officers because "Congress, the constitutionally authorized source of authority over the military system of justice," had not provided such a remedy and so a judicially created one "would be plainly inconsistent with Congress' authority." 462 U.S. 296, 304 (1983). In *United States v. Stanley*, the Court relied on *Chappell* to hold that *Bivens* does not extend to any claim incident to military service, again emphasizing that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." 483 U.S. 669, 683 (1987). And in *Abbasi*, the Court relied on these principles in declining to extend *Bivens* to challenges to the confinement conditions imposed on illegal aliens pursuant to executive policy in the wake of the September 11 attacks. 137 S. Ct. at 1858-63. The Court emphasized that "[j]udicial inquiry into the national-security

realm raises ‘concerns for the separation of powers in trenching on matters committed to other branches,’” which are “even more pronounced” in the context of a claim seeking money damages. *Id.* at 1861 (citation omitted). The Court concluded that “congressionally uninvited intrusion [wa]s inappropriate action for the Judiciary to take.” *Id.* at 1862 (quotation marks omitted).

The same logic precludes the extension of *Bivens* to aliens injured abroad by U.S. government officials. This category of cases unquestionably implicates foreign relations because the United States is answerable to other sovereigns for injuries inflicted on their citizens within their territory. Indeed, the United States and the government of Mexico have repeatedly addressed cross-border shootings in recent years. In 2014, the two governments established a joint Border Violence Prevention Council to provide a standing forum in which to address issues of border violence. Mexico and the United States have also addressed cross-border shootings in other forums, including the annual U.S.-Mexico Bilateral Human Rights Dialogue. Judicial examination of the incident at issue in this case would inject the courts into these sensitive matters of international diplomacy and risk undermining the government’s ability to speak with one voice in international affairs. See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985).

Permitting *Bivens* suits in this context also would directly implicate the security of the border. Congress has charged the Department of Homeland Security and its components, including U.S. Customs and Border Protection, with preventing terrorist attacks within the United States and securing the border. 6 U.S.C. §§ 111, 202. “[T]his country’s border-control policies are of crucial importance to the national security and foreign policy of the United States.” *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004). Moreover, this Court has recognized that the related context of “immigration issues ‘ha[s] the natural tendency to affect diplomacy, foreign policy, and the security of the nation,’ which further ‘counsels hesitation’ in extending *Bivens*.” *Mirmehdi v. United States*, 689 F.3d 975, 982 (9th Cir. 2012) (quoting *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009)).

In her initial brief, plaintiff argued that this Court should ignore the extent to which this case involves foreign relations, national security, and immigration when deciding whether to extend *Bivens* because those same factors are relevant to whether the Fourth Amendment applies extraterritorially. Br. 52-53. *Abbasi* and *Hernandez* make clear, however, that this Court must consider those factors in addressing the antecedent *Bivens* issue. Indeed, the premise of the special-factors inquiry is that a judicially created damages remedy is *not* appropriate for every constitutional violation—indeed, “in most instances [the Supreme Court] ha[s] found a *Bivens* remedy unjustified.” *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

Second, a variety of statutes indicate that Congress’s failure to provide the damages remedy that plaintiff seeks was not “‘inadvertent,’” which confirms that it would be inappropriate for the courts to provide a damages remedy here. *Abbasi*, 137 S. Ct. at 1862 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)); see *Western Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009). Traditionally, injuries suffered by aliens abroad were addressed through diplomatic negotiations or by voluntary *ex gratia* payments to the injured parties. See William R. Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 Mil. L. Rev. 59, 61-64 (1966). The United States continues to rely on such measures in many contexts. See, e.g., Exec. Order No. 13,732, § 2(b)(ii), 81 Fed. Reg. 44,485 (July 1, 2016). In certain recurring circumstances, Congress has authorized limited administrative remedies for aliens injured abroad by U.S. employees. See 10 U.S.C. §§ 2734(a),

2734a(a); 21 U.S.C. § 904; 22 U.S.C. § 2669-1. Tellingly, Congress has not adopted a similar claims procedure for aliens injured abroad by the actions of U.S. Border Patrol agents. Moreover, where Congress has provided remedies for aliens injured abroad by U.S. employees, it has done so through administrative mechanisms, not by authorizing suits in federal court.

In addition, where Congress has provided judicial damages remedies, it has not extended those remedies to injuries of the sort plaintiff asserts here. Congress limited the statutory remedy for individuals whose constitutional rights are violated by *state* officials to “citizen[s] of the United States or other person[s] within the jurisdiction thereof.” 42 U.S.C. 1983. Similarly, in enacting the Federal Tort Claims Act (FTCA), the most comprehensive statute providing remedies for injuries inflicted by federal employees, Congress specifically excluded “[a]ny claim arising in a foreign country.” 28 U.S.C. 2680(k). That is a strong indication that Congress did not intend a damages remedy for injuries occurring abroad.

Plaintiff contended in her initial brief that the FTCA foreign-country exception has “absolutely no bearing” on whether a *Bivens* remedy is available here because Congress enacted the exception solely to avoid the application of foreign substantive law in FTCA cases. Br. 51. That was not Congress’s only goal. Even before concerns regarding foreign law were raised during Congress’s consideration of the statute, the bill that became the FTCA excluded “all claims ‘arising in a foreign country *in behalf of an alien*.’” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 (2004) (quoting H.R.5373, 77th Cong., 2d Sess., § 303(12) (1941)) (emphasis added).

More recently, in the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. 1350 note, Congress created a cause of action for damages against “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation,” subjects another individual to “torture” or “extrajudicial killing.” 28 U.S.C. 1350 note § 2. “But the statute exempts U.S. officials, a point that President George H.W. Bush stressed when signing the legislation.” *Meshal*, 804 F.3d at 430 (Kavanaugh, J., concurring). “In confining the coverage of statutes such as the [FTCA] and the [TVPA], Congress has deliberately decided not to fashion a cause of action” for aliens injured abroad by government officials. *Id.* Congress’s repeated decisions not to provide such a remedy counsel strongly against providing one under *Bivens*.

Moreover, plaintiff may have other remedies available to her. If the United States succeeds in prosecuting Swartz for murder, plaintiff has a potential statutory monetary remedy for restitution, which could include funeral expenses and lost future wages. *See* 18 U.S.C. § 3663A(a); *United States v. Cienfuegos*, 462 F.3d 1160, 1165-69 (9th Cir. 2006). In addition, plaintiff may have a state-law tort remedy against Swartz. The Westfall Act would protect Swartz from state-law tort suits only if the Department of Justice certifies that he was acting within the scope of his employment at the time of the incident. 28 U.S.C. § 2679(b), (d). The United States has not yet made that determination, and it would be reviewable in court. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995).

Third, the presumption against extraterritoriality underscores the inappropriateness of extending *Bivens* to aliens injured abroad. It is axiomatic that, in general, “United States law governs domestically but does not rule the world.” *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). The presumption against extraterritoriality “helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.” *Id.* at 1664. And the Supreme Court has made clear that “the principles underlying the canon of interpretation similarly constrain courts” recognizing common-law causes of action. *Id.* Indeed, “the danger of

unwarranted judicial interference in the conduct of foreign policy is magnified” when “the question is not what Congress has done, but instead what courts may do.” *Id.*

The Court recently held that even when the underlying substantive rule has extraterritorial reach, the “presumption against extraterritoriality must be applied separately” to the question of whether the private damages remedy extends to injuries suffered abroad. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2108 (2016). The Court held that the private right of action at issue did not reach injuries suffered abroad—even injuries caused by domestic conduct—because “[n]othing in [the statute] provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States.” *Id.* Likewise, here, the presumption counsels against extending the *Bivens* damages remedy to injuries suffered by aliens abroad.

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Cross References

Microsoft case and extraterritorial application of U.S. law, **Ch. 3.A.2.**

Universal jurisdiction, **Ch. 3.A.5.**

Litigation regarding NPT (political question doctrine), **Ch. 4.B.2.**

Aviation v. United States, **Ch. 8.D.2.a.**

Ali v. Warfaa, **Ch. 10.B.2.**

Cooper v. TEPCO, **Ch. 19.B.2.**

CHAPTER 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On March 3, 2017, the Department of State released the 2016 Country Reports on Human Rights Practices. The Department submits the reports to Congress annually per §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for accounts of human rights practices in other countries. While the Country Reports describe facts relevant to human rights concerns, the reports do not reach conclusions about human rights law or legal definitions. The Country Reports are available at [State.gov/humanrightsreports](https://www.state.gov/humanrightsreports). A special briefing by an administration official previewing the release of the Country Reports is available at <https://www.state.gov/r/pa/prs/ps/2017/03/268195.htm>.

2. International Covenant on Civil and Political Rights

a. *Follow-up to Periodic Report*

As discussed in *Digest 2015* at 174 and *Digest 2014* at 168-78, the United States made its presentation to the Human Rights Committee on its Fourth Periodic Report Concerning the International Covenant on Civil and Political Rights in 2014 and conveyed its one-year follow-up response on the Committee's priority recommendations in 2015. The U.S. periodic reports and follow-up responses are available at <https://www.state.gov/j/drl/reports/treaties/index.htm#ftn2>. In 2016, the Committee posted two letters on its website regarding the U.S. follow-up response. The United States responded to those letters on October 11, 2017. U.N. Doc. No.

CCPR/C/USA/CO/4/Add.1. The U.S. response is available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FUSA%2FCO%2F4%2FAdd.1&Lang=en and excerpted below. On November 20, 2017, the Committee informed the United States that it had decided to discontinue the follow-up procedure in respect of the United States and would consider the 2017 follow-up response in the next reporting cycle.

* * * *

2. The Committee's follow-up requests focus on conduct during international operations in the context of armed conflict, and particularly detention and interrogation in the aftermath of the September 11 terrorist attacks. The United States reiterates its long-standing and fundamental disagreement with the Committee's view regarding the application of ICCPR obligations with respect to individuals located outside the territory of the United States. However, in the spirit of cooperation, the United States has endeavored throughout the periodic reporting process to provide details on how the United States has conducted and will continue to conduct thorough and independent investigations of credible allegations of crimes committed during such international operations and of credible allegations of mistreatment of persons in its custody, as well as on final decisions regarding any prosecution of persons for such crimes when such disclosure is appropriate. We hope that the Committee is able to recognize that although the public disclosure of government information is often in the public interest, refraining from releasing information concerning specific individuals can also be appropriate, especially when privacy or other human rights interests counsel against disclosure.

3. In further response to the Committee's request in subparagraph (a), the United States reaffirms and continues to uphold the bedrock principle that torture and cruel, inhuman, or degrading treatment or punishment are categorically and legally prohibited always and everywhere, violate U.S. and international law, and offend human dignity, and the United States has many protections against torture and cruel, inhuman, or degrading treatment or punishment. Torture is contrary to the founding principles of our country and to the universal values to which the United States holds itself and others in the international community. All U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo, are carried out in accordance with all applicable international and domestic laws. Paragraph 177 of our Fourth Periodic Report summarized Executive Order 13491, Ensuring Lawful Interrogations. The National Defense Authorization Act for Fiscal Year 2016 ("2016 NDAA") codified many of the interrogation-related requirements included in the Executive Order, including requirements related to Army Field Manual 2-22.3. It also imposed new legal requirements, including that the Army Field Manual remain publicly available, and that any revisions be made publicly available 30 days in advance of their taking effect.

* * * *

5. U.S. law provides several avenues for the domestic prosecution of U.S. Government officials and contractors who commit torture and other serious crimes overseas. ...

* * * *

7. The U.S. Government has investigated numerous allegations of torture or other mistreatment of detainees. For example, prior to August 2009, career prosecutors at the Department of Justice carefully reviewed cases involving alleged detainee abuse. These reviews led to charges in several cases and the conviction of a Central Intelligence Agency (CIA) contractor and a Department of Defense contractor....

8. In addition to the Department of Justice, and in further response to the Committee's subparagraph (a) request, there are many other accountability mechanisms in place throughout the U.S. Government aimed at investigating credible allegations of torture and prosecuting or punishing those responsible. For example, the CIA Inspector General conducted more than 25 investigations into misconduct regarding detainees after 9/11. The CIA also convened six high-level accountability proceedings from 2003 to 2012. These reviews evaluated the actions of approximately 30 individuals, around half of whom were held accountable through a variety of sanctions.

9. In addition, the U.S. military investigates credible allegations of misconduct by U.S. forces, and multiple accountability mechanisms are in place to ensure that personnel adhere to laws, policies, and procedures. ...

10. The U.S. law, policy, and procedures that we have described in the preceding paragraphs apply to U.S. Government personnel, including persons in positions of command. Persons in positions of command are not exempt from the requirement to comply with the law, nor are they exempt from investigations based on allegations of wrongdoing. As noted above, it is sometimes not appropriate to highlight the cases of particular individuals.

11. In relation to the Committee's subparagraph (a) inquiry regarding judicial remedies available to detainees in U.S. custody at Guantanamo, the United States notes that all Guantanamo detainees have the ability to challenge the lawfulness of their detention in U.S. federal court through a petition for a writ of habeas corpus. ...

* * * *

20. The United States wishes to clarify a misunderstanding of our earlier response regarding Stand Your Ground laws that is apparent from the Committee's request under paragraph (b). The review of Stand Your Ground provisions of state law, as previously reported, was not undertaken by the U.S. Government, but rather by the U.S. Commission on Civil Rights, which is an independent, bipartisan agency established by Congress to investigate, report, and make recommendations to the President and the Congress on civil rights matters. The information we reported regarding the focus of the Commission's independent review and the expectation of a final report was based on publicly available statements by participants in the Commission hearings. The United States has no role in or control over this independent undertaking. Also, our previous reports and responses, including paragraph 22 of our March 31, 2015 response, have made clear the respective roles of federal, state, and local governments and laws under our federal system of government, including criminal laws and rules governing self-defense. In our federal system, these laws are the province of state and local governments.

21. As a final note, the United States wishes to remind the Committee of the long-standing position of the United States regarding the scope of a State Party's ICCPR responsibility with respect to the private conduct of non-State actors, both in relation to gun violence and the exercise of self-defense, as noted in our response dated October 9, 2015, paragraph 10.12 Likewise, the United States does not share the Committee's view as to the applicability of such concepts as "necessity" and "proportionality" in relation to assessing the use of force or self-defense for purposes of Articles 6 and 9 of the ICCPR. These concepts are derived from domestic and regional jurisprudence under other legal systems and are not broadly accepted as legally-binding internationally, nor supported by either the Covenant text or its travaux préparatoires.

* * * *

b. *Draft General Comment 36 on right to life*

In July 2016, the Human Rights Committee completed its draft General Comment on Article 6 of the ICCPR and invited interested stakeholders to comment on the draft. On October 6, 2017, the United States provided its observations on Draft General Comment No. 36 on Article 6—Right to Life. Excerpts follow from the U.S. comments. The committee continued its discussion of Draft General Comment No. 36 in November 2017.

* * * *

3. As discussed below, the range of issues the Committee considers to fall within the scope of the inherent right to life and the obligations of States Parties under Article 6 is overly expansive and the Committee provides little or no authoritative legal support or treaty analysis grounded in established rules of treaty interpretation under international law to support many of its positions. The Committee's citations to its own work products, whether in the form of general comments, concluding observations and recommendations, or "views" on Protocol communications, do not in and of themselves provide legal support under international law. They merely represent a collection of the Committee's prior consistent, non-binding views and carry no greater weight or authority than when first published.

Treaty Interpretation

* * * *

6. The United States has previously observed in its dialogue with the Committee that many of the Committee's more ambitious opinions appear to reflect an attempt to fill what it may consider to be gaps in the reach and coverage of the Covenant. And indeed, as noted below, some of the positions advanced in draft General Comment 36 purport to interpret Article 6 in ways that were proposed and debated by various negotiating delegations, but were excluded from the final text when agreement could not be reached. If one believes there to be gaps in a treaty, the proper approach to take under international treaty law is to *amend* the treaty to fill those gaps.

It is for each Party to decide for itself, as an exercise of its sovereignty, whether it will be bound by what are, in fact, new treaty obligations.

7. In this regard, it is also of concern that the Committee has looked to interpret or fill what it may consider to be gaps in the ICCPR by importing requirements from other human rights treaties. Any such Committee interpretation, expanding on the terms of the ICCPR itself, is inconsistent with a proper interpretive analysis under VCLT Articles 31 and 32, ignores the express terms of the ICCPR, and fails to consider that not all ICCPR States Parties have ratified these other treaties or otherwise consented to such obligations. For example, the Committee's importation in paragraph 8 of requirements under the International Convention for the Protection of All Persons from Enforced Disappearance and in paragraph 28 of requirements under the Convention on the Rights of Persons with Disabilities, however they may also contribute to the right to life, ignores the terms and scope of application of those treaties. And it is unclear on what basis the Committee would suggest in paragraph 30 an implied duty under Article 6 to address "the general conditions in society that may eventually give rise to direct threats to life" or other health-related measures, as characterized by the Committee under paragraphs 9, 10, and 20 of its draft general comment. State Party obligations with respect to health-related rights, for example, are set forth in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which establishes in its Article 12 the right to the enjoyment of the highest attainable standard of physical and mental health. Given that ICESCR was negotiated and concluded in parallel with the ICCPR specifically to address such rights separately and that States party to ICESCR agreed, pursuant to Article 2 of that Covenant, to take steps "with a view to achieving progressively the full realization" of such rights, there is no basis to infer that the negotiators would have considered such measures to be required or necessary to also give effect to the right to life within the meaning of Article 6. Thus, in the context of the right to health contained in the ICESCR, which is the proper lens by which to examine rights characterized as health-related human rights, there is no obligation as part of that right to give effect to the right to life. The right to the enjoyment of the highest attainable standard of health is not commensurate with a right to be healthy or a right not to succumb to disease. It is, instead, oriented toward the progressive realization, in accordance with a State's available resources, of the right for an individual to enjoy the *highest attainable standard* of health. For these reasons, and bearing in mind the history of the negotiations of the two Covenants, any issues concerning access to abortion (paragraph 9 of the Committee's draft) are outside the scope of Article 6. Although the United States agrees that human rights treaties may be mutually reinforcing, this does not mean that the contents of obligations contained within one human rights treaty can be imputed or read into other human rights treaties. Doing so would render meaningless the right of each State to decide for itself whether to accept particular legal obligations associated with particular human rights treaties.

8. We are particularly concerned about the suggestion in paragraph 65 that obligations of States under the ICCPR and international environmental law depend on each other or are changed by each other in their interpretation or application. The Committee has no mandate to suggest that Article 6(1) obligations "must reinforce" States' relevant obligations under international environmental law, or that international environmental law should necessarily "inform the contents" of States Parties' obligations under Article 6(1). Nor can such an interpretation of Article 6(1) find any support in accepted principles of treaty interpretation reflected in VCLT Articles 31 and 32. This would set up an inaccurate description of the legal relationship between the ICCPR and international environmental law, and it would create

significant legal uncertainty about the scope and meaning of important environmental obligations if they were reinterpreted based on a separate area of law like the ICCPR. The relevant treaties cover wholly distinct areas (one of which barely existed at the time the ICCPR was negotiated) and do so with different and varied approaches that are tailored to the particular goals of each treaty. Obligations in environmental treaties, for example, generally do not take a human rights-based approach. The ICCPR thus cannot be a lens through which environmental obligations must be viewed, nor vice versa; that would be beyond the intent of the negotiators that created the ICCPR and particular environmental obligations in various agreements.

9. The United States also believes the Committee is mistaken in paragraph 69 in its view that entry of a reservation with respect to Article 6 would be incompatible with the object and purpose of the ICCPR, especially in light of the article's peremptory and non-derogable nature. The Committee relies solely on its previous General Comment No. 24 for this position. We refer the Committee to the United States' Observations on General Comment No. 24 for a detailed explanation of why the assertion is contrary to the Covenant and international law.

* * * *

II. General Issues of Overarching Concern

Territorial Scope

13. Throughout the draft general comment, references are made to the application of the Covenant to actions outside the territory of a State Party. Particularly problematic is the assertion in paragraph 66 that Covenant obligations extend to "persons located outside any territory effectively controlled by the State who are nonetheless impacted by its military or other activities in a [direct], significant and foreseeable manner." As the United States has previously advised, the Covenant applies only to individuals who are both within the territory of a State Party and subject to its jurisdiction. This interpretation is the most consistent with the ordinary meaning of Covenant text and its negotiating history, and also accords with longstanding international legal principles of treaty interpretation. ...

14. We likewise do not agree that an individual on State-Party-registered ships located beyond that State Party's territorial sea, or on State Party-registered aircraft flying in international airspace (or in another State's airspace), would be located within the territory of that State Party for purposes of application of ICCPR rights. ...

15. Although some States Parties may have accepted somewhat broader jurisdictional obligations as parties to regional human rights conventions, or because doing so might correspond with their domestic laws, the United States has not done so. To the extent that there are differing views among States Parties, the Committee has no mandate to resolve them or to interpret authoritatively the Convention's terms. Thus, we urge the Committee to refrain from any characterization of the jurisdictional and territorial scope of ICCPR obligations that deviates from the express treaty text.

Armed Conflict

16. Paragraph 67 of the Committee's draft states: "Like the rest of the Covenant, article 6 continues to apply also [to the conduct of hostilities] in situations of armed conflict to which the rules of international humanitarian law are applicable. While rules of international humanitarian law may be relevant for the interpretation and application of article 6, both spheres of law are complementary, not mutually exclusive. Uses of lethal force authorized and regulated by and complying with international humanitarian law are, in principle, not arbitrary. By

contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and persons hors de combat, including the targeting of civilians and civilian objects, indiscriminate attacks, failure to apply adequate measures of precaution to prevent collateral death of civilians, and the use of human shields, violate article 6 of the Covenant.”

17. The United States disagrees. Although the United States would agree as a general matter that armed conflict does not suspend or terminate a State’s obligations under the Covenant within its scope of application, we do not believe that the Committee’s views, reflected here or in prior general comments addressing military operations, accord sufficient weight to the well-established principle that international humanitarian law (IHL) is the *lex specialis* with respect to the conduct of hostilities and the protection of war victims (*e.g.*, prisoners of war, civilian internees, persons placed *hors de combat*) in any armed conflict. ...

18. In this regard, we reject the suggestions and assertions in paragraph 67 of the Committee’s draft, including that States Parties should disclose information on the use of weaponry and targeting, the process for identifying military targets, the degree to which it considers non-lethal alternatives, and other details concerning the means and methods of warfare. Although these particular disclosure recommendations are framed in advisory terms, the Committee offers no support for such suggestions or in stating that States Parties “must also investigate allegations of violations of article 6 in situations of armed conflict in accordance with the relevant international standards.”

19. ... The Committee should not seek to opine on issues related to IHL with respect to the study, development, acquisition, adoption, or use of various types of weapons, including non-lethal weapons, nor on the nature of obligations of parties to treaties other than the ICCPR, such as the Treaty on the Non-Proliferation of Nuclear Weapons.

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Derogation

21. There is no question that the right to life, as codified in Article 6, is a non-derogable right under Article 4(2) of the Covenant, and that it, therefore, continues to apply in any circumstance within the Covenant’s scope of application. Regardless of differing views regarding the scope of application, this phrase, “within the Covenant’s scope of application” needs to be added to the second sentence of paragraph 68 for accuracy.

* * * *

Transfers to Other Countries (Non-Refoulement)

24. ... As we have stated before, the Committee’s non-binding opinions on this matter have no legal basis in the text of the treaty or the intention of its States Parties at the time they negotiated or became parties to the ICCPR. The only obligations under international human rights and refugee law that the United States has assumed with respect to such transfers are the *non-refoulement* provisions contained in Article 33 of the Convention Relating to the Status of Refugees (applicable to the United States by virtue of its ratification of the Protocol Relating to the Status of Refugees) and in Article 3 of the Convention Against Torture.

III. Specific Issues of Concern Related to Article 6(1)

25. The Committee should conform its language throughout draft General Comment 36 to the text of the obligations set out under Article 6(1), which are to ensure, within the scope of application of the treaty: (1) that the right to life “shall be protected by law” and (2) that “no one

shall be arbitrarily deprived of his life.” These obligations also must be read in conjunction with the more general obligations under Article 2, in particular under Article 2(2) “[w]here not already provided for by existing legislative or other measures, . . . to take the necessary steps, in accordance with [a State Party’s] constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

26. Article 2(2) is foundational to the reading of any Article setting forth ICCPR-recognized rights. It establishes, as a general matter, that the decision as to the most appropriate means of domestic implementation of ICCPR obligations is left to the internal law and constitutional processes of each State Party. Thus, to the extent that specific conditions, measures or requirements necessary to give effect to an ICCPR right are not expressly set forth in the relevant article, and therefore not an obligation undertaken upon ratification by the State Party, any elaboration of the measures necessary to give it effect are for the State Party to determine and implement in accordance with its laws and any other relevant ICCPR obligations. This is a reflection of a conscious decision of the drafters of the ICCPR, in an effort to protect human rights and secure the widest possible adherence.

Arbitrary Deprivation of Life

27. Article 6(1) provides that no one shall be arbitrarily deprived of his life. The Committee has undertaken, in paragraphs 18 and 19, to give the word “arbitrarily” a uniform meaning expressed in mandatory terms, by elaborating on how it understands the meaning of the treaty provision. The Committee states that this treaty term “must be interpreted more broadly to include” a list of specific elements apparently drawn from individualized, non-binding findings on communications it has considered under the Optional Protocol, inapplicable jurisprudence of the European Court of Human Rights, and reports of U.N. Human Rights Council Special Rapporteurs. As drafted, these elements appear intended to apply in all contexts, without any reference to or consideration of the differing legal systems and constitutional requirements and standards that may pertain in implementing Article 6(1). The Committee recognizes in paragraph 20 that the Covenant does not provide a list of permissible grounds for the taking of a life. For the same reason that the negotiators were unable or unwilling to include such specificity in the treaty, the Committee should refrain from seeking to do so through its general comment practice. As reasonable as these elements may be to consider in adopting domestic measures, assessing self-defense, or justifying the use of force by law enforcement officials in a given situation, it would be more appropriately within the Committee’s mandate for it to recommend consideration of such “elements” by States Parties as best practices in implementing their obligations within their legal systems.

* * * *

Protecting the Right to Life by Law

30. With regard to the general heading, “duty to protect life,” we note that the obligation in Article 6(1) is that “[t]his right shall be protected by law.” The Committee should conform the heading accordingly, as well as any references to this obligation throughout the text.

* * * *

32. Although it is true that Article 2(2) requires States to adopt legislation and other measures to the extent necessary to give effect to ICCPR rights, neither Article 2(2) nor Article 6(1) specifies the conduct to be criminalized, nor the elements or penalties commensurate with such crimes. Indeed, some of the provisions that the Committee appears to put forward as required would encompass dangers or threatening behavior regardless of whether the conduct to be criminalized results in deprivation of life (*e.g.*, “disproportionate use of firearms,” “blood feuds,” “death threats,” “manifestations of violence” or “incitement to violence”). These types of conduct do not clearly fall within the ordinary meaning of “deprivation of life” under Article 6(1), and although they may be worthy of criminalization, this is not expressly required within the ordinary meaning of Article 6(1). It is reasonable to expect States Parties to take steps to review their criminal codes and to adopt new laws as circumstances and threats as conditions demand; however, the ICCPR does not prescribe universal crimes or measures that each State Party “must” adopt to give effect to the right to life.

33. With respect to the Committee’s assertions that States Parties have a duty to take “reasonable positive measures” and exercise “due diligence” to respond to foreseeable threats by private persons and entities (*e.g.*, paragraph 25 of the Committee’s draft), the United States remains of the view that neither the text nor its negotiating history supports any such obligation under the ICCPR. ...

* * * *

36. What is also apparent from the debates throughout the negotiation of Article 6 is that the deprivation of life under discussion was generally understood to refer to actual killings of one person by another, whether attributable to State actors or private actors, and that the measures discussed and compromise achieved only contemplated that any protection to be afforded from the conduct of non-States actor would be pursuant to domestic criminal laws. ...

37. In light of the ordinary meaning of Article 6(1) and this negotiating history, there is no basis to seek to further expand upon an obligation to ensure the right to life that would entail a duty to protect life from all foreseeable threats to life and to ensure the “effective enjoyment of the right life” (paragraph 28). The United States does not agree that “[t]he obligation of States parties to respect and ensure the right to life extends to all threats that can result in loss of life” and that “States parties may be in violation of article 6 even if such threats have not actually resulted in loss of life” as suggested in paragraph 7 of the draft. Similarly, the United States does not agree with the Committee’s assertions of the positive measures articulated in paragraphs 25, 26, 27 and 30.

38. Any suggestion, even if only by implication, of a duty to protect life that would extend to addressing “general conditions in society that may eventually give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity” strays beyond the mandate of the Committee and is unsupported by established rules of treaty interpretation with respect to Article 6. Whatever steps a State may take to address such conditions as those addressed in the draft such as environmental pollution, life threatening disease, the adequacy of health care, traffic and industrial accidents, hunger, poverty or homelessness, natural disasters or cyber-attacks, none of these fall within the scope of ICCPR obligations. Attention spent on such issues in the context of a general comment or State Party periodic reporting diverts attention from the essential issues for which the Committee has responsibility.

IV. Death Penalty

39. Consistent with its mandate, the sole responsibility of the Committee is to advise States Parties, which have not abolished the death penalty, on issues that arise in its application to individual cases within the terms of Article 6 (2)-(5). As the Committee correctly notes in paragraph 37 of its draft, Article 6 strictly limits the application of the death penalty leaving little room for further interpretation or elaboration. Any observations or advice by the Committee regarding State practices in implementing their obligations in this area need to be expressed as best practices or in advisory “should” terms, rather than obligatory terms such as “have to” or “must.”

40. Committee views regarding abolition of the death penalty, and in particular the view that abolition is “legally irrevocable” (paragraph 38), lack legal support grounded in the interpretive rules reflected in VCLT Article 31 and 32 and should either be deleted or expressed as views of the Committee regarding best practices. The ICCPR is silent on the question of reinstating the death penalty after abolition. ...

41. The same applies to the Committee’s assertion in paragraph 38 of the draft that a State Party may not modify domestic laws after ratifying the Covenant in any way that would either create a new capital offense or remove legal conditions under an existing capital offense that would permit its imposition in circumstances not previously allowed. The article is silent and the Committee has provided no authoritative legal support or treaty analysis grounded in established rules of treaty interpretation under international law. The only relevant ICCPR obligation is the requirement in Article 6(2) that the death penalty be imposed in accordance with the law in force at the time of the commission of the crime, applied in conformity with the Article 15 obligation that a heavier penalty not be imposed than the one applicable at that time. Certainly, if the States Parties had considered or agreed to any further restriction as proposed by the Committee, these provisions would not read as they do. The Committee’s related arguments in paragraph 38 are addressed in Part II above.

Death Penalty in Relation to Other Covenant Provisions

42. We agree that under Article 6, the death penalty may not be imposed or carried out in a manner that is contrary to the provisions of the ICCPR, including Article 7 with respect to any method that would amount to torture or to other cruel, inhuman, or degrading punishment or punishment, and Article 14, with respect to fair trial and appeal guarantees. We also agree that violation of those articles in the course of applying the death penalty could also lead to a violation of Article 6. The plain language in Article 6(2) requires that it not be imposed contrary to other Covenant provisions.

43. However, the United States disagrees with several of the views expressed in paragraph 44 of the draft, particularly regarding certain methods of execution and the impact of solitary confinement or delays in carrying out the sentence. We suggest that any discussion of repercussions and potential violations of other Articles that do not lead to the death of an individual would more properly be addressed in Committee general comments on such other articles.

44. We cannot agree with the Committee’s view that “a failure to promptly inform detained foreign nationals charged with a capital crime of their right to consular notification pursuant to the Vienna Convention on Consular Relations” could “render the imposition of the death penalty contrary to article 6 (paragraph 46).” As the Committee recognizes in paragraph 46, consular notification is not expressly required under Article 14 or any other Covenant provision, and the Committee has offered no treaty analysis grounded in VCLT Articles 31 or 32

to support such a view. Consular notification is not a “right” owed to a foreign national in detention. Rather, consular access and assistance is a right exercised by the detained individual’s State of nationality. The consular notification protections under the Vienna Convention on Consular Relations (VCCR) are based on principles of reciprocity, nationality, and function. Nor is consular notification a necessary component of the right to a fair trial or the right to due process in criminal proceedings. ...

45. We strongly disagree with the Committee’s assertion in paragraph 50 that either the requirement of a final judgment before execution under Article 6(2) or the right of the sentenced person to seek pardon or commutation under Article 6(4) can be considered to encompass appeals to any and all “available non-judicial avenues,” to include international commissions, monitoring bodies, or U.N. treaty bodies. Further, there is no support for the suggestion that a failure to implement non-binding recommendations, interim measures, or other requests in paragraph 50 by such international bodies would be contrary to any ICCPR obligation, including the reporting obligation under Article 40 to submit reports in response to the Committee’s request. The requirement under Article 6(2) that the death penalty can only be carried out “pursuant to a final judgement rendered by a competent court” can only be read in conjunction with Article 14(1) and (5) to mean a competent, independent and impartial higher tribunal established by law. The United States is not subject to the jurisdiction of any international court that would fall within such terms. It is for States that are subject to the jurisdiction of such an international court to interpret the scope of their obligation in that regard.

46. With respect to the question of abolition, there is no basis for the assertion in paragraph 54 that Article 6, paragraph 6 reaffirms the position of States Parties that there should be “an irrevocable path towards complete abolition.” Neither the wording nor the *travaux préparatoires* supports such a view, particularly in view of how controversial the subject was throughout the negotiation of Article 6. Although this may have been the view of some States during the drafting, it was not the view of all States, and the entire Article, including paragraph 6, was neutrally drafted for that reason. ...

* * * *

3. Human Rights Council

a. Overview

The United States was elected to the UN Human Rights Council as a voting member in for a three-year term starting in 2017 after spending a mandatory year off the Council in 2016. The key outcomes of each regular session of the HRC for the United States are summarized in fact sheets issued by the State Department. The key outcomes for the 34th session are described in a March 27, 2017 fact sheet, available at <https://www.state.gov/r/pa/prs/ps/2017/03/269155.htm>. They include: reducing support for anti-Israel resolutions; renewal of the mandate of the Commission on Human Rights in South Sudan; extension of the UN role in justice and reconciliation in Sri Lanka; a strengthened role of the Office of the UN High Commissioner for Human Rights (“OHCHR”) in collecting evidence of human rights abuses in North Korea;

resolutions on Burma, Iran, Syria, Mali, Haiti, Libya, and Georgia; and resolutions on freedom of expression, torture, freedom of religion, and human rights defenders.

U.S. Permanent Representative to the UN Nikki Haley attended the opening of the 35th Session of the HRC, which was held June 6-23, 2017. Key outcomes for the United States from the 35th Session are summarized in a June 26, 2017 fact sheet available at <https://www.state.gov/r/pa/prs/ps/2017/06/272182.htm>. They include country-specific resolutions on: the DRC, Venezuela, Syria, Ukraine, Belarus, Eritrea, and Cote d'Ivoire; and thematic resolutions on: gender equality, trafficking in persons, child/early/forced marriage, countering terrorism, rights of persons with disabilities, independence of judges and lawyers, and human rights and transnational corporations. Other outcomes of note for the United States include country-specific resolutions and discussions on the DRC, Venezuela, Syria, Ukraine, Belarus, Eritrea, and Cote d'Ivoire. Thematic resolutions of importance include resolutions on eliminating violence against women and discrimination against women and girls; extending the mandate of the special rapporteurs on trafficking in persons and child, early, and forced marriage; protecting human rights while countering terrorism; extending the mandate of special rapporteurs on the independence of judges and lawyers and the rights of persons with disabilities; and extending the work of the working group on human rights and transnational corporations.

Key outcomes of U.S. priorities at the HRC's 36th Session are summarized in an October 3, 2017 fact sheet, available at <https://www.state.gov/r/pa/prs/ps/2017/10/274577.htm>. They include country-specific resolutions or other actions on: Yemen; Venezuela; Burundi; the DRC; Sudan; Syria; Somalia; CAR; Burma; Crimea; the Philippines; and Cambodia. Key thematic resolutions and actions at HRC 36 include: extending the mandate of the special rapporteurs on truth, justice, reparation, and guarantees of non-recurrence; the human rights of indigenous persons, women, and Sustainable Development Goals ("SDGs"); and renewing the mandate of the Working Group on Enforced and Involuntary Disappearances.

On June 6, 2017, Ambassador Haley delivered remarks at the Graduate Institute of Geneva on "A Place for Conscience: the Future of the United States in the Human Rights Council." Her remarks are excerpted below and available at <https://geneva.usmission.gov/2017/06/06/ambassador-nikki-haley-remarks-at-the-graduate-institute-of-geneva/>.

* * * *

The first chairman of the United Nations organization dedicated entirely to human rights was a chairwoman.

Eleanor Roosevelt was elected to head the Human Rights Commission when it first met in January 1947. She was a natural choice. Mrs. Roosevelt was already well known for her heartfelt advocacy for universal human rights.

She was a woman of deep faith. Her nightly prayer asked God to quote, “make us sure of the good we cannot see, and of the hidden good in the world.” Eleanor Roosevelt was an idealist. But she was no pushover.

The first item on the Commission’s agenda was drafting the Universal Declaration of Human Rights. During the debate, the United States and the Soviet Union clashed repeatedly in some of the opening skirmishes of the Cold War.

The Soviet delegate taunted Mrs. Roosevelt: How could the United States call itself a champion of human rights when African Americans were still discriminated against? To which Mrs. Roosevelt acknowledged that yes, the United States still had problems, and progress was being made.

And then she proposed a deal that quieted the Soviet delegate: She said the Soviets could send a delegation to observe the United States—if the United States could do the same to the Soviet Union.

Of course, the Soviets never did and never would give free reign to a U.S. delegation. She was making a point. She was calling out a fellow commission member for using human rights as a cover for its political agenda.

Mrs. Roosevelt’s vision of the Human Rights Commission was bigger than any one country. She saw the Commission as a place for conscience, not politics. She knew that if it was allowed to become a forum for hypocrisy and political point-scoring, it would do more to hurt the cause of human rights than to help it.

My country has a unique beginning, founded on human rights, holding self-evident the truth that all men are created equal with rights to life, liberty, and the pursuit of happiness. Of course America did not invent these rights—God did. Simply by our birth, human beings are endowed by our Creator with certain inalienable rights. These rights belong to all of us. They are not the gift of any government. They cannot legitimately be taken away by any government.

The American idea is that government exists to serve the people, not the other way around. Government should secure our rights, not violate them.

We continue striving to achieve this principle through self-government, using elections and the rule of law to hold our leaders accountable. The inherent dignity of the individual is not secured by words but by actions. This is the standard by which we judge ourselves as a nation—and by which we invite others to judge us as well.

It is this commitment to the equal worth of all human beings that leads the United States to support universal human rights. And of course we are not alone. There are many other nations, both on the Council and off, that affirm universal human rights and act to protect and extend them.

When the Human Rights Council has acted with clarity and integrity, it has advanced the cause of human rights. It has brought the names of prisoners of conscience to international prominence and given voice to the voiceless.

At times, the Council has placed a spotlight on individual country violators and spurred action, including convening emergency sessions to address the war crimes being committed by the Assad regime in Syria. The Council’s Commission of Inquiry on North Korea led to the Security Council action on human rights abuses there.

The Council is at its best when it is calling out human rights violators and abuses, and provoking positive action. It changes lives. It pushes back against the tide of cynicism that is building in our world. And it reassures us that it deserves our continued investment of time and treasure.

But there is a truth that must be acknowledged by anyone who cares about human rights: When the Council fails to act properly—when it fails to act at all—it undermines its own credibility and the cause of human rights. It leaves the most vulnerable to suffer and die. It fuels the cynical belief that countries cannot put aside self-interest and cooperate on behalf of human dignity. It re-enforces our growing suspicion that the Human Rights Council is not a good investment of our time, money, and national prestige.

Tragically, we've been down this road before.

In 2005, then-Secretary-General Kofi Annan disbanded the precursor to the Human Rights Council, the Human Rights Commission. He blamed what he called its “credibility deficit.” The description was well-earned.

Many of the world's worst human rights offenders were elected to the seats on the Commission. They used those positions, not to advance human rights, but to shield themselves from criticism or to criticize others.

In short, the Commission had lost the world's trust. It had stained and setback the cause of human rights.

These problems were supposed to have been fixed when the new Council was formed. Sadly, the case against the Human Rights Council today looks an awful lot like the case against the discredited Human Rights Commission over a decade ago.

Once again, over half the current member countries fail to meet basic human rights standards as measured by Freedom House.

Countries like Venezuela, Cuba, China, Burundi, and Saudi Arabia occupy positions that obligate them to, in the words of the resolution that created the Human Rights Council, “uphold the highest standards” of human rights. They clearly do not uphold those highest standards.

And once again, as with the disgraced and disbanded Human Rights Commission, the victims of the world's most egregious human rights violations are too often ignored by the very organization that is supposed to protect them.

In Venezuela, the government has systematically destroyed civil society through arbitrary detention, torture, and blatant violations of freedom of the press and freedom of expression. Children are starving to death. Mothers dig through trash cans to feed their families. This is a crisis that has been 18 years in the making. The Venezuelan people have been robbed of their human rights.

And yet, not once has the Human Rights Council seen fit to condemn Venezuela. Quite the contrary—the Council chose to showcase Venezuela's work while protestors were being beaten in the streets. Just two years ago, President Maduro was invited to address the Council, just weeks after Venezuela was re-elected as a member.

In Cuba, the government continues to arrest and detain critics and human rights advocates. The government strictly controls the media and severely restricts the Cuban people's access to the internet. Political prisoners by the thousands continue to sit in Cuban jails. Yet Cuba has never been condemned by the Human Rights Council. It, too, is a member country.

In fact, Cuba uses its membership in the Council as proof that it is a supporter of human rights, instead of a violator that it is. The Cuban deputy foreign minister called Cuba's 2016 re-election to the Human Rights Council, “irrefutable evidence of Cuba's historic prestige in the promotion and protection of all human rights for Cubans.”

This is a reversal of the truth that would make George Orwell blush.

The list goes on.

In 2014, Russia invaded Ukraine and took over Crimea. This illegal occupation resulted in thousands of civilian deaths and injuries as well as arbitrary detentions. No special meeting of the Human Rights Council was called, and the abuses continue to mount.

Robert Mugabe continues his decades-long campaign of repression in Zimbabwe. Nothing from Geneva. Instead, human rights violators Iran, Venezuela, and North Korea, took advantage of a Council review to commend Mugabe's so-called "promotion and protection of human rights."

The Human Rights Council has been given a great responsibility. It has been charged with using the moral power of universal human rights to be the world's advocate for the most vulnerable among us. Judged by this basic standard, the Human Rights Council has failed.

In case after case, it has been a forum for politics, hypocrisy, and evasion—not the forum for conscience that its founders envisioned. It has become a place for political manipulation, rather than the promotion of universal values. Those who cannot defend themselves turn to this Council for hope but are too often disappointed by inaction.

Once again, the world's foremost human rights body has tarnished the cause of human rights. The United Nations must now act to reclaim the legitimacy of universal human dignity.

For all of us, this is an urgent ask. Human rights are central to the mission of the United Nations. Not only are they the right thing to do, they're the smart thing to do.

I dedicated the U.S. presidency of the Security Council in April to making the connection between human rights and peace and security.

This is a cause that is bigger than any one organization. If the Human Rights Council is going to be an organization we entrust to protect and promote human rights, it must change. If it fails to change, then we must pursue the advancement of human rights outside of the Council.

America does not seek to leave the Human Rights Council. We seek to reestablish the Council's legitimacy.

There are a couple of critically necessary changes.

First, the UN must act to keep the worst human rights abusers from obtaining seats on the Council. As it stands, elections for membership to the Council are over before the voting even begins. Regional blocs nominate slates of pre-determined candidates that never face any competition for votes.

No competition means no scrutiny of candidates' human rights records. We must change the elections so countries are forced to make the case for membership based on their records, not on their promises.

Selection of members must occur out in the open for all to see. The secret ballot must be replaced with open voting. Countries that are willing to support human rights violators to serve on the Human Rights Council must be willing to show their faces. They know who they are. It's time for the world to know who they are.

Second, the Council's Agenda Item Seven must be removed. This, of course, is the scandalous provision that singles out Israel for automatic criticism. There is no legitimate human rights reason for this agenda item to exist. It is the central flaw that turns the Human Rights Council from an organization that can be a force for universal good, into an organization that is overwhelmed by a political agenda.

Since its creation, the Council has passed more than 70 resolutions targeting Israel. It has passed just seven on Iran. This relentless, pathological campaign against a country that actually has a strong human rights record makes a mockery not of Israel, but of the Council itself.

The Council's effort to create a database designed to shame companies for doing business in Israeli controlled areas is just the latest in this long line of shameful actions.

Blacklisting companies without even looking at their employment practices or their contributions to local empowerment, but rather based entirely on their location in areas of conflict is contrary to the laws of international trade and to any reasonable definition of human rights. It is an attempt to provide an international stamp of approval to the anti-Semitic BDS movement. It must be rejected.

Getting rid of Agenda Item Seven would not give Israel preferential treatment. Claims against Israel could still be brought under Agenda Item Four, just as claims can be brought there against any other country. Rather, removal of Item Seven would put all countries on equal footing.

The Council is no more justified in having a separate agenda item on Israel than it is on having one for the United States, or Canada, or France, or the United Kingdom. More appropriate would be to have an agenda item on North Korea, Iran, and Syria, the world's leading violators of human rights.

These changes are the minimum necessary to resuscitate the Council as a respected advocate of universal human rights.

For our part, the United States will not sit quietly while this body, supposedly dedicated to human rights, continues to damage the cause of human rights.

In the end, no speech and no structural reforms will save the members of the Human Rights Council from themselves. If they continue to put politics ahead of human rights, they will continue to damage the cause that they supposedly serve.

All those years ago, Mrs. Roosevelt understood this. She was engaged in building an institution to bring the nations of the world together to protect the most vulnerable. But she knew the good she was seeking would not come from that institution, but from the hearts of men and women who would work in it. Every night, she prayed: "Save us from ourselves and show us a vision of a world made new."

I believe that vision is still achievable. I believe we can come together. I know there are many who share the belief.

The status quo is not acceptable. It is not a place for countries who champion human rights.

I call on all likeminded countries to join in making the Human Rights Council reach its intended purpose.

Let the world be on notice: We will never give up the cause of universal human rights. Whether it's here, or in other venues, we will continue this fight.

Thank you.

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Along with explanations of positions for specific resolutions, the United States also made general statements at HRC 35 and HRC 36 explaining overarching concerns with regard to several resolutions under Item 3 of the Human Rights Council agendas, which address the protection and promotion of human rights. These general statements reflect broad, overarching commentary on policy and legal issues that arose in the context of multiple resolutions in Item 3.

Specifically, on June 23, 2017, at the 35th Session of the HRC, Jason Mack delivered the U.S. statement, available at <https://geneva.usmission.gov/2017/06/23/us-clarifies-position-on-issues-in-various-resolutions-at-35th-hrc/>. Similarly, on September 29, 2017, at the 36th Session of the HRC, Jason Mack delivered the U.S. statement, excerpted below and available at <https://geneva.usmission.gov/2017/09/29/general-statement-by-the-united-states-human-rights-council-item-3/>.

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The United States understands that the Human Rights Council’s resolutions do not change the current state of conventional or customary international law. Nor does the Universal Declaration of Human Rights itself create legal obligations. We do not read these resolutions to imply that states must join or implement obligations under international instruments to which they are not a party. We understand abbreviated references to certain human rights to be shorthand for the accurate terms used in the applicable international treaty, and we maintain our longstanding positions on those rights. The United States understands that any reaffirmation of prior documents applies only to those states that affirmed them initially, and, in the case of international treaties or conventions, to those States who are party. “Welcoming” a report should not be understood as acceptance of all assertions, conclusions, or recommendations contained therein.

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 interpret 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). We note that countries have a wide array of policies and actions that may be appropriate in promoting the progressive realization of economic, social, and cultural rights. Therefore, we believe that these resolutions should not try to define the content of those rights.

The concerns of the United States about the existence of a “right to development” are long-standing and well known. While we recognize that development facilitates the enjoyment of human rights, the “right to development” does not have an agreed international meaning. Furthermore, work is needed to make any such “right” 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.

The United States recognizes the 2030 Agenda as a global framework for sustainable development that can help countries work toward global peace and prosperity. We applaud the call for shared responsibility in the Agenda and emphasize that all countries have a role to play in achieving its vision. We also strongly support national responsibility stressed in the Agenda. However, each country has its own development priorities, and we emphasize that countries must work towards implementation in accordance with their own national circumstances and priorities.

In terms of the relationship between human rights and development, we recall the Vienna Declaration and Programme of Action, which recognizes that “development facilitates the enjoyment of all human rights” but that “the lack of development may not be invoked to justify

the abridgement of internationally recognized human rights.” We recognize that development, including aspects of the 2030 Agenda, and respect for human rights and fundamental freedoms can be mutually reinforcing, but emphasize that states must respect all of their human rights obligations, both in the context of development and beyond.

The United States is firmly committed to providing equal access to education. As educational matters in the United States are primarily determined at the state and local levels, we understand that when resolutions call on States to strengthen various aspects of education, including with respect to curriculum, this is done in terms consistent with our respective federal, state, and local authorities.

The United States is concerned about the growth in funding related to the Human Rights Council. UN regular budget support to OHCHR has more than tripled since the mid-2000s. In addition, significant amounts of regular budget funding support the human rights pillar via UN conference services. The United States works to contain costs where possible but is often the lone voice advocating fiscal discipline.

This general statement applies in particular to the following resolutions: The full enjoyment of human rights by all women and girls and the systematic mainstreaming of a gender perspective in the implementation of the 2030 Agenda on Sustainable Development Goals, Human Rights and Indigenous Peoples, Human Rights in the Administration of Justice, including juvenile justice, Promoting international cooperation to support national human rights follow up systems and processes including, as appropriate, national mechanisms for reporting and follow-up: their potential contribution to the implementation of the 2030 Agenda, Mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; Mandate of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mental Health and Human Rights, Unaccompanied migrant children and adolescents and human rights, World Programme for Human Rights Education.

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On September 19, 2017, the United States joined the Kingdom of the Netherlands and the United Kingdom in issuing a joint statement on reform of the HRC following a meeting co-hosted by Ambassador Haley, Dutch Foreign Minister Bert Koenders, and British Foreign Secretary Boris Johnson. That statement follows and is available at <https://usun.state.gov/remarks/7985>.

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The United States, the Kingdom of the Netherlands, and the United Kingdom co-hosted a meeting on reform of the UN Human Rights Council on the margins of the UN General Assembly on September 19, 2017. The three co-host nations thank the 37 countries that joined this meeting and helped lead a productive dialogue, making clear their commitment to achieving progress on meaningful reforms to strengthen the Human Rights Council.

We agreed that reform is urgently needed to ensure that the Council's status as a respected advocate for human rights is secured, noting that the Council cannot perform this function if serial human rights violators are continuously allowed to serve on it. We must seek reforms that help advance global human rights and ensure that the UN's premier human rights body lives up to its name.

Ten years from passing the Human Rights Council resolution that set out the Council's agenda and procedures is an appropriate moment to explore ways to make the Council more effective and we call on other UN Member States to stand with us in working to achieve progress on reforms this year, both in Geneva and New York.

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b. *Special session on Burma*

In December 2017, the HRC held a special session on the human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar. The U.S. co-sponsored the resolution adopted at the session. On December 5, 2017, Ambassador Kelley E. Currie, U.S. Representative to the U.N. Economic and Social Council, made a statement regarding the session, excerpted below and available at: <https://geneva.usmission.gov/2017/12/05/unhrc-special-session-on-burma/>. In addition, at the time of the resolution's adoption, the United States also made an explanation of position, which can be found at <https://geneva.usmission.gov/2017/12/06/eov-unhrc-special-session-on-burma/>.

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The United States is pleased to cosponsor today's special session in order to shine an urgent light on the grave human rights abuses occurring in Burma. We appreciate the information shared by the High Commissioner, the Special Rapporteur, Pak Marzuki Darusman, and SRSG Patten and others who have brought to light shocking new details about the nature and scale of the violence. We again call on the Government of Myanmar to provide access for the Fact Finding Mission and other UN mechanisms. We thank Bangladesh for organizing this session and for its generosity in receiving so many refugees fleeing for their lives.

The United States again condemns the August 25 attacks. However, no provocation can justify the widespread and horrendous atrocities that have been perpetrated by Burma's security forces against the Rohingya population. The United States and other countries have deemed this to be a calculated campaign of ethnic cleansing. As we have heard today, facts continue to come to light describing the events of recent months as possibly premeditated—including actions taken well before August 25.

These are neither isolated nor unprecedented behaviors by the Tatmadaw. UN bodies have documented decades of similar, systemic abuses against ethnic communities across Myanmar. Today in Kachin and Northern Shan State, tens of thousands of IDPs are suffering yet another winter of fear and deprivation. These ethnic groups have been virtually alone within Burma in speaking out against the treatment of the Rohingya because they know this brutality so well from their own experience.

The United States again calls on Myanmar authorities to respect the rights of its entire population, provide unhindered UN, humanitarian and media access throughout Burma, especially in Rakhine State, ensure justice for victims and accountability for those responsible for human rights violations and abuses, and take all necessary measures so that all persons can safely and voluntarily return to their places of origin. We share the concerns raised by SR Lee regarding the repatriation agreement.

The United States welcomes the government's commitment to implement the Annan commission report, including with respect to access to citizenship and reform of the discriminatory 1982 Citizenship law. It is incumbent upon the security forces to respect these commitments, and to assist the civilian government in implementing them instead of undermining them. It is also essential that the hate speech, dehumanization and incitement to violence against the Rohingya come to an end. The lack of citizenship status and associated civil and political rights is the fundamental root cause of this crisis. Addressing this is an urgent imperative for the government of Myanmar in order to create conditions allowing safe, voluntary and dignified return. The first step in this is also to stop denying the seriousness of the current situation.

This Council, along with the Security Council and the General Assembly, all have an obligation to ensure that not one more Rohingya child will live through the violence we have seen in the past few months. ...

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c. *Actions regarding Sri Lanka*

On March 13, 2017 at the 34th session of the HRC, the Friends of Sri Lanka Core Group, including the United States, tabled a draft resolution on promoting reconciliation, accountability, and human rights in Sri Lanka. See March 15, 2017 State Department press statement, available at <https://geneva.usmission.gov/2017/03/16/support-for-human-rights-council-resolution-on-sri-lanka/>. Sri Lanka co-sponsored the resolution as it had in past years.

On March 23, 2017, at the 34th Session of the HRC, the United States introduced the resolution, "Promoting reconciliation, accountability and human rights in Sri Lanka." The resolution was adopted by consensus on March 23, 2017. The resolution asks the Government of Sri Lanka to continue its process of reconciliation and justice for two more years. William J. Mozdierz, head of the U.S. delegation to the HRC's 34th session, delivered the introductory statement, which is available at <https://geneva.usmission.gov/2017/03/23/statement-by-the-u-s-introducing-the-resolution-on-sri-lanka-at-the-human-rights-council/>. In the introductory statement, the United States thanked Sri Lanka and other member states and stakeholders for their cooperation on the resolution. Mr. Mozdierz said:

This resolution reflects our continued strong commitment to peace, justice, and reconciliation for all the people of Sri Lanka. It recognizes both the important steps that Sri Lanka has taken toward protecting human rights and fundamental

freedoms, and also the need for full implementation of remaining steps to ensure the consolidation of these protections. Sri Lanka's co-sponsorship of this resolution is a testament to the Sirisena administration's positive engagement with the international community and commitment to improving the lives of all Sri Lankans.

d. *Actions regarding South Sudan*

On March 24, 2017, Mr. Mozdierz delivered the U.S. statement introducing a resolution on the situation of human rights in South Sudan. The statement is excerpted below and available at <https://geneva.usmission.gov/2017/03/24/u-s-introduces-resolution-on-human-rights-in-south-sudan/>.

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We thank South Sudan, members of the African Group, our core group members, Albania, Paraguay, and the United Kingdom, and all other member states and stakeholders for their constructive engagement on this resolution.

The human rights situation in South Sudan is deeply alarming to us all. Numerous reports and statements, including from the High Commissioner for Human Rights, the Commission on Human Rights in South Sudan, the Special Adviser of the Secretary-General on the Prevention of Genocide, and the African Union have detailed ongoing gross human rights violations and abuses and violations of international humanitarian law. Just last week, we heard from the Commission chilling accounts of whole villages burned to ashes, women gang raped, young girls held as sexual slaves, and individuals targeted because of their perceived political allegiances, as calculated by ethnicity. The report also underscores that impunity for these and other severe human rights violations and abuses remains widespread.

We are also gravely concerned about the recent declaration of famine in parts of the former Unity State, as well as severe food insecurity affecting millions as highlighted yesterday by the Secretary-General. Mass displacements continue within and outside South Sudan.

We must come together to address these atrocities and put an end to the humanitarian crisis. The Human Rights Council must condemn violence by all sides, encourage domestic and regional efforts to foster a national reconciliation process, and ensure accountability.

In response to the Commission's recommendations, we put forward today a resolution to enhance the Commission's mandate to determine and report the facts and circumstances of, collect and preserve evidence of, and clarify responsibility for alleged gross violations and abuses of human rights and related crimes. The Commission's work will be made available to transitional justice mechanisms, including the Hybrid Court, to help end impunity and lay the groundwork for accountability. In this vein, we reiterate our call for the speedy establishment of the Hybrid Court by the African Union pursuant to Chapter V of the 2015 peace agreement.

We welcome the Government of South Sudan's stated commitment to cooperate with OHCHR, UN special procedures, and the Commission on Human Rights in South Sudan. We call upon the Government to continue to cooperate fully and constructively with and to provide

unhindered access to them, as well as to provide such access to the United Nations Mission in South Sudan, the Regional Protection Force, regional, subregional, and international mechanisms, and humanitarian workers on the ground.

We are encouraged by the strong support from other delegations that have joined us in cosponsoring this resolution.

Our shared goals are to prevent this human rights crisis, dating to 2013, from intensifying and to help South Sudan establish a just and enduring peace. It is urgently important to address the ongoing atrocities in South Sudan and to renew the Commission's mandate.

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e. Actions regarding the Democratic Republic of Congo

On June 23, 2017, the U.S. Mission to the UN issued a statement by Ambassador Haley on the HRC resolution establishing an international investigation into the violence in the Democratic Republic of the Congo. That statement follows and is available at <https://usun.state.gov/remarks/7879>.

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Today, the United Nations Human Rights Council (HRC) adopted a resolution establishing an international team that will investigate mass atrocities occurring in the Kasai provinces of the Democratic Republic of the Congo (DRC). The violence in the Kasais, which has left more than 3,000 people dead and over one million displaced since last August, is the result of the DRC government's failure to hold elections in accordance with the country's constitution. It also claimed the lives of UN experts Michael Sharp and Zaida Catalan, who were investigating human rights violations in the Kasais.

"We are glad the Human Rights Council has finally taken action to investigate human rights abuses in the DRC," said Ambassador Nikki Haley. "However, there is still much work to be done to bring justice to the victims of these brutal crimes. Investigators must be able to carry out their work without interference, and the Congolese government must fully cooperate with the investigation. If they fail to do so, the Council must be prepared to act."

Last week, the United States called on the HRC to take decisive action and launch an independent investigation into the human rights violations and abuses in the DRC.

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B. DISCRIMINATION**1. Race****a. UN**

On October 31, 2017, Stefanie Amadeo, U.S. Deputy Representative to ECOSOC, delivered remarks at the Third Committee general discussion on racism and self-determination. Her remarks are available at <https://usun.state.gov/remarks/8069>, and excerpted below.

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The United States would like to reaffirm its commitment to combatting racism and racist ideology worldwide. Too many people in this lifetime and throughout history have needlessly and tragically lost their lives due to discrimination because of their race, color, ethnicity, and religion. Racism comes in many forms—in violence, mass murders, and genocide as well as in everyday intolerance, persecution, and hate. Therefore, we all have a duty to stand up, speak out, and condemn discrimination of any kind. As Ambassador Nikki Haley recently said, “Those who spew hate are few, but loud. We must denounce them at every turn and isolate them the same way they wish to isolate others.”

We are aware that combatting racism is a challenge that every nation faces, including our own, but we must acknowledge that ending racism is not achieved by government action alone—it is achieved in the hearts and minds of the people we serve. In a free society, each citizen has to choose not to hate or to tolerate those who do. And in all nations, government should not sit idly by in the face of intolerance. Instead, leaders should speak out against racism and employ domestic tools that address discrimination.

In the United States, we have established robust legal mechanisms that protect individual liberties and defend against discrimination and violence. We have a public school system that educates our children about our history and teaches the next generation of Americans the importance of respect, civil rights, and fundamental freedoms. We have developed a culture that celebrates diversity, rather than one that denounces or seeks to eliminate it.

The American spirit and the American dream are what unite us, and our differences—and the freedom to be different—make us stronger. As Secretary Rex Tillerson recently said, “Racism is evil; it is antithetical to America’s values; it is antithetical to the American idea. So, we condemn racism and bigotry in all its forms.” And because of that, we will continue to stand with those around the world who choose peace over hate.

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On November 20, 2017 U.S. Advisor to ECOSOC Mordica Simpson provided the U.S. explanation of vote on a resolution calling for concrete action for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and

Programme of Action. That statement is excerpted below and available at <https://usun.state.gov/remarks/8157>.

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...From our own experience and history, the United States remains convinced that the best antidote to offensive speech is in fact free speech—not bans and censorship but a free society where goodness and justice have the opportunity to triumph over evil and persecution.

We regret that we cannot support this resolution on such an important topic, but our concerns are well known and have been repeated year after year. Among our chief concerns about the resolution are its endorsements of the Durban Declaration and Program of Action as well as the outcome of the Durban review conference, particularly its unfair and unacceptable singling out of Israel and its endorsement of overbroad restrictions on freedom of speech and expression. This resolution serves as a vehicle to prolong the divisions caused by the Durban conference and its follow-up, rather than providing a comprehensive and inclusive way forward for the international community to combat the scourge of racism and racial discrimination. In addition, we cannot accept the resolution's legally incorrect implication that any and all reservations to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination are per se contrary to the object and purpose of the treaty. We reiterate that this resolution has no effect as a matter of international law.

Finally, we underscore our concerns about the additional costs this resolution will impose on the UN's regular budget through the request for reactivation of the Independent Eminent Experts' activities. In view of the significant constraints on the UN's regular budget and the limited ability of member states to provide increasing amounts of resources, we stress the need for this body to consider carefully the resource implications of such requests before making them.

For all of these reasons, we cannot support this resolution and will vote no as we have consistently done for years. We will, however, continue to denounce hate and to support free societies that promote individual liberties and defend against discrimination and violence.

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b. Human Rights Council

On March 24, 2017, at HRC 34, Mr. Mozdierz delivered the U.S. explanation of vote on "the Elaboration of Complementary Standards to the International Convention on the Elimination of All Forms of Racial Discrimination." That explanation is excerpted below and available at <https://geneva.usmission.gov/2017/03/24/u-s-eov-on-the-elaboration-of-complementary-standards-to-the-international-convention-on-the-elimination-of-all-forms-of-racial-discrimination/>.

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The United States will call a vote and vote “no” on this resolution on the elaboration of complementary standards to the International Convention on the Elimination of All Forms of Racial Discrimination.

The United States remains committed to combatting racism and racial discrimination as well as to implementing our existing obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and we encourage other states to implement their commitments and obligations in this regard. We believe the CERD provides comprehensive protections and constitutes the primary international framework to address all forms of racial discrimination, which includes discrimination on the basis of national origin. The push to negotiate a new protocol to the CERD not only distracts from the implementation of existing obligations, but risks undermining the Convention by implying that it does not already provide comprehensive protections in this area. As several members of the CERD Committee have underscored to the Ad Hoc Committee, the CERD is sufficient to address contemporary forms of racism such as xenophobia and there is no need for a protocol on this issue.

We would also be deeply concerned if any new protocol were used as a vehicle to push for prohibiting or criminalizing protected forms of speech and expression.

The United States remains deeply concerned about speech that advocates national, racial, or religious hatred, particularly when it constitutes incitement to violence, discrimination, or hostility. From our own experience and history, the United States remains convinced that the best antidote to offensive speech is not bans and punishments but a combination of three key elements: robust legal protections against discrimination and hate crimes; proactive government outreach to racial and religious communities; and the vigorous protection of freedom of expression, both on- and off-line.

We call upon all delegations to oppose this resolution and to vote “no.”

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Also on March 24, 2017, Mr. Mozdzierz delivered the U.S. explanation of vote on the “Mandate of the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action.” That statement is excerpted below and available at <https://geneva.usmission.gov/2017/03/24/u-s-eov-on-the-mandate-of-the-intergovernmental-working-group-on-the-effective-implementation-of-the-durban-declaration-and-programme-of-action/>.

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The United States will call a vote and vote “no” on this resolution extending the mandate of the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action.

The United States is firmly committed to combating racism and racial discrimination. We will continue to work with civil society, international mechanisms, and all nations of goodwill to combat racism and racial discrimination, xenophobia, intolerance, anti-Semitism, and bigotry, at home and abroad.

We regret that we cannot support this resolution on such an important topic due to our concerns about the Durban Declaration and Program of Action (DDPA) and the outcome of the Durban review conference, which are well-known.

We believe this resolution serves as a vehicle to prolong the divisions caused by the Durban conference and its follow-up rather than providing a comprehensive and inclusive way forward for the international community to combat the scourge of racism and racial discrimination.

For these reasons we cannot support this resolution and will vote “no.”

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2. Gender

a. 2017 UN Commission on the Status of Women

Matthew Dolbow, Counselor for Economic and Social Affairs for the U.S. Mission to the United Nations, delivered the U.S. explanation of position on the agreed conclusions at the 2017 UN Commission on the Status of Women on March 24, 2017. The U.S. explanation of position follows and is available at <https://usun.state.gov/remarks/7724>.

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Thank you, Mr. Chair. The United States thanks our facilitator Egypt, all participating delegations, civil society partners, and the untiring staff of UN Women on their diligent efforts toward developing a substantive, action-oriented set of Agreed Conclusions that were ... adopted by consensus.

While we are not a CSW member this year, we engaged constructively in the negotiations because the topics of women’s economic empowerment and women in the workplace are of high importance to the United States. We would like to outline our views on certain portions of the text.

The United States understands the intention of inclusion of “equal pay for equal work and work of equal value” to promote pay equity between men and women, and accepts the formulation on that basis. The United States implements it by observing the principle of “equal pay for equal work.”

We recognize the importance of unpaid care work and have released periodic time-use surveys and estimates of the monetary value of unpaid work, but do not factor the value of unpaid work into our core national accounts, including GDP.

On a gender-responsive approach to public financial management, not all countries take this approach in shaping public expenditures. We recognize that in cases when it has been applied, there is potential for beneficial results for women and girls.

The United States would like to underscore the critical importance of the ILO's 1998 Declaration on Fundamental Principles and Rights at Work to women's economic empowerment in the changing world of work. The Declaration represents the solemn commitment of all ILO Member States to respect, promote, and realize workplace principles and rights in the areas of freedom of association and the effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labor; effective abolition of child labor; and elimination of discrimination in respect of employment and occupation.

With respect to "temporary special measures," the U.S. position is that each country must determine for itself whether they are appropriate. The best way to improve the situation of women and girls is often through legal and policy reforms that end discrimination against women and promote equality of opportunity.

We regret that the final text does not mention some of the groups most vulnerable to discrimination like those discriminated against based on sexual orientation and gender identity, race, color, or religion or belief. We are, however, pleased to see that the text includes language about the establishing or strengthening of social protection systems "without discrimination of any kind."

The United States views sexual harassment as a form of employment discrimination that may amount to gender-based violence in the form of sexual assault, although most sexual harassment does not rise to the level of sexual assault. U.S. law recognized that sexual harassment is a form of gender discrimination.

We recognize that sexual harassment can occur not only in the workplace, but in work-related situations and in digital and online spaces, and that women, girls, men, and boys can be targeted.

The United States believes that women should have equal access to reproductive health care. We remain committed to the commitments laid out in the Beijing Declaration and Program of Action. As has been made clear over many years, there was international consensus that the Beijing documents do not create new international rights, including any "right" to abortion. The U.S. fully supports the principle of voluntary choice regarding maternal and child health and family planning. We do not recognize abortion as a method of family planning, nor do we support abortion in our reproductive health assistance. Let me reiterate that the U.S. is the largest donor of bilateral reproductive health and family planning assistance.

Pending review of U.S. policies relating to climate change and the Paris Agreement, the United States reserves its position on language in paragraph 23 of these Agreed Conclusions relating to these issues.

The United States does not support the Agreed Conclusion's references to technology transfer.

The United States views unilateral and multilateral sanctions as legitimate means to attain foreign policy, security, and other national and international objectives. Sanctions regimes are consistent with the UN Charter and international law, and are an alternative to the use of force. We disagree that sanctions adversely affect civilians or lead to humanitarian crises.

On illicit financial flows, we would like to point out that this term has no agreed upon international meaning. Our preference is to focus on the underlying illegal activities that constitute illicit financial flows, such as bribery, tax evasion, money laundering, and other

corrupt practices. We support taking concrete actions to combat these illegal activities, and have actively participated in many multilateral processes addressing these issues, including the UN Convention Against Corruption. Discussions of these topics are best left to technical experts with the appropriate expertise and mandate to address these issues. We believe it is not appropriate to consider illicit financial flows in the CSW.

Our views about the “right to development,” which lacks an internationally accepted definition, are long-standing and well-known. Further 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 government.

The United States joins consensus on these Agreed Conclusions with the understanding that its provisions do not imply that states must become parties to instruments to which they are not a party, or implement obligations under such instruments without first becoming a party. For example, the United States is not a party to the International Covenant on Economic, Social and Cultural Rights. Accordingly, we interpret this document’s references to rights under that Convention to be limited to States Parties to that covenant, in light of its Article 2(1).

We also underscore that these Agreed Conclusions do not change or necessarily reflect the United States’ or other states’ obligations under treaty or customary international law.

Thank you, Mr. Chair, and we ask that this statement be made part of the official records of these proceedings.

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b. *Women, Peace, and Security*

Ambassador Michele J. Sison, U.S. Deputy Permanent Representative to the United Nations, delivered remarks at a UN Security Council open debate on “Women, Peace, and Security” on October 27, 2017. Ambassador Sison’s remarks are excerpted below and available at <https://usun.state.gov/remarks/8054>.

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Dr. Bhimrao Ambedkar, the esteemed Indian jurist and social activist, once said, “I measure the progress of a community by the degree of progress which women have achieved.” So as we engage in this debate today, I think we should keep Dr. Ambedkar’s simple but important idea in mind.

The role of women in maintaining international peace and security is more critical than ever, but we must continue to move from rhetoric to reality when it comes to fully implementing the Women, Peace, and Security Agenda. Today’s debate should remind us all of the collective work that is still required to see more women gain positions of leadership in government, civil society, and gain seats at the negotiating table. As the Secretary-General’s report makes clear, we have so much more to do to achieve inclusivity.

For our part, the United States remains committed to advancing full implementation of UN Security Council Resolution 1325. Earlier this month, the United States took a major legislative step to advance the Women, Peace, and Security Agenda. On October 6th, the U.S. Women, Peace, and Security Act of 2017 was signed into law. This reflects a growing body of evidence confirming that the inclusion of women in peace processes helps reduce conflict and advance stability over the long term. This act, for example, requires my government to develop a comprehensive strategy to expand women's participation in security operations. This law reflects a now indisputable fact – when women are involved in efforts to bring about peace and security, the results are more sustainable.

We are taking other important steps to advance this agenda, particularly through women's economic empowerment. We know that women's full participation in the economy leads not only to national growth and prosperity—it also bolsters stability for all. That is why the United States has helped spearhead the Women Entrepreneurs Finance Initiative, or “We-Fi.” This initiative, which already has \$340 million in donor commitments, will support women entrepreneurs in developing countries by increasing their access to finance, markets, technology, and networks—everything needed for them to start and grow a business.

I'd like to turn now to the Secretary-General's report. First, we were disheartened to learn that the number of women participating in UN co-led peace processes has gone down. Research shows that the participation of women and civil society groups in a peace negotiation makes the resulting agreement 64 percent less likely to fail, and 35 percent more likely to endure at least fifteen years. We welcome the Secretary-General's commitment to addressing this, but I must underscore that we all need to do more to improve women's meaningful participation in peace processes. In this regard, we welcome the development of the High-Level Advisory Board on Mediation, and we hope it will find effective ways to achieve equal representation of women in mediation.

Now we cannot talk about the involvement of women in peace processes without applauding one recent example—Colombia. In large part because of the inclusion of women in Colombia's peace negotiations—women like Ms. Rojas—Colombia's peace agreement includes over 100 gender-specific provisions. So when women effectively influence a peace process, it's more likely that an agreement will be reached, will be implemented, and will be sustained, and we are confident Colombia will continue to be important example of this.

Second, we welcome the Secretary-General's commitment to improve impact evaluation of gender-inclusion efforts. Whether on corporate boards, in government, or in ... post-conflict zones, we know that gender parity makes teams more effective and makes women more empowered. We look forward to results being included into next year's annual report.

And, third, we welcome increased attention on the nexus between violent extremism and women, peace, and security. In our view, women continue to be an underutilized and under-tapped resource in the fight against violent extremism. Women are, of course, local peacebuilders and grassroots civil society activists. They are in touch with their communities, and thus should be seen also as a first line of defense in detecting radicalization in their communities. My country is dedicating increased focus and resources to understanding the variety of roles that women play in this space—including how women can play more vital roles in preventing terrorist ideologies from taking root.

We are grateful that there are women defying terrorist ideologies across the globe—oftentimes putting their own lives at risk to do so. For example, when the Taliban attacked Kunduz in 2015 and attacked again in 2016, they tried each time to kill Ms. Sediqa Sherzai, a

brave journalist who runs Radio Roshani in Afghanistan. Ms. Sherzai leads discussion programs and call-in shows, and she urges women to assert their rights to an education and to lead as vital voices in their communities. Courageous women activists like Ms. Sherzai are making a difference, and thanks to the Women, Peace, and Security Agenda at the UN, we are hopeful these gains will continue.

In conclusion, Mr. President, the United States remains fully committed to robust implementation of the Women, Peace, and Security Agenda. We welcome the Secretary-General strong commitment to this issue, and we look forward to continuing to partner with the UN and other member states to advance these goals.

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c. UN Third Committee

U.S. ECOSOC Advisor Mordica Simpson delivered remarks at a Third Committee meeting on the advancement of women on October 5, 2017. Her remarks are excerpted below and available at <https://usun.state.gov/remarks/8049>.

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Our remarks today focus on the importance of supporting economic opportunities for women, particularly women entrepreneurs. At a March 2017 roundtable with women small business owners, President Trump declared, “Empowering and promoting women in business is an absolute priority... because I know how crucial women are as job creators, role models, and leaders all throughout our communities.” The President further said, “We will continue to address the barriers faced by women professionals and entrepreneurs, including access to capital, access to markets, and access to networks.”

We would like to highlight several United States government initiatives to promote women’s success in business by helping women overcome some of those barriers. Our approach is to collaborate with the private sector, which is essential for addressing complex challenges, reducing duplication, and leveraging limited resources.

In July 2017, the United States announced its intent to provide \$50 million to the Women Entrepreneurs Finance Initiative, or We-Fi. We-Fi is an innovative new multi-donor facility for which the World Bank will serve as Trustee, aimed at expanding access to financial services for women entrepreneurs as well as technical assistance, covering such areas as skills enhancements and market access. The initiative will support projects that address the legal and policy barriers women face in starting and growing successful businesses in a variety of sectors.

The United States has collaborated with the private sector to develop programs that link women business owners with others in their regions. These include Women’s Entrepreneurship in the Americas, WEAmericas; African Women’s Entrepreneurship Program, AWEP; and Women’s Entrepreneurship in APEC, WE-APEC.

The Alliance for Artisan Enterprise helps artisan enterprises throughout the world reach their full economic potential, including through financing mechanisms and coaching on efficient business practices. The artisan sector is the second largest employer in the developing world

after agriculture, generating over \$32 billion each year, and women make up a large number of its employees. The United States, Aspen Institute, and over 125 artisan businesses and support organizations, corporations, foundations, governments, and multilateral agencies partner through the Alliance.

The United States and private sector partners have established business centers to help women business owners' transition from the informal economy to establish formally registered companies, thereby contributing to a country's economic growth and societal change. Training, mentoring, capacity building, and technology support are among the activities that take place. Some centers have engaged men and boys to prevent and respond to gender-based violence.

The United States and India will co-host the November 2017 Global Entrepreneurship Summit, GES, in Hyderabad, India. Since 2010 this annual summit has brought together entrepreneurs, investors, and other stakeholders to encourage new initiatives and economic growth, promote collaboration across borders, and increase economic opportunities. This year's summit will focus on women entrepreneurs under the theme "Women First, Prosperity for All," which recognizes the tremendous promise for economic growth and prosperity that women represent.

In conclusion, enabling women's economic participation has substantial benefits, including increased economic opportunities for all and greater security and stability. When women succeed, we all succeed. The United States intends to remain strongly engaged in this area.

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d. Human Rights Council

On June 22, 2017, at the 35th Session of the HRC, Jason Mack delivered the U.S. Explanation of Position on the resolution on discrimination against women. The explanation of position is excerpted below and available at <https://geneva.usmission.gov/2017/06/23/explanation-of-position-on-resolution-l-29-on-discrimination-against-women/>

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The United States thanks Mexico and Columbia for their efforts to craft a strong resolution on this important topic. Eliminating discrimination against women worldwide is a key foreign policy goal of the United States, as reflected among other programs in the U.S. Strategy to Prevent and Respond to Gender-Based Violence Globally and our Let Girls Learn initiative. Therefore, the United States strongly supports the spirit of this resolution on the elimination of discrimination against women and girls. However, we must dissociate from operative paragraph 12 due to our concerns about issues related to reproductive rights. The U.S. position on reproductive health, abortion, and comprehensive sexual education was stated earlier when we dissociated from OP9(d) of the Violence Against Women resolution and applies to this resolution as well.

With respect to the “temporary special measures” referenced in operative paragraphs 5(b) and 6, the U.S. position is that each country must determine for itself whether such measures are appropriate. The best way to improve the situation of women and girls is often through legal and policy reforms that end discrimination against women and promote equality of opportunity.

The United States finds it essential to mention “women’s human rights defenders” in the resolution, and therefore voted “no” on proposed amendment L.41. Women human rights defenders play a strong role in combating discrimination against women and are uniquely vulnerable in their efforts to defend human rights on the frontlines. Therefore, it is important to specifically recognize them.

We are pleased that the oral amendment to PP9 did not pass. The United States views international human rights law to be inclusive of gender. We note that many recent consensus documents, such as those from the recent Commission on the Status of Women, speak in terms of “gender equality” and “gender discrimination.”

In closing we note that additional comments will be provided in the United States’ Statement to be delivered at the end of Item 3.

* * * *

e. *Violence Against Women*

The U.S. explanation of position on the resolution on violence against women at the Human Rights Council is excerpted below and available at

<https://geneva.usmission.gov/2017/06/22/u-s-explanation-of-position-on-human-rights-council-resolution-on-violence-against-women/>.

[W]e must dissociate from the consensus on operational paragraph 9(d). The United States believes that women should have equal access to reproductive health care. We remain committed to the commitments laid out in the Beijing Declaration and International Conference on Population and Development Programme of Action. As has been made clear over many years, there was international consensus that these documents do not create new international rights, including any “right” to abortion. The United States fully supports the principle of voluntary choice regarding maternal and child health and family planning. We do not recognize abortion as a method of family planning, nor do we support abortion in our reproductive health assistance. The United States is the largest bilateral donor of reproductive health and family planning assistance.

3. *Sexual Orientation and Gender Identity*

On September 25, 2017, Scott Busby, Deputy Assistant Secretary of State for the Bureau of Democracy, Human Rights, and Labor, addressed a hearing on LGBTI rights outside the EU and implementation of EU guidelines on the LGBTI rights. Mr. Busby’s remarks are excerpted below and available at

<https://www.state.gov/j/drl/rls/rm/2017/274413.htm>.

* * * *

Today I'd like to highlight three points...

First, the Department of State remains committed to protecting and promoting the human rights and fundamental freedoms of all persons around the world, and this of course includes members of the LGBTI community. We recognize that societies are more stable, prosperous and secure when all people within them live freely without fear of violence or discrimination. In this regard, it is especially important that we pay attention to the rights of historically vulnerable groups such as religious, racial and ethnic minorities, persons with disabilities, survivors of gender-based violence and LGBTI persons.

In June of this year, U.S. Secretary of State Rex Tillerson issued a statement recognizing LGBTI Pride Month.* The Statement underscored that violence and discrimination against any vulnerable group undermines our collective security as well as our values. Also in June, the Department issued formal guidance to our diplomatic missions around the world affirming that Pride Month could be recognized, depending of course on the local context. I personally have been heartened to see our Embassies—including in hostile environments—take steps to promote the human rights of LGBTI persons. U.S. diplomats meet with LGBTI activists, march in Pride Parades, fly the Pride Flag, sponsor training workshops, and use their convening power to bring different allies together in support of human rights and fundamental freedoms. In undertaking this work, we of course recognize that every context is unique—and that our role is to support local activists and human rights defenders as they develop their own strategies and tactics to achieve their own priorities. We strive to do no harm and as a result we do not always publicize our engagement.

Some examples of this work include the engagement of our Embassy in Ukraine, who together with like-minded diplomatic missions signed a statement affirming support for LGBTI rights and successfully urged the Ukrainian government to ensure the safety of a peaceful pride celebration. The Embassy in Kyiv also hosted an LGBTI Art Exhibit. In Brazil, our Embassy once again supported the LGBTI International Film Festival in Brasilia, now in its second year. The Embassy's Public Affairs Section also conducted training for transgender activists on the use of traditional and social media. In Ghana, our Embassy held a reception for Pride bringing together representatives of the government, civil society and diplomatic partners. Over 60 individuals attended. These are just a few examples and there are many more in all regions.

On my second point, the United States remains deeply concerned about the safety and security of LGBTI persons and their advocates, including in crisis zones. No one should be targeted just because of who they are or whom they love. We continue to follow the human rights situation in Chechnya very closely, including the allegations of widespread extrajudicial detentions and torture, and in some cases killings of LGBTI persons. In July, Secretary Tillerson sent a letter to Russian Foreign Minister Lavrov, noting the opening of a criminal investigation by the Russian government and an inquiry by the Human Rights Ombudsman, and encouraging swift and independent investigations into these troubling allegations. The Secretary urged that any perpetrators of violations be held accountable under Russian law. The letter from Secretary

* Editor's note: The statement is available at

<https://www.state.gov/secretary/20172018tillerson/remarks/2017/06/271626.htm>.

Tillerson followed multiple U.S. statements condemning the violence in Chechnya, including from U.S. Ambassador to the UN Nikki Haley, the U.S. representative to the OSCE, and the State Department Spokesperson in Washington. We were also proud to sign on to a joint statement of the Equal Rights Coalition—the first such statement from this new, like-minded group of governments committed to equality and dignity for all—and that statement called for a stop to the violence in Chechnya and an immediate investigation.

Our concern about violence targeting LGBTI persons of course extends beyond Russia. Addressing violence and discrimination targeting the LGBTI community is global challenge, which includes of course the United States. We remain particularly concerned about violence targeting transgender persons, including in Turkey, where transgender refugees from Syria have been particularly targeted. We also remain deeply saddened to learn of transgender persons who have been killed in Pakistan and elsewhere this year.

To strengthen the rule of law for LGBTI persons and members of other vulnerable groups, the U.S. government supports the training of law enforcement officers and other criminal justice practitioners on countering bias-motivated violence, sometimes referred to as hate crimes. In some cases these trainings are led by active serving police officers from U.S. police departments who have developed considerable expertise in responding to and preventing hate crimes. Working with the Council of Europe and other institutions, we are also supporting the American Bar Association to develop a new framework to assist governments and civil society groups to reduce violence. In partnership with other governments, foundations, and corporations through the Global Equality Fund, we are supporting civil society's efforts to reduce violence and increase protection for vulnerable groups. And finally we are pleased to see continued UN attention to addressing violence and discrimination targeting the LGBTI community, including the important work of Vitit Muntarbhorn, the first UN Independent Expert on sexual orientation and gender identity. We were disappointed to learn recently Mr. Muntarbhorn needs to step down from that position, but we will be working hard with the supporters of this mandate to identify other qualified candidates for the job.

In addressing all of these issues, the European Union plays a fundamental role. The U.S. strongly supports the EU Guidelines to Promote and Protect the Human Rights of LGBTI Persons and their full dissemination and implementation. The Guidelines are similar to internal State Department guidance that provides examples of steps U.S. diplomats at embassies can take to support the human rights of LGBTI persons. The Guidelines rightly emphasize the importance of working with civil society organizations—and note they should be consulted before taking public action or issuing public statements. This mirrors our approach. Do no harm is the most important principle of our work.

In closing, I want to emphasize that while I've highlighted some incidents of violence and discrimination against LGBTI persons, there are many rays of hope and positive steps in the advancement of LGBTI rights. For example, Belize decriminalized consensual same-sex conduct in 2016 and India's Supreme Court ruled in April of this year that the right to privacy is fundamental under India's constitution. In June, Timor-Leste's Prime Minister publicly supported LGBTI persons and the country's first-ever Pride celebration in Dili, Timor-Leste's capital. We as the international community should be mindful of these exciting developments and encourage similar actions by other governments.

Dignity and equality for all persons are among the founding constitutional principles of U.S. democracy, and they will continue to drive U.S. diplomacy as well. Thank you.

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On October 27, 2017, Ambassador Kelley Currie, U.S. Representative for Economic and Social Affairs, delivered remarks at a Third Committee interactive dialogue with Vitit Muntarbhorn, independent expert on protection against violence and discrimination based on sexual orientation and gender identity. Ambassador Currie's remarks are excerpted below and available at <https://usun.state.gov/remarks/8057>.

* * * *

The United States thanks the Independent Expert for his service as the first-ever UN Independent Expert on protection from violence and discrimination based on sexual orientation and gender identity. This is a mandate that is of critical importance to the United States, especially at a time when LGBTI individuals around the world are being murdered, tortured, and attacked.

Dignity and equality are core universal human rights values, and they are American values underpinned by our Constitution. The United States will continue to stand up for the human rights of all persons. The United States opposes all forms of discrimination, and we appreciate the Independent Expert's focus on grave human rights violations. In 2017, it is unacceptable that LGBTI persons face criminal charges related to LGBTI status or conduct in around 80 countries. It is intolerable that same sex conduct is punishable by the death penalty in some countries around the world. We appreciate the Independent Expert's focus on this important issue.

When we receive reports of the murder, kidnapping, and torture of LGBTI individuals, we must all call out those violations and the governments perpetrating them. The recent cases in several countries of arbitrary arrests, disappearances, and crackdowns on the fundamental freedom of LGBTI persons are incredibly disturbing.

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C. CHILDREN

1. Rights of the Child

a. U.S. Appearance before the Committee on the Rights of the Child

On May 16, 2017, the United States appeared before the UN Committee on the Rights of the Child in Geneva to answer the Committee's questions with respect to the 2016

U.S. periodic report on its implementation of the two Optional Protocols to the Convention on the Rights of the Child to which the United States is a party. For discussion of the 2016 U.S. periodic report, see *Digest 2016* at 212-14. In March 2017, the United States filed written answers to the Committee's questions in follow-up to the 2016 report. Those can be found at <https://www.state.gov/j/drl/reports/treaties/> and are also available at <https://www.state.gov/s/l/c8183.htm>.

U.S. delegation statements at the May appearance are excerpted below and available at <https://geneva.usmission.gov/2017/05/17/u-s-statements-before-the-un-committee-on-the-rights-of-the-child/> and at <https://www.state.gov/s/l/c8183.htm>. Chargé d'Affaires Ted Allegra of the U.S. Mission to the United Nations in Geneva introduced the U.S. delegation, which was composed of several federal and state officials, including: Richard Visek, the Acting Legal Adviser to the U.S. Department of State; Susan Coppedge, Ambassador-at-Large to Monitor and Combat Trafficking in Persons; and Cynthia Coffman, Attorney General of the State of Colorado. Mr. Visek's opening statement at the May 2017 appearance is excerpted below.

* * * *

Today's review is the latest in a series for the United States since we last appeared here in January 2013. In 2014, the United States presented our record before three different international human rights treaty bodies: the Human Rights Committee, the Committee on the Elimination of All Forms of Racial Discrimination, and the Committee Against Torture. And, in May 2015, we appeared before the UN Human Rights Council for a Universal Periodic Review.

These treaty presentations and the numerous reports we have submitted demonstrate the United States' ongoing commitment to protecting human rights and fundamental freedoms domestically through the operation of our comprehensive system of laws, policies, and programs at all levels of government—federal, state, local, insular, and tribal. They also demonstrate our willingness to look at our own practices with the goal of deepening our efforts to promote and protect human rights and fundamental freedoms for all. And, throughout these reporting processes, we are proud that we have continued to consult openly with members of civil society. Since our last review in 2013, the State Department alone has helped facilitate more than 15 consultations with civil society specifically on issues related to international human rights obligations or commitments.

In short, we value the reporting process; we value our engagement with the Committee; and we value our engagement with the international human rights community, including civil society.

We turn our attention today to the Optional Protocols. Before addressing the Protocols, I would like to acknowledge that the United States has not ratified the Convention on the Rights of the Child (CRC), although we agree with its underlying goal of protecting some of humanity's most vulnerable persons. As you know, the United States has a robust system of federal and state laws to protect and promote children's rights, which often serves as a model for other countries. Our not having ratified the Convention does not in any way indicate a lack of commitment to protecting children.

Throughout our presentation, you will hear from dedicated public servants who will attest to our efforts—as well as the challenges we face—to combat child trafficking, child pornography, and the unlawful recruitment and use of child soldiers. We are especially proud to be joined by Attorney General Cynthia Coffman from the State of Colorado, a state that has made important strides in combatting human trafficking and other forms of child exploitation. Her presence underscores our national commitment to combatting child exploitation at every level of our federal system.

In her remarks this morning, Ambassador Susan Coppedge will provide an introduction to U.S. efforts related to the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (OPSC). Attorney General Coffman will then provide an overview of Colorado’s efforts to combat these forms of exploitation.

Following Attorney General Coffman’s remarks, Tara Jones of the Department of Defense will provide a brief introduction to U.S. efforts under the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC).

Alexandra Gelber, from the Department of Justice, and Jeff Rezmovic, from the Department of Homeland Security, will also offer brief opening remarks that introduce their agencies’ key roles in implementing U.S. obligations under the Protocols.

On behalf of the entire U.S. delegation, I thank the Committee for its commitment to protecting children around the world, as well as for the care and constructive spirit with which it has approached this review.

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The presentation by Ambassador Susan Coppedge on the U.S. government’s efforts to implement the Optional Protocols to the Convention on the Rights of the Child is excerpted below.

* * * *

I will briefly highlight some steps the U.S. government has taken to combat human trafficking—including child trafficking—through collaboration with survivors, interagency coordination, and support programs to protect children.

In December 2015, the U.S. government appointed its first U.S. Advisory Council on Human Trafficking. All 11 Council members are survivors, some of whom were exploited as children, with a diverse range of backgrounds. This Council provides a formal platform for survivors to advise the President’s Interagency Task Force on human trafficking. In its first report, released in October 2016, the Council recommended, among other things, that the U.S. government provide training to relevant employees on human trafficking, including forced child labor and specifically child begging.

In 2016, the U.S. government issued a report on activities of federal and state governments to deter and prevent child trafficking in the United States. One highlight is the work of the Department of Health and Human Services to develop guidance on providing services to and reducing trafficking vulnerabilities for youth under the age of 18 who come in contact with programs for runaway and homeless youth.

In my Office, we have initiated Child Protection Compact Partnerships aimed at reducing child trafficking by working bilaterally with partner governments to build effective systems of justice, prevention, and protection. In 2015, we entered into our first such partnership, with Ghana, and my Office awarded \$5 million to two NGO partners who are working with Ghanaian ministries and civil society organizations. In its first year, the program developed standards for child victim identification and screening; a plan to refurbish a children's shelter; and coordination with local communities to remove 68 children from labor trafficking situations.

Last month, we signed our second Partnership with the Philippines, which aims to increase prevention efforts and protections for child victims of online sexual exploitation and forced child labor and hold perpetrators of these crimes accountable. My office and the Philippine government will provide funding to help achieve these objectives.

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The remarks of Tara Jones, advisor for humanitarian policy of the U.S. Department of Defense, are excerpted below.

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Since 1973, the U.S. military has been an all-volunteer force. Ensuring this professional force is manned with individuals of high caliber is a demanding task—as recruiters must compete with myriad opportunities available to our nation's young men and women. In taking on this challenge, our highly trained, professional recruiters serve as military ambassadors in their communities, and their integrity and demeanor are of great importance to the Department of Defense. Through clear rules, training, and rigorous oversight mechanisms, we have been successful in implementing our prohibition on the entry into the U.S. Armed Forces of any person under the age of 17.

In fact, the overwhelming majority of new recruits have attained 18 years of age, and most have at least a high school diploma. As young people in the United States typically begin to consider career options during their final years of high school, recruiters offer them information about serving in the military, including information about additional educational opportunities and other lifelong benefits of service.

The Department of Defense and each military service has policies in place to ensure that all feasible measures are taken that no one under the age of 18 engages directly in hostilities, and the military departments have checks in their personnel systems to ensure adherence to the provisions of those service policies.

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The opening remarks of Alexandra Gelber, National Coordinator for Child Exploitation Prevention and Interdiction at the Department of Justice, summarizing the Department's work to protect children, are excerpted below.

* * * *

In 2016, the Department released the second National Strategy for Child Exploitation Prevention and Interdiction. The Strategy highlights emerging threats against children, and sets forth a response that addresses investigations and prosecutions, victim services, outreach and education, and policy and legislation.

Next month, the Department is hosting the National Law Enforcement Training on Child Exploitation, which will be attended by over 1300 federal, state, tribal, and local law enforcement, prosecutors, digital investigative analysts, and victim service providers. The specialized training focuses on technology-facilitated crimes against children, as well as best practices for working with victims and for prevention.

Among its many programs to enhance victim services, DOJ has allocated \$2 million for grants to provide services for child pornography victims, and \$4.75 million to fund a solicitation to improve Outcomes for Child and Youth Victims of Human Trafficking.

The Department brings high-impact prosecutions against the most serious offenders. In a recent case, the Department obtained a 30-year sentence against an individual who created and administered a website called Playpen that was only accessible on the Tor anonymity network. In the U.S., this investigation has led to the arrest of at least 350 defendants, including 25 producers of child pornography and 51 molesters, and the identification or rescue of 55 children. International leads have yielded at least 548 arrests and identification or rescue of at least 296 children.

The Department of Justice remains deeply committed to domestic and international efforts to prevent child exploitation.

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b. *Rights of the Child Resolution*

On November 21, 2017, U.S. Adviser Greg Staff delivered the explanation of vote on resolution A/C.3/72/L.21/Rev.1 on the rights of the child. The U.S. statement is available at <https://usun.state.gov/remarks/8162>, and excerpted below.

* * * *

The United States supports and voted for this resolution to underscore the priority we place on our domestic and international efforts to protect and promote the well-being of children.

In supporting the resolution today, we wish to clarify our views on several provisions therein. We will not comment explicitly on all of our concerns about the text but instead focus on its most problematic elements. Other general concerns were addressed in the General Statement we delivered on November 20, 2017.*

First, we underscore that this resolution and the other ones adopted by this Committee do not change or necessarily reflect the United States' or other States' obligations under treaty or

* Editor's note: The November 20 general statement is excerpted in Section E.1. *infra*.

customary international law, including with respect to language in preambular paragraph 16, as well as operative paragraphs 2, 9, 10, 11, 23, 37(c), 37(n), and 37(q). With respect to operative paragraph 2, we note that reservations are an accepted part of treaty practice and are permissible except when prohibited by a treaty or incompatible with the treaty's object and purpose. Finally, with respect to operative paragraph 37(i) in particular, we underscore that human rights violations result from conduct by State officials and agents, not by private parties.

This resolution rightly emphasizes the importance of protecting vulnerable children. We read this resolution's references to persons in vulnerable or marginalized families or communities or situations to include LGBTI persons and persons with disabilities.

The United States is firmly committed to providing equal access to education. We also note that within the federal structure of the United States, education is primarily a state and local responsibility. We therefore voted in favor of this resolution on the understanding that the United States will continue to address the goals and recommendations of this resolution with respect to curriculum, programs, training, and other aspects of education as appropriate and consistent with current U.S. law and the federal government's authority.

With regard to this resolution's references to the 2030 Agenda for Sustainable Development and Paris Agreement, we addressed our concerns in the General Statement we delivered on November 20, 2017.**

As for operative paragraph 13, we understand its language to refer the "production" of child pornography.

Any reaffirmation of prior documents in this resolution and other resolutions applies only to those States that reaffirmed them initially. Furthermore, with specific reference to the reaffirmation of paragraphs 40 to 87 of General Assembly resolution 71/177, concerning migrant children, contained in operative paragraph 9 of this resolution, we underscore that the United States fulfills its applicable international obligations to promote and protect the human rights of migrants by providing substantial protections under the U.S. Constitution and domestic laws to individuals within the territory of the United States, regardless of their immigration status. We interpret resolution 71/177's references to due process and other protections, including for persons seeking to cross an international border and in the context of returns, to be consistent with our existing national laws and policies in this regard. We also reiterate the well-settled principle under international law that all States have the sovereign right to regulate the admission and expulsion of foreign nationals from [their] territory, subject to international obligations.

The United States dissociates from the language in operative paragraph 10. As we underscored in our separate November 20 General Statement,*** we do not read this resolution to imply that states must join human rights or other international instruments to which they are not a party, or that they must implement those instruments or any obligations under them. Among other things, this understanding applies to this resolution's references to the principle of the best interests of the child, which is derived from the Convention on the Rights of the Child. In this regard we would further reiterate that any reaffirmation of prior documents in this resolution and other resolutions apply only to those States that reaffirmed them initially.

In addition, with respect to operative paragraph 67 of General Assembly Resolution 71/177, which is reaffirmed in operative paragraph 9 of this resolution and was drawn from operative paragraph 33 of the New York Declaration for Refugees and Migrants, we reiterate the

** Editor's note: The November 20 general statement is excerpted in Section E.1. *infra*.

*** Editor's note: The November 20 general statement is excerpted in Section E.1. *infra*.

concerns in our Explanation of Position on that declaration, which are set forth in UN Document A/71/415.

Furthermore, we underscore our view that no language in this resolution or any others adopted by this Committee at its current session will pre-judge or prejudice the upcoming negotiation of a global compact on safe, orderly, and regular migration.

With respect to operative paragraph 37(h) of this resolution, we understand this provision to call on States to work to ensure that marriage is entered into only with the informed, free, and full consent of the intending spouses. Moreover, we understand that when the resolution calls on States to enact and enforce laws concerning the minimum age of consent and marriage, this is done in terms consistent with our respective federal and state authorities.

With respect to the reference to “foreign occupation” in preambular paragraph 17. We reaffirm our abiding commitment to a comprehensive and lasting resolution to the Israeli-Palestinian conflict. We remain committed to supporting the Palestinian people in practical and effective ways, including through sustainable development. We will continue to work with the Palestinian Authority, Israel, and international partners to improve the lives of ordinary people as they pursue a more sustainable future.

Second, we dissociate from the phrase “ensuring that the best interests of the child are a primary consideration in policies on integration, return and family reunification in operative” in operative paragraph 10 for the reasons set forth above and in the U.S. Explanation of Position on the “Protection of Migrants” resolution adopted on November 20.

We request that the U.S. dissociations be reflected in the record for this meeting and for this resolution.

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2. Children in Armed Conflict

a. Child Soldiers Prevention Act

Consistent with the Child Soldiers Prevention Act of 2008 (“CSPA”), Title IV of Public Law 110-457, as amended, the State Department’s 2017 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 2017 report are the governments of the Democratic Republic of the Congo, Mali, Nigeria, Somalia, South Sudan, Sudan, Syria, and Yemen.

The full text of the TIP report is available at <https://www.state.gov/j/tip/rls/tiprpt/2017/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 listed in accordance with the CSPA are subject to restrictions applicable to certain security assistance and licenses for direct commercial sales of military equipment for the subsequent fiscal year. In a memorandum for the Secretary of State dated September

30, 2017, the President determined:

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 Mali and Nigeria; to waive the application of the prohibition in section 404(a) of the CSPA with respect to the Democratic Republic of the Congo to allow for provision of Peacekeeping Operations (PKO) assistance, to the extent the CSPA would restrict such assistance or support; to waive the application of the prohibition in section 404(a) of the CSPA with respect to Somalia to allow for the provision of International Military Education and Training assistance, PKO assistance, and support provided pursuant to 10 U.S.C. 333, to the extent the CSPA would restrict such assistance or support; and to waive the application of the prohibition in section 404(a) of the CSPA with respect to South Sudan to allow for PKO assistance, to the extent the CSPA would restrict such assistance or support. Accordingly, I hereby waive such applications of section 404(a) of the CSPA.

82 Fed. Reg. 49,085 (Oct. 23, 2017).

b. *Statements at the UN*

On October 13, 2017, Ambassador Sison delivered remarks at an open “Arria” meeting on children and armed conflict. Her remarks are excerpted below and available at <https://usun.state.gov/remarks/8014>.

* * * *

So, hearing from you today and learning from the Secretary-General’s report, we are seeing that children in conflict situations are still faced with inestimable challenges around the world. The number of children killed, kidnapped, maimed, used, abused is even more staggering today than it was 20 years ago when the Children and Armed Conflict mandate was created. And of course the impact on the girl child is especially telling and distressing. But all of these children need to be protected.

The U.S. considers the work of the [UN] Special Representative [for Children and Armed Conflict Virginia Gamba] to be of paramount importance to international peace and security, and it really is appropriate that we are gathered here as Security Council members and civil society and other member states to talk about this issue today. ...

And when Special Representative Gamba was in Washington last week, she made very clear to my colleagues that the preventative aspects of her mandate—protecting children today—means staving off future conflict and staving off radicalization to violence of scores of young people. That was important. These children can emerge from the horrors of war only to find themselves without family, without acceptance in the community, without access to basic

services, or without access to the resources they need for reintegration into society. And this was an issue that we did discuss on our visit to the Lake Chad Basin and to Maiduguri....

The U.S. remains deeply committed to the mandate and mission of the UN's work to end the suffering of children in conflict situations. Not only is this work essential—absolutely essential—to putting a stop on the ongoing atrocities faced by children in such situations, but this work is also essential to secure international peace and security for future generations. ...

In the past two decades, we've come together numerous times to express our outrage at the blatant and reckless attacks on schools, and today is no different. Of course, attacks on schools not only can constitute a violation of international humanitarian law, but they also shock our conscience. ... Such attacks have lasting effects on society. Such attacks have lasting effects on children. And of course, we also condemn armed actors who unlawfully convert schools for military use. All of these practices that we're talking about today deeply impact a child's right to learn.

I want to mention and turn for a moment to the drawn-out conflict in Syria, where we've seen devastating of the conflict on children. One in three casualties in the Syrian conflict has been a child under the age of 15. One in three schools in Syria is out of commission; the school has either been destroyed or been damaged or is now sheltering the displaced or is being used for military purposes. And more than half of Syria's public health facilities have been completely destroyed in the conflict. In more than 75 percent of Syrian households, we see children now having to work to help support their families, and many of these children are the sole breadwinners for their families. And these children, then, have not only lost their childhood, of course, many have lost their lives.

The use of schools, as I said, by armed groups is completely unacceptable. We've seen this practice in northeastern Nigeria, ...but also in Central African Republic, in the DRC, and in other global conflicts.

Former Special Representative Olara Otunnu, in his first address as the first [Special Representative] for Children and Armed Conflict, called on the Security Council to ensure that schools and hospitals be considered "battle-free zones." And we all need to continue working toward this goal.

The U.S. is committed to doing everything possible to protect educational institutions and students in time of conflict. Over two decades, of course, the UN has established a robust multilateral framework to help protect children affected by armed conflict. And again, the mandate of the SRSG is an essential element of this framework because it reflects all of our steadfast determination to end these devastating effects on children in armed conflict situations.

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Ambassador Sison delivered additional remarks at a UN Security Council open debate on "Children in Armed Conflict" on October 31, 2017. Her remarks are excerpted below and available at <https://usun.state.gov/remarks/8059>.

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We should all be disturbed by the Secretary-General's report on children and armed conflict this year. The report shows that in conflicts around the world, children are being killed and maimed, abducted, and attacked in schools and hospitals, recruited to fight, sexually abused, and denied humanitarian aid—by state and non-state actors alike. All parties to armed conflict should share the goal of protecting children from violence, and yet, all too often, violations and abuses of international law affecting children in armed conflict are rampant.

Of particular concern to the United States is the scale and gravity of such violations and abuses against children by terrorist organizations including the Taliban, ISIS, Boko Haram, and al-Shabaab. These groups are responsible for many of the most barbaric attacks, committing over 6,800 violations and abuses against children, as documented by the UN.

South Sudan also remains a major cause for concern. The number of children who have been recruited by armed groups is around 17,000—coincidentally about the same number of staff as the UN peacekeeping mission in South Sudan. Ambassador Haley just returned from that country, where she issued a stern warning to President Kiir: "The hate and the violence that we are seeing has to stop." She also told President Kiir during their meeting that he could not deny the actions of his military, whether it was related to violence or rape or child soldiers. Sexual violence against girls and boys in particular, including mass gang rape, has intensified, even in parts of the country that were once deemed safe for them. The UN and this Council should bring all of our influence and tools to bear to ensure that all parties to the conflict in South Sudan immediately end committing all violations and abuses against children.

This month Ambassador Haley also visited the Democratic Republic of the Congo, DRC, where she witnessed the plight of children caught in the cross-fire of conflict firsthand. The DRC, which has never witnessed a democratic, peaceful transfer of power, has been plagued by dozens of armed groups vying for power and control, with rape used as a weapon of war and children recruited as soldiers. As reported by the Secretary-General, recruitment and use of children by non-state actors in DRC remains rampant, and child casualties in DRC are up by 75 percent as compared to 2015. And sexual violence as a weapon of war is endemic, with more than 60 percent of survivors in DRC being children. Every day, displaced women and girls in DRC fear being assaulted and their children abducted. This must end.

As Ambassador Haley emphasized on her recent trip, "We cannot turn a blind eye to all of this. No one should live like this." To better help children victimized by armed conflict, the United States would like to emphasize three points.

First, we need to demand that all parties to a conflict—including state actors—fulfill their obligations under international law that bear on the protection of children. These obligations include avoiding the unlawful recruitment of children. All of us must do more to make sure parties to conflicts understand these responsibilities and fulfill them.

Second, when parties to conflict fail to comply with these obligations that bear on the protection of children in conflict, we must hold them accountable. Atrocities committed by the Assad regime—enabled by Iran, Hizballah, and Russia—show what happens when this Council fails to demand accountability. In 2016, the Assad regime slaughtered thousands of civilians in Aleppo and gassed its own people using banned chemical weapons. Schools and hospitals have been repeatedly attacked. The immediate and long-term impact on children in Syria of these atrocities is impossible to calculate. We must not stop pushing to bring the perpetrators of these acts to justice and to get help to the civilians who need it.

Similarly, in Yemen, the Houthis, Al-Qa'ida, and militias on all sides reportedly continue to recruit children in spite of our numerous demands to stop. The Yemeni government must also urgently take further steps to stop any unlawful recruitment of children in its ranks.

All parties to the conflict in Yemen need to do more to ensure the protection of civilians.

Third, the UN, humanitarian partners, and member states should do more to focus on what happens to children after they are released from recruitment or suffer wartime atrocities. For example, we must ensure resources are available to meet the needs of all children subject to grave violations and abuses, including survivors of sexual violence. These children desperately need assistance, including psychological support, food and shelter, or medical assistance. We must not let them down or allow them to return to the battlefield.

The proliferation of child deaths, abuses, attacks on hospitals and schools, and unlawful recruitment in armed conflict shows the importance of the UN's capacity to alleviate the suffering of these children. As we consider our Security Council mandates, the United States recognizes the importance of maintaining the role of child protection officers in UN field missions, as the report recommends.

In closing, even in this grim landscape, it is important to note progress. Over 60 countries have action plans in place with the UN. From Afghanistan to Chad, a number of governments have continued their good-faith work toward full implementation of these action plans to end abuses suffered by children in conflict.

We still have a long way to go in stemming the tide of abuse and horror faced by children in conflict situations. The United States will continue to stand behind the important work being done by the United Nations to protect these children.

* * * *

3. Third Committee

Senior Policy Advisor for the U.S. Mission to the UN Kelly Razzouk delivered remarks to the UN General Assembly Third Committee on the promotion and protection of the rights of children on October 10, 2017. Her remarks are excerpted below and available at <https://usun.state.gov/remarks/8007>.

* * * *

Thank you, Mr. Chair. Every year we come together during this annual debate to discuss the state of the world's children. As member states, we must acknowledge that often it is the innocent and vulnerable among us, our children, who suffer the most from the human rights challenges that plague our societies.

This year, yet again, all over the world, children's rights continue to be violated due to crisis and conflict. As we sit here today, a child in North Korea is starving to death because of a regime that sees no value in taking care of its own people. As we sit here today, a child in Syria wakes up surrounded by the violent sounds of bombings and attacks. The ongoing violence has led UNICEF to name Syria as one of the most dangerous places in the world to be a child.

Children in Syria suffer daily from physical wounds, and the psychological scars they bear could take years to heal. The constant psychological strain on children in Syria has manifested itself in speech impediments, and, in some, even losing their ability to speak altogether. In January 2017, the Syrian Network for Human Rights reported that no fewer than 26,000 children had been killed in Syria since the start of the conflict. Barbaric attacks against schools in Syria account for half of all the worldwide attacks from 2011-2015, and 43 percent of Syrian children are out of school.

To support our children around the world, much more must be done to help meet their basic, immediate needs. We must continue to invest in quality education. Girls, in particular, face challenges and barriers to receiving an education, including threats of violence and access to sanitary facilities, among other critical concerns.

Children in displaced situations are particularly vulnerable to trafficking and other forms of abuse such as rape, torture, and forced marriage. Children suffered from human rights violations in situations of conflict in 14 countries last year.

Education for displaced children remains a high priority for the United States government. We are a leading advocate in ensuring humanitarian response includes access to quality education. Growing evidence shows that education in emergencies and protracted crises can save lives. Education is also a long-term investment in individual child growth, a country's future, and sustainable peace.

As part of our efforts to provide quality and safe education for children, we must ensure global focus includes substantive discussions on bullying, including cyberbullying. Collectively, we want children to be good stewards of the world, which extends to messaging and content that children are exposed to on a daily basis. The consequences of activities like cyber bullying are severe and can include mental health concerns, substance abuse, exploitation, violent or self-destructive behavior, and even suicide.

Our children should receive the best that we, as governments, can offer them. They are the future leaders who will one day be sitting right here where we are today and we must all redouble our efforts to ensure that the world they inherit is the one they deserve.

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4. Resolution on the Girl Child

On November 20, 2017, Laurie Shestack Phipps, U.S. Adviser for Economic and Social Affairs, provided the U.S. explanation of position on Agenda Item 68(a), resolution A/C.3/72/L.19/Rev. 1 on "The Girl Child." The U.S. explanation of position follows and is also available at <https://usun.state.gov/remarks/8140>.

* * * *

The United States joins consensus on "The Girl Child" Resolution, and we thank South Africa and the other countries of [the Southern African Development Community] for their efforts to find agreement on a strong text. We would like to deliver the following Explanation of Position.

When the resolution addresses “trafficking and slavery like practices,” such as in operative paragraph 15, it is important to include commercial sexual exploitation in a list along with forced and bonded labor. Forcing women to engage in prostitution and inducing children to do the same is a central form of exploitation and defined in international law as a form of human trafficking.

On operative paragraph 23, the wording “trafficking and forced migration” seem to imply movement. The crime of trafficking in persons, however, as defined in the widely ratified Trafficking Protocol, is not movement-based.

The United States is firmly committed to providing equal access to education and the importance of fostering safe, supportive school environments and positive school climates, including preventing and addressing violence directed against girls. We understand that when the resolution calls on States to strengthen various aspects of education such as curriculum, programs, training, and other aspects of education, this is done in terms as appropriate and consistent with our respective federal, state, and local authorities.

We understand that the provisions of this resolution and the others adopted by this Committee do not change the current state of conventional or customary international law, nor do they imply that States must become parties to instruments to which they are not a party or implement obligations under such instruments. 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 interpret 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). Any reaffirmation of prior documents in this resolution and other resolutions applies only to those states that reaffirmed them initially.

We understand the reference to education in the areas of sexual and reproductive health in preambular paragraph 20 to refer to age appropriate education as determined by parents or legal guardians. Therefore, we voted against the amendment proposed by Argentina.

Finally, we understand this resolution’s operative paragraph 17 to call on States to work to ensure that marriage is entered into only with the informed, free and full consent of the intending spouses. Moreover, we understand that when the resolution calls on States to enact and enforce laws concerning the minimum age of consent and marriage, this is done in terms consistent with our respective federal and state authorities.

* * * *

5. Human Rights Council

At the HRC’s 34th session, on March 6, 2017, U.S. Delegate Kathryn Keeley delivered the statement of the United States at the annual full-day meeting on the rights of the child. The U.S. statement is excerpted below and available at <https://geneva.usmission.gov/2017/03/07/hrc-34-annual-full-day-meeting-on-the-rights-of-the-child/>.

* * * *

The United States supports efforts to protect the best interests of children in the 2030 Agenda for Sustainable Development implementation process. We agree that children should get their best start in life to thrive. Children are the agents of change and should have the capacity to be active partners in realizing the Sustainable Development Goals.

Since the adoption of the 2030 Agenda, there has been significant discussion on the enormous potential of young persons to change the world for the better. Each day we are reminded that every young person is a key driver of prosperity, security, and democracy, both today and into the future.

The global youth bulge, rise of violent extremism, and high global youth unemployment demonstrate the urgency to invest in young persons. The generation of 1.8 billion young persons in the world today is the largest youth population in history.

This is a key moment for governments, aid agencies, and youth themselves. The United States Agency for International Development has been implementing the Youth in Development Policy since 2012. The agency has been engaging young persons as partners across sectors and working to ensure their needs are met in health, education, economic opportunity, and security. USAID also launched the program YouthPower last year. This is a 447 million dollar project which focuses on empowering young persons at the local, national, and global levels.

The U.S. government also supports the Young African Leaders Initiative, the DREAMS Partnership, Young Leaders of the Americas, and the Young South East Asian Leadership Initiatives. We also are a partner in the Global Partnership to End Violence Against Children along with UNICEF and other organizations, with a focus to directly address the causes and consequences of violence in the home, school, and community with children both as beneficiaries and partners. We will continue to work with young persons wherever they are, and to encourage them as full partners in our efforts to foster sustained and inclusive economic growth and promote resilient, democratic societies.

* * * *

Also at HRC 34, on March 24, 2017, Mr. Mozdzierz delivered the U.S. explanation of position on the resolution on the rights of the child. That statement is excerpted below and available at <https://geneva.usmission.gov/2017/03/24/u-s-explanation-of-position-on-the-rights-of-the-child-resolution/>.

* * * *

The United States joins consensus on the Rights of the Child resolution with the understanding that the provisions of this resolution, and the others adopted by this Council, do not imply that States must become parties to instruments to which they are not a party, or implement obligations under such instruments.

Any reaffirmation of prior documents in this resolution and any others adopted by this Council applies only to those States that affirmed them initially. We also underscore that this resolution and the others adopted by this Council do not change or necessarily reflect the United States or other States' obligations under treaty or customary international law, nor does the use of the term "agreed" with respect to previous instruments necessarily suggest that they do

so. This or other resolutions cannot change, and do not necessarily reflect private parties' legal obligations. We thus read [operative paragraph] 3's statement that "the best interest of the child shall be the guiding principle of those responsible for his or her nurture and protection" as recommendatory.

We understand the terms "human trafficking" and "modern slavery" to be synonymous, umbrella terms that describe the totality of the crime of "trafficking in persons," i.e., the various acts, means, and forms of exploitation used to control another person. We underscore that the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children has 170 State Parties. Within the Palermo Protocol definition of trafficking in persons, "forced labor or services, slavery or practices similar to slavery" are included in the forms of exploitation. We also note that human trafficking can include, but does not require, movement. Additionally, it is unfortunate that the references to "trafficking" in OP 21 do not accurately refer instead to "trafficking in persons" or "human trafficking."

Pending review of U.S. policies relating to climate change and the Paris Agreement, the United States reserves its position on language in this resolution relating to these issues.

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D. SELF-DETERMINATION

In October and November 2017, the UN General Assembly's Fourth Committee adopted its annual resolutions on decolonization. While the United States joined consensus on 15 of these resolutions, including the annual resolutions on the U.S. territories of the Virgin Islands and American Samoa, it voted "no" on six others. These six included the annual resolution on Guam, which was adopted by the General Assembly as Resolution 72/102 on December 7, 2017. This was the first time the United States had voted "no" on that annual resolution on Guam since 1996. The other five on which the U.S. voted no were Resolutions 72/91, 72/92, 72/93, 72/110, and 72/111, also adopted by the Assembly on December 7.

The resolution on Guam requested that the United States work with Guam to facilitate its "decolonization" and keep the Secretary General informed of progress to that end. The 2017 Guam resolution included language suggested by Venezuela criticizing, *inter alia*, the U.S. military presence on Guam, the fact that Guam is "involuntarily place[d]" in the midst of an "ongoing conflict" between the U.S. and the DPRK, and a recent federal district court injunction (*Davis v. Guam*, 2017 WL 930825, Mar. 8, 2017) of Guam's planned self-determination plebiscite where the court found that the plebiscite unconstitutionally restricted the vote effectively to indigenous Guamanians. The resolution on Guam was adopted despite "no" votes by nine states (the United States, the United Kingdom, France, Israel, Japan, Iraq, Morocco, Ukraine, and Malawi) and 62 abstentions, including the majority of European member states.

The Fourth Committee adopted all but three of these resolutions on October 10, 2017. U.S. delegate Max Kendrick delivered the U.S. joint explanation of votes and positions on various of the resolutions—including "Implementing the Declaration on the

Granting of Independence to Colonial Countries and Peoples” (Resolution 72/110) and “Information from Non-Self-Governing Territories Transmitted Under Article 73 e of the Charter of the United Nations” (Resolution 72/91)—on that day. This explanation is excerpted below. This explanation is summarized at U.N. Doc. A/C.4/72/SR.9, paragraph 65 *et seq.*

* * * *

We are proud to support the right of self-determination and will continue to uphold the full application of Article 73 of the UN Charter. But we must also reiterate our well-known concerns that these resolutions continue to place too much weight on independence as a one-size-fits-all status option for a territory’s people in pursuit of their right of self-determination.

As correctly stated by the Declaration on Principles of International Law Concerning Friendly Relations of 1970, the people of a Non-Self-Governing Territory may, as an alternative to independence, validly opt for free association or any other political status — including integration with the Administering State — provided such status is freely determined by the people.

In other words, the territories can speak for themselves and it is not for this Assembly to put its thumb on the scale toward any particular outcome. Leaving the decision, whatever it may be, to the free will of the people is the essence of the right of self-determination.

Moreover, we are dismayed at this resolution’s resurrection in operative paragraph 14 of an outdated call to terminate all military activities and bases in non-self-governing territories. The United States Government has a sovereign right to carry out its military activities in accordance with its national security interests, and it is facile to assume that military presence is necessarily harmful to the rights and interests of the people of the territory, or incompatible with the wishes of the people.

In light of the debate that was held [before the Special Committee on Decolonization] last week, we also find it necessary to reiterate the longstanding U.S. view that the right of self-determination of the people of a non-self-governing territory is to be exercised by the *whole* people, not just one portion of the population.

In this connection, we hold that self-determination decisions should be conducted consistently with applicable human rights obligations and commitments, including the commitments set forth in the Universal Declaration on Human Rights. As we are all aware, among these are important commitments relating to non-discrimination and universal and equal suffrage.

With respect to the resolution on Information from Non-Self-Governing Territories Transmitted Under Article 73(e) of the Charter, we underscore that it is for Administering State to determine whether a territory has achieved self-governance under the terms of the Charter, and whether to transmit information under Article 73(e) of the Charter.

Finally, we reiterate and incorporate by reference the other concerns we have expressed in years past about these resolutions.

We stress that the statements in these resolutions, as well as those in prior resolutions of the General Assembly—including Resolution 1514 of 1960—are nonbinding and do not necessarily state or reflect conventional or customary international law. Any reaffirmation of prior documents in these resolutions applies only to those States that affirmed them initially.

* * * *

The Fourth Committee adopted the other three decolonization resolutions—“Economic and Other Activities Which Affect the Interests of the Peoples of the Non-Self-Governing Territories” (“Resolution II,” ultimately adopted as General Assembly Resolution 72/92); “Question of Guam” (“Resolution X,” Resolution 72/102); and Question of New Caledonia (Resolution 72/104)—on November 8, 2017. The U.S. explanation of vote on the former two resolutions is excerpted below.

* * * *

We are deeply disappointed today to have been forced, as a result of counterproductive additions primarily on the part of the Venezuelan delegation, to call a vote and vote against the resolution on the Question of Guam for the first time in over 20 years. While we endeavored to work with Committee members to resolve problematic language so that we could join consensus, we were ultimately rebuffed by some members’ insistence on using this resolution to launch a political attack. Problematic language added this year to Resolution II [on Economic and Other Activities] also forced the United States to vote “no” on that resolution.

We take this opportunity to draw attention to some of the elements in the texts on Guam and Economic and Other Activities that made it impossible for the United States to join consensus.

First, on the new language with the unfounded claim that the people of Guam are uniformly opposed to U.S. military activities, this allegation has no basis in fact, nor does the suggestion that these activities harm the environment or contravene the wishes of Guam’s people. We must also reject as a waste of UN resources the unnecessary new request for a UN environmental study on the impacts of military activities in Guam.

The resolution on Economic and Other Activities broadens presumptions about military presence in non-self-governing territories with language in operative paragraph 5 urging avoidance of military activities. To this we would reiterate that the United States has a sovereign right to carry out its military activities in accordance with its national security interests, and it is facile to assume that military presence is necessarily harmful to the rights and interests of the people of the territory, or incompatible with the wishes of the people.

Second, new language in the Guam resolution also dangerously mischaracterizes the situation regarding North Korea. While we must continue to address the Kim regime’s incessant provocations, it is incorrect to say we are “in the midst of an ongoing conflict.” The only North Korea reference that belongs in this resolution is a condemnation of the threats Kim Jong Un has made against Guam and condemnation of North Korea’s continued unlawful development of its unlawful nuclear and ballistic missile programs which threaten international peace and security.

Third, ... [the United States is compelled to] object to the criticism of a recent U.S. court

ruling that halted Guam's planned plebiscite on its political status. Guam is one of the United States' most multicultural societies, counting among its residents not only indigenous Chamorros and migrants from other parts of the United States, but also the descendants of immigrants from across East Asia. The United States has long supported the right of self-determination for the people of Guam and continues to do so. Guam's legislature passed a law, however, that restricts the plebiscite on its political status to those with roots on Guam since 1950 [effectively omitting all Guamanians who fall outside of this category]. The court found these limitations incompatible with U.S. constitutional guarantees against restricting suffrage on the basis of race. Guam has appealed this ruling to a federal appeals court, and for this reason alone it is inappropriate for the Assembly to comment on the case.

We also find it necessary to repeat a basic axiom about self-determination ...: the right of self-determination of the people of a non-self-governing territory is to be exercised by the whole people, not just one portion of the population. As Resolution 1514 and many of the other self-determination resolutions recognize, such decisions should be conducted consistently with applicable human rights obligations and commitments, including those related to universal and equal suffrage without distinction on the basis of race or ethnicity.

F[ourth], we would recall the words of the Chair at the conclusion of [the October 10] session, in which he noted that Venezuela's support for territorial peoples is rooted in its own colonial experience. We, too, once fought a bloody war to free ourselves from colonialism, and we have long championed the cause of self-determination. Since shortly after our own independence, we have supported countries that choose independence, and we have been proud to welcome them as equal and sovereign partners in this body.

[Fifth, the United States does not support a mission by the [Special Committee on Decolonization] to Guam. It serves to recall that General Assembly Resolution 850(IX) stipulates that any such visits are to be conducted "in agreement with" the Administering State.]

But we also support the right of peoples in other territories to choose other paths, including integration or simply maintenance of the status quo, if that is what the people prefer. It is long past time for this body to eschew one-size-fits-all solutions, when we can all clearly see that many peoples prefer various options.

Finally, we reiterate that this resolution and the other "decolonization" resolutions, including Resolution 1514, are nonbinding and do not necessarily state or reflect international law.

For these reasons, the United States called this vote and will vote "no" on this resolution.

* * * *

Separate from the Fourth Committee decolonization resolutions, the Third Committee, and then the General Assembly in plenary, adopted annual resolutions on self-determination (Resolutions 72/158, 72/159, and 72/160). The United States voted "no" on 72/158 and 72/160 and joined consensus on 72/159. On November 16, 2017, before the Third Committee, U.S. ECOSOC Advisor Mordica Simpson delivered the U.S. explanation of its position on 72/160 (then labeled as draft resolution A/C.3/72/L.58) on the "Universal Right of Peoples to Self-Determination." The U.S. explanation, available at <https://usun.state.gov/remarks/8153>, states:

The United States considers the right of self-determination of peoples to be important and therefore joins consensus on this resolution. We note, however, as has frequently been stated by the U.S. and other delegations, that this resolution contains many misstatements of international law and is inconsistent with current state practice.

E. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

1. General

On March 23, 2017 at the 34th session of the HRC, Mr. Mozdzierz delivered the explanation of position for the United States on the resolution on the “Realization of Economic, Social, and Cultural Rights.” The U.S. explanation of position follows and is available at <https://geneva.usmission.gov/2017/03/23/u-s-explanation-of-position-on-the-realization-of-economic-social-and-cultural-rights/>.

* * * *

The United States is pleased to join consensus on this resolution concerning the realization of economic, social, and cultural rights. We engaged in the negotiations that developed this resolution and join consensus today as part of our efforts to work constructively with delegations on these important issues. We in particular thank the main cosponsors for their cooperative and collaborative approach to the development of this text.

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 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 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 as consistent with Article 2.2 of the Covenant.

While we recognize the importance of social protection floors, we note that countries have a wide array of policies and actions that may be appropriate in promoting the progressive realization of economic, social, and cultural rights. Therefore, we think that this resolution should not try to define the content of those rights.

The United States also 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. In that regard, human rights mechanisms may have the potential to inform national

efforts to leave no one behind. We regret, however, that additional references to “the right to development” were introduced into this resolution and several others under this agenda item. 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, such that its reference in this resolution with respect to issues covered in the Sustainable Development Goals is vague and undefined. Furthermore, work is needed to make it consistent with human rights, which the international community recognizes as universal rights held and enjoyed by individuals.

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.

* * * *

On November 20, 2017, U.S. Adviser for Economic and Social Affairs Laurie Shestack Phipps delivered the general statement at the UN Third Committee meeting on the 2030 Agenda. This November 20 general statement applied to multiple resolutions considered by the Third Committee, as indicated at the end of the statement, which is excerpted below and available at <https://usun.state.gov/remarks/8216>.

* * * *

Mr. Chair, as this Committee continues to take action on the resolutions negotiated during this session, we take this opportunity to make important points of clarification on some of the language we see reflected across multiple resolutions. We underscore that General Assembly resolutions, and many of the outcome documents referenced therein, including the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda, are non-binding documents that do not create rights or obligations under international law, nor bind states to any financial commitments.

Regarding the reaffirmation of the 2030 Agenda, the United States recognizes the Agenda as a global framework for sustainable development that can help countries work toward global peace and prosperity. We applaud the call for shared responsibility in the Agenda and emphasize that all countries have a role to play in achieving its vision. We also strongly support national responsibility stressed in the Agenda. However, each country has its own development priorities, and we emphasize that countries must work toward implementation in accordance with their own national policies and priorities.

We also highlight our mutual recognition, in paragraph 58 of the 2030 Agenda, that implementation of this Agenda must respect and be without prejudice to the independent mandates of other processes and institutions, including negotiations, and does not prejudge or serve as precedent for decisions and actions underway in other forums. For example, this Agenda does not represent a commitment to provide new market access for goods or services. This

Agenda also does not interpret or alter any WTO agreement or decision, including the Agreement on Trade-Related Aspects of Intellectual Property, TRIPS Agreement.

We take this opportunity to make important points of clarification regarding the reaffirmation of the Addis Ababa Action Agenda. Specifically, we note that much of the trade-related language in the AAAA outcome document has been overtaken by events since July 2015 and is immaterial. Indeed, some of the intervening events happened just months after the release of the outcome document. Therefore, any reaffirmation of the outcome document has no standing for ongoing work and negotiations involving trade.

The United States notes that our President announced his intention to withdraw from the Paris Agreement as soon as the U.S. is eligible to do so, unless we can identify terms that are more favorable to American businesses, workers, and taxpayers. While our climate policy is under review, we must note our concerns with language related to the Paris Agreement across many of the resolutions this committee is considering. We recognize that climate change is a complex global challenge and affirm our strong commitment to an approach that lowers emissions while supporting economic growth and improving energy security needs.

This statement applies to all resolutions on which the United States joins consensus during this session of the Third Committee, including several applicable resolutions we intend to or already have cosponsored. For the sake of brevity, we will not name all of these resolutions here but instead we will supply a list of these resolutions to the Third Committee Secretariat separately. The document numbers of these resolutions are also indicated in the heading of this statement.

Furthermore, the United States understands that the General Assembly's resolutions do not change the current state of conventional or customary international law. We do not read any resolution acted upon by this Committee to imply that states must join or implement obligations under international instruments to which they are not a party. We understand abbreviated references to certain human rights to be shorthand for the accurate terms used in the applicable international treaty, and we maintain our longstanding positions on those rights. The United States understands that any reaffirmation of prior documents applies only to those states that affirmed them initially, and, in the case of international treaties or conventions, to those States who are party. Finally, "welcoming" a report should not be understood as acceptance of all assertions, conclusions, or recommendations contained therein.

We request that this statement, along with the specific list of resolutions below, be made part of the official record of this meeting and incorporated by reference for subsequent meetings where all relevant resolutions are adopted.

Thank you.

Relevant resolutions covered by this statement:

A.I. 27 A/C.3/72/L.10/Rev.1 Persons with Albinism

A.I. 27(a) A/C.3/72/L.12/Rev.1 Implementation of the outcome of the World Summit for Social Development and of the 24th special session of the General Assembly

A.I. 27(b) A/C.3/72/L.7/Rev.1 Promoting social integration through social inclusion

A/C.3/72/L.13/Rev.1 Follow-up to the Second World Assembly on Ageing

A/C.3/72/L.14/Rev.1 Follow-up to the 20th anniversary of the International Year of the Family and beyond

A/C.3/72/L.15/Rev.1 Policies and programs involving youth

A.I. 28 A/C.3/72/L.17 /Rev.1 Violence against women migrant workers

A/C.3/72/L.22/Rev.1 Improvement of the situation of women and girls in rural areas

- A.I. 64 A/C.3/72/L.61 Assistance to refugees, returnees and displaced persons in Africa
A.I. 68(a) A/C.3/72/L.21/Rev.1 Rights of the child
A.I. 70(a) A/C.3/72/L.56/Rev.1 Combating glorification of Nazism, neo-Nazism and other practices that contribute to fueling contemporary forms of racism, racial discrimination, xenophobia and related intolerance
A.I. 72(a) A/C.3/72/L.18/Rev.1 Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto: Situation of women and girls with disabilities
A.I. 72(b) A/C.3/72/L.26/Rev.1 The right to development
A/C.3/72/L.28/Rev.1 Enhancement of international cooperation in the field of human rights
A/C.3/72/L.29/Rev.1 Human rights and cultural diversity
A/C.3/72/L.31 Promotion of a democratic and equitable international order
A/C.3/72/L.32/Rev.1 The right to food
A/C.3/72/L.39/Rev.1 The human rights to safe drinking water and sanitation
A/C.3/72/L.43/Rev.1 Protection of Migrants
A/C.3/72/L.45 National institutions for the promotion and protection of human rights
A/C.3/72/L.46/Rev.1 Protection of and assistance to internally displaced persons
A/C.3/72/L.50/Rev.1 Declaration on Human Rights Defenders
A/C.3/72/L.51/Rev.1 Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
A/C.3/72/L.52 Globalization and its impact on the full enjoyment of all human rights
A.I. 107 A/C.3/72/L.6/Rev.1 Improving the coordination of efforts against trafficking in persons
A/C.3/72/L.11/Rev.1 Strengthening the United Nations crime prevention and criminal justice programme, in particular its technical cooperation capacity

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On November 21, 2017, Marguerite Walter provided the U.S. explanation of position at the World Summit for Social Development at the UN. Ms. Walter's statement is excerpted below and available at <https://usun.state.gov/remarks/8133>.

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The United States is disappointed that issues remain in this resolution which are not clearly linked to social development or the work of this Committee. The Secretary-General has called for UN reform to increase efficiency and effectiveness, and the consideration of issues not within the topic of this resolution is a misuse of resources. We must express our concerns over portions of this resolution that attribute supposed negative impacts on economic and social development to vague and sweeping references to some trade practices and trade barriers; and inappropriately call upon international financial institutions and other non-UN organizations to take actions that are beyond the scope of what this resolution should properly address. For these reasons, we are calling for a vote and voting no on this resolution, and encourage other member states to vote no as well.

We underscore that this resolution and the other ones adopted by this Committee do not change or necessarily reflect the United States' or other States' obligations under treaty or customary international law. A few paragraph-specific observations and explanations follow.

Regarding reference to foreign occupation in preambular paragraph 15, we reaffirm our abiding commitment to a comprehensive and lasting resolution to the Israeli-Palestinian conflict. We remain committed to supporting the Palestinian people in practical and effective ways, including through sustainable development. We will continue to work with the Palestinian Authority, Israel, and international partners to improve the lives of ordinary people as they pursue a more sustainable future.

In reference to operative paragraph 37, the United States believes the UN Guiding Principles on Business and Human Rights provide a valuable, universal framework for working through a wide range of issues and challenges. In that regard, we understand the responsibility of business enterprises raised in this resolution to be consistent with the UN Guiding Principles. We further emphasize that the responsibility is not artificially limited to "transnational" or "private" corporations, but applies to all kinds and forms of business enterprises regardless of their size, sector, location, ownership and structure.

Regarding economic and trade issues, it is inappropriate for the UN General Assembly to call on international financial institutions to provide debt relief, as this resolution does in operative paragraph 45. Further, the demands in operative paragraph 57 that the international community "shall" increase market access or provide debt relief are wholly unacceptable in a resolution such as this one. We note that General Assembly resolutions should refrain from using language such as "shall" in reference to action by member states, in that such terminology is only appropriate with respect to binding texts. In the view of the United States, this language has no standing in this or in any other forum, including in future negotiated documents.

Further, the United States understands that all references to transfer of, or access to, technology in this resolution—or any others this Committee adopts at this session—refer to voluntary technology transfer on mutually agreed terms and conditions, and that all references to access to information and/or knowledge are to information or knowledge that is made available with the authorization of the legitimate holder.

We note that the term "equitable" is used in multiple contexts in this resolution. While the United States fully endorsed the importance of universal access to open and transparent markets for example, we must collectively avoid any unintended interpretation of the term "equitable" that implies a subjective assessment of fairness that, among other things, may lead to discriminatory practices.

We appreciate that the sponsors of the resolution removed language in the zero draft which offered an additional example of China's attempts to impose its national view of multilateralism and world geopolitics on the international system. The United States cannot agree to this language, but looks forward to working with China and others in the months and years ahead to sustain and strengthen the international norms on which the global system is based.

With regard to this resolution's references to the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda, we addressed our concerns in a General Statement delivered previously, on November 20.^{****}

^{****} Editor's note: The November 20 general statement is excerpted in Section E.1. *supra*.

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2. Food

The explanation of vote by the United States on the right to food resolution at HRC 34 is excerpted below and available at <https://geneva.usmission.gov/2017/03/24/u-s-explanation-of-vote-on-the-right-to-food/>.

* * * *

This Council is meeting at a time when the international community is confronting what could be the modern era's most serious food security emergency. Under Secretary-General O'Brien warned the Security Council earlier this month that more than 20 million people in South Sudan, Somalia, the Lake Chad Basin, and Yemen are facing famine and starvation. The United States, working with concerned partners and relevant international institutions, is fully engaged on addressing this crisis.

This Council, should be outraged that so many people are facing famine because of a manmade crisis caused by, among other things, armed conflict in these four areas. The resolution before us today rightfully acknowledges the calamity facing millions of people and importantly calls on states to support the United Nations' emergency humanitarian appeal. However, the resolution also contains many unbalanced, inaccurate, and unwise provisions that the United States cannot support. This resolution does not articulate meaningful solutions for preventing hunger and malnutrition or avoiding its devastating consequences. This resolution distracts attention from important and relevant challenges that contribute significantly to the recurring state of regional food insecurity, including endemic conflict, and the lack of strong governing institutions. Instead, this resolution contains problematic, inappropriate language that does not belong in a resolution focused on human rights.

For the following reasons, we will call a vote and vote "no" on this resolution. First, drawing on the Special Rapporteur's recent report, this resolution inappropriately introduces a new focus on pesticides. Pesticide-related matters fall within the mandates of several multilateral bodies and fora, including the Food and Agricultural Organization, World Health Organization, and United Nations Environment Program, and are addressed thoroughly in these other contexts. Existing international health and food safety standards provide states with guidance on protecting consumers from pesticide residues in food. Moreover, pesticides are often a critical component of agricultural production, which in turn is crucial to preventing food insecurity.

Second, this resolution inappropriately discusses trade-related issues, which fall outside the subject-matter and the expertise of this Council. The language in paragraph 28 in no way supersedes or otherwise undermines the World Trade Organization (WTO) Nairobi Ministerial Declaration, which all WTO Members adopted by consensus and accurately reflects the current status of the issues in those negotiations. At the WTO Ministerial Conference in Nairobi in 2015, WTO Members could not agree to reaffirm the Doha Development Agenda (DDA). As a result, WTO Members are no longer negotiating under the DDA framework. The United States also does not support the resolution's numerous references to technology transfer.

We also underscore our disagreement with other inaccurate or imbalanced language in this text. We regret that this resolution contains no reference to the importance of agricultural innovations, which bring wide-ranging benefits to farmers, consumers, and innovators. Strong protection and enforcement of intellectual property rights, including through the international rules-based intellectual property system, provide critical incentives needed to generate the innovation that is crucial to addressing the development challenges of today and tomorrow. In our view, this resolution also draws inaccurate linkages between climate change and human rights related to food.

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.

We also do not accept any reading of this resolution or related documents that would suggest that States have particular extraterritorial obligations arising from any concept of a right to food.

Lastly, we wish to clarify our understandings with respect to certain language in this resolution. 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. 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. 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.

Finally, we interpret this resolution's reaffirmation of previous documents, resolutions, and related human rights mechanisms as applicable to the extent countries affirmed them in the first place.

As for other references to previous documents, resolutions, and related human rights mechanisms, we reiterate any views we expressed upon their adoption.

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The U.S. explanation of vote on draft UN General Assembly resolution A/C.3/72/L.32/REV.1 on the right to food was delivered by U.S. Advisor Robin Brooks on November 16, 2017. That statement follows and is available at <https://usun.state.gov/remarks/8149>.

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We thank the delegation of Cuba for conducting a transparent negotiating process and for its efforts to address many of our concerns.

This Committee is meeting at a time when the international community is confronting what could be the modern era's most serious food security emergency. Over 20 million people in South Sudan, Somalia, the Lake Chad Basin, and Yemen are facing famine and starvation. The United States, working with concerned partners and relevant international institutions, is fully engaged on addressing these conflict-related crises.

This Committee, and all members of the international community, should be outraged that so many people are facing food insecurity because of manmade crises caused by instability and armed conflict. The resolution before us today rightfully acknowledges the calamity facing millions of people and importantly calls on States to support the United Nations' emergency humanitarian appeal. However, the resolution also contains many unbalanced, inaccurate, and unwise provisions that the United States cannot support. In other words, this resolution does not articulate meaningful solutions for preventing hunger and malnutrition or avoiding its devastating consequences.

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. 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. The United States does not recognize any change in the current state of conventional or customary international law regarding rights related to food. Moreover, we note that 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."

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. We also do not accept any reading of this resolution or related documents that would suggest that States have particular extraterritorial obligations arising from any concept of a right to food.

However, we underscore our disagreement with other inaccurate or imbalanced language in this text. We regret that this resolution contains no reference to the importance of agricultural innovations, which bring wide-ranging benefits to farmers, consumers, and innovators. Strong protection and enforcement of intellectual property rights, including through the international rules-based intellectual property system, provide critical incentives needed to generate the innovation that is crucial to addressing the development challenges of today and tomorrow. The United States also does not support the resolution's numerous references to technology transfer.

Moreover, this resolution inappropriately discusses trade-related issues, which fall outside the subject-matter and the expertise of this Committee. As we have stated on many occasions, it is not acceptable to the United States for the UN to speak to ongoing or future work of the World Trade Organization, to reinterpret WTO agreements and decisions, or to seek to shape WTO negotiations and its agenda. The WTO is an independent organization with a different membership, mandate, and rules of procedure. The language in paragraph 28 in no way supersedes or otherwise undermines the WTO Nairobi Ministerial Declaration, which all WTO Members adopted by consensus and accurately reflects the current status of the issues in those negotiations. At the WTO Ministerial Conference in Nairobi in 2015, WTO Members could not

agree to reaffirm the Doha Development Agenda. As a result, WTO Members are no longer negotiating under the DDA framework. Paragraph 28 also inaccurately links trade negotiations at the WTO to the right to food.

The United States rejects operative paragraphs 29 and 35. Paragraph 29 inaccurately suggests there is a tension between international trade agreements and the right to food. Regarding paragraph 35, we cannot accept the UN opining on what WTO Members should do or consider in implementing a WTO agreement. The UN has no voice on these matters. For this same reason, we cannot accept the attempts made in paragraphs 24 and 37 for the UN to shape the agenda and negotiating priorities of the WTO.

Finally, we interpret this resolution's reaffirmation of previous documents, resolutions, and related human rights mechanisms as applicable to the extent countries affirmed them in the first place. As for other references to previous documents, resolutions, and related human rights mechanisms, we reiterate any views we expressed upon their adoption.

For the foregoing, we will call a vote and vote "no" on this resolution.

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3. Water

ECOSOC Advisor Simpson delivered the U.S. explanation of position on draft resolution A/C.3/72/L.39/Rev.1 on the "Human Rights to Safe Drinking Water and Sanitation" on November 17, 2017. That statement follows and is available at <https://usun.state.gov/remarks/8196>.

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The United States recognizes the importance and challenges of meeting basic needs for water and sanitation to support human health, 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 voting yes on this resolution today we reaffirm the understandings in our statement in New York at the UN General Assembly's meeting on this topic in 2015, as well as in our explanations of position on the Human Rights Council's September 2012, 2013, 2014, and 2016 resolutions on the human right to safe drinking water and sanitation.

The United States joins consensus on the understanding that this resolution 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, ICESCR, and the rights contained therein are not justiciable in U.S. courts. We interpret 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 ICESCR, in light of its Article 2(1). We also note that water resource management is a technical function that is distinct from international human rights law and underscore our view that preambular paragraph 21 of this resolution should not be understood as creating any international legal obligations.

We disagree with any assertion that the right to safe drinking water and sanitation is inextricably related to or otherwise essential to enjoyment of other human rights, such as the right to life as properly understood under the International Covenant on Civil and Political Rights, ICCPR. To the extent that access to safe drinking water and sanitation is derived from the right to an adequate standard of living, it is addressed under the ICESCR, which imposes a different standard of implementation than that contained in the ICCPR. We do not believe that a state's duty to protect the right to life by law would extend to addressing general conditions in society or nature that may eventually threaten life or prevent individuals from enjoying an adequate standard of living.

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 reports mentioned in this resolution. We would also note, with respect to preambular paragraph 25, that although climate models project that there may be changes in the patterns of natural disasters in the future, at this time there is no consensus within the scientific community on the presence of an observable trend in key types of sudden onset natural disasters.

Finally, we regret that the United States must dissociate from operative paragraph 2 of this resolution. The language used to define the right to water and sanitation in that paragraph is based on the views of the Committee on Economic, Social, and Cultural Rights and the Special Rapporteur only. That language does not appear in an international agreement and does not reflect any international consensus.

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4. Housing

At HRC 34, on March 23, 2017, Mr. Mozdierz delivered the U.S. explanation of position on the resolution on the right to adequate housing. U.N. Doc. A/HRC/34/L.12. The U.S. statement is available at <https://geneva.usmission.gov/2017/03/24/u-s-explanation-of-position-on-the-right-to-adequate-housing/> and excerpted below.

* * * *

Thank you, Mr. President. 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.

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 the references in the resolution to non-discrimination as reflecting the prohibition under the international covenants on human rights of discrimination on the basis of all protected grounds and as articulating important 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 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.

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5. Health

At HRC 35, on June 23, 2017, Jason Mack delivered the U.S. explanation of position on the resolution on the "Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health in the Implementation of the 2030 Agenda for Sustainable Development." U.N. Doc. A/HRC/35/L.18. That statement is excerpted below and available at <https://geneva.usmission.gov/2017/06/23/explanation-of-position-on-resolution-l-18/>.

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The United States greatly appreciates the extensive consultations conducted by Brazil, Portugal, Mozambique, Paraguay, and Thailand on this resolution and will join consensus on it.

However, the United States disassociates from the reference to technology transfer in operational paragraph 9. For the United States, this language will have no standing in future negotiations. The United States continues to oppose language that we believe undermines intellectual property rights.

With respect to the High Commissioner for Human Rights report called for under operational paragraph 13, the United States would like to express disappointment. We are concerned with the report's focus on the "contributions of the right to health framework to the effective implementation and achievement of the health-related Sustainable Development Goals." We do not see this as an appropriate task and responsibility for the High Commissioner, and we do not wish to frame the SDGs in a "right to health framework" when there is no "right to health framework" language in the SDGs themselves. We encourage governments and public institutions to work closely on implementation with regional and local authorities, subregional institutions, international institutions, academia, philanthropic organizations, volunteer groups, and others, as appropriate. Furthermore, we note that certain recent UN reports have put forward a flawed understanding on issues of healthcare access, particularly with respect to access to medicines, and have generated divisiveness among member states and the UN. We strongly urge the UN to consider a new approach to analyzing healthcare that seeks to unite all of the parties responsible for delivering critical healthcare solutions to patients around the world. To this end, the UN Secretary-General's High-Level Panel on Access to Medicines should not be used as a model for this new work.

The United States would also like to note that we were pleased to see language specifically addressing persons with psychosocial disabilities in this text and continue to support the work that the Special Rapporteur does to advance the human rights of all persons with disabilities.

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On September 29, 2017, Jason Mack delivered the U.S. explanation of position on the resolution considered at HRC 36 on mental health. U.N. Doc. A/HRC/36/L.25. That statement is excerpted below and available at <https://geneva.usmission.gov/2017/09/29/explanation-of-position-on-mental-health-hrc36-resolution-l-25/>

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The United States thanks Brazil and Portugal for their continued dedication to an issue of tremendous importance to all countries. The United States strongly supports the right to the enjoyment of the highest attainable standard of mental health.

While we share the broad aims of this resolution, the United States believes there is a need to clarify a few key points. We interpret this resolution's references to obligations as applicable to States only to the extent they have assumed such obligations, and to the extent that they accurately reflect the rights as articulated in the Convention on the Rights of Persons with Disabilities and the International Covenant on Civil and Political Rights. Moreover, we understand "international human rights norms" to refer to the human rights and fundamental freedoms that are set forth in international human rights covenants and conventions, as applicable.

Despite these and other concerns with the resolution, we join consensus on this resolution because we support its focus on encouraging States to take measures to address the challenges faced by persons with mental health and psychosocial conditions. We believe these persons should be respected and treated as equal members of the community, and we maintain a high priority on identifying solutions that alleviate those challenges.

Other concerns regarding this resolution will be addressed in the United States' general statement delivered at the end of Item 3.*

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F. HUMAN RIGHTS AND THE ENVIRONMENT

On June 22, 2017, at the HRC's 35th session, the United States provided an explanation of position on an HRC resolution on climate change. That explanation of position is excerpted below and available at <https://geneva.usmission.gov/2017/06/22/u-s-explanation-of-position-on-hrc-climate-change-resolution/>.

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* Editor's note: The U.S. general statements at the HRC in 2017 are discussed in section A.3, *supra*.

We thank the members of the core group for their continued dedication to an issue of importance to many countries. Climate change is a complex global challenge. As we said with respect to a prior Human Rights Council 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 are joining consensus on this resolution.

At the same time, this resolution raises some serious concerns for the United States. We regret that the sponsors missed an opportunity to highlight the need for States to promote and respect the human rights of persons on their territories when they take action to address climate change. We also regret that the resolution fails to focus on the core mandate of the Council. Regarding the resolution's references to the Paris Agreement, the United States notes that President Trump announced on June 1 that the United States will withdraw from or renegotiate U.S. participation in the Paris Agreement or another international climate deal.

Certain language in the resolution goes beyond a human rights focus and intrudes on matters that are properly addressed in fora with specific expertise related to climate change, and the resolution takes out of context the resolutions and actions resulting from such negotiations. This is particularly inappropriate in light of ongoing work in the UN Framework Convention on Climate Change (UNFCCC). The resolution's unnecessary and selective quotations from the UNFCCC, the Paris Agreement, and decisions of the Conference of the Parties (COP) cannot be understood to change or interpret the meaning or applicability of these instruments, nor can it prejudice ongoing or future negotiations in other fora in any way. Similarly, any calls for climate action in this resolution can only affirm actions that countries choose to take.

While the effects of climate and weather phenomena may be one factor, among others, that influences human movement, the resolution text ignores, to its detriment, additional factors. The omission of reference to the important diversity of drivers of migration cannot be understood to suggest a broad, direct and singular path of causation between climate change and migration.

We understand the reference in OP10 to certain constituted bodies related to the UNFCCC to mean an invitation to the UNFCCC Secretariat, which may draw on relevant UNFCCC bodies as appropriate; these constituted bodies have no independent international standing and have limited mandates prescribed by UNFCCC Parties.

We understand the research the OHCHR is being requested to undertake pursuant to OP 12 to be related solely to addressing human rights protection gaps in the context of migration and displacement. We do not see any role for OHCHR to research adaptation and mitigation plans or their related means of implementation.

Other concerns regarding this resolution will be addressed in the United States' General Statement, which will be delivered at the end of Item 3.**

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G. BUSINESS AND HUMAN RIGHTS

On November 27, 2017, the State Department Bureau of Democracy, Human Rights, and Labor released a fact sheet on U.S. government efforts to advance respect for human

** Editor's note: The U.S. general statements at the HRC in 2017 are discussed in section A.3, *supra*.

rights among business enterprises in 2017. The fact sheet follows. It is also available at <https://www.state.gov/j/drl/rls/fs/2017/275861.htm>.

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The U.S. government is committed to supporting and advancing respect for human rights among businesses, and has continued to take steps toward this objective in 2017. This document is meant to provide a snapshot of a few examples of the work undertaken in this regard.

Laws and Policies

[U.S. government enacts Countering America's Adversaries Through Sanctions Act.](#) Under this law, any foreign person or company that utilizes North Korean labor, which is presumed to be forced labor, in their supply chains could be subject to sanctions. The law is an example of how the U.S. government takes action to promote internationally recognized labor rights for all workers and creates consequences for entities complicit in human rights abuses. U.S. Customs and Border Protection has a [factsheet](#) to guide companies on supply chain due diligence, including under this law.

[USAID launches global alliance to promote legal and sustainable seafood.](#) Launched in October, the Seafood Alliance for Legality and Traceability "SALT" brings together the seafood industry, governments, and non-governmental organizations to collaborate on innovative solutions for legal and sustainable seafood, with the goal of increased transparency in seafood supply chains and strengthened management of fisheries.

[U.S. government addresses trafficking in persons in federal supply chains.](#) The U.S. government continues to implement the Federal Acquisition Regulation (FAR), "Ending Trafficking in Persons," which prohibits federal contractors, sub-contractors, and their agents from engaging in human trafficking or activities known to facilitate trafficking. The Department of State continues to conduct training for new acquisition personnel on their roles and a responsibility related to the FAR, and engages other governments to encourage them to examine their own supply chains.

[U.S. government commits to publishing a fourth Open Government Partnership \(OGP\) National Action Plan.](#) In October, the U.S. government notified OGP that it would publish its fourth National Action Plan, and related documents, in early 2018. This extension will allow the additional time needed to work with trusted civil society partners to develop a comprehensive plan reflective of our national priorities.

[U.S. National Contact Point undertook a Peer Review September 28-29, 2017.](#) The Peer review assessed how the National Contact Point process is working in practice and how it helps to promote responsible business conduct within the United States.

[U.S. government joins G20 leaders' summit declaration, which includes a commitment to labor, social, and environmental standards.](#) Leaders convened in Hamburg on July 7-8 to address major global economic challenges and to contribute to prosperity and well-being. Commitments included establishing and fostering the implementation of policy frameworks on business and human rights and underlining the responsibility of business to exercise due diligence.

[U.S. government co-sponsored UN Human Rights Council resolutions that advance business and human rights.](#) In June 2017, the U.S. co-sponsored a resolution extending the

mandate of the UN Business and Human Rights Working Group to promote dissemination and implementation of the UN Guiding Principles (GPs). The resolution also calls upon all business enterprises to meet their responsibility to respect human rights in accordance with the GPs. In March 2017, the United States co-sponsored a [resolution](#) renewing the mandate of the Special Rapporteur for Human Rights Defenders. The Special Rapporteur's 2017 [annual report](#) focused on defenders in the field of business and human rights. In its interactive dialogue on the issue, the U.S. noted the important role that human rights defenders play in protecting and advancing the fundamental freedoms that create the enabling environment for successful businesses to thrive around the world.

[U.S. government submits amicus brief in *Jesner et. al. v. Arab Bank*](#). The *Jesner* case asked whether a corporation can ever be held liable under the Alien Tort Statute. The U.S. took the position, consistent with its position in *Kiobel*, that the court below “erred in holding that a corporation can never be subject to a ‘civil action’ for a ‘tort’ in violation of the law of nations” under the Alien Tort Statute, but that other obstacles might prevent this particular case from moving forward.

[U.S. government joins U.K. Call to Action on Human Trafficking](#). The U.S. government endorsed U.K. Prime Minister Theresa May's Call to Action to end Forced Labour, Modern Slavery and Human Trafficking. Released on September 20, 2017, and endorsed by 37 states, the Call To Action expresses a political commitment to “combating the exploitation of human beings for the purposes of compelled labour or commercial sex through the use of force or other forms of coercion, or fraud.”

Tools

[U.S. Department of Labor releases new “Comply Chain” mobile app](#). The app is designed to help companies and business groups develop robust social compliance systems to root out child labor and forced labor from global supply chains.

[U.S. Department of State awards \\$25M to Global Fund to End Modern Slavery](#). This award is for a three-year program to reduce the prevalence of modern slavery in specific countries or regions around the world. A portion of the \$25 million will support grants focused on combating human trafficking in select industries. The Program will seek to raise commitments of \$1.5 billion in support from other governments and private donors.

[U.S. Department of State updates tools to prevent human trafficking in global supply chains](#). The State Department and NGO Verité are adding new sector-specific materials to the Responsible Sourcing Tool, an online platform with resources to help federal contractors, acquisitions officers, and businesses identify, prevent, and address human trafficking risks in their global supply chains. The site contains information on sectors and commodities at risk for trafficking or trafficking-related activities, as well as 10 risk management tools and a set of seafood sector specific tools. Recent efforts include increased data analytics, marketing, and evaluations to analyze current usage, drive new users to the site, and enhance the tools' effectiveness.

[USAID undertakes Three Responsible Land-Based Investment Pilots](#). The three pilots are with Illovo Sugar in Mozambique, the Moringa Partnership in Kenya, and Hershey in Ghana. USAID partners with the private sector to better understand and mitigate land tenure risks associated with agribusiness investments in the developing world. Through these partnerships, USAID works to secure legitimate land rights and to improve livelihoods and other outcomes for communities in the investment areas.

U.S. Department of Labor supports project to reduce child labor in production of vanilla in Madagascar. The project works with vanilla exporters to develop a supply chain traceability system to ensure their supply chains are free of child labor.

U.S. Department of State and USAID renew Public-Private Alliance for Responsible Minerals Trade. It was renewed for another 5 years. The U.S. Department of Labor also joined. The Alliance consists of thirty members from NGOs, trade associations, and private companies to address conflict minerals in the Great Lakes Region of Africa.

USAID launches a second Land Tenure and Property Rights Massive Open Online Course (MOOC) in 2017. The course, publicly available, includes three new modules on geospatial data and technology, customary and community tenure, and USAID programming as it relates to land tenure and property rights.

USAID updates Land Governance Profiles. USAID creates and/or updates 15 such profiles (Afghanistan, Burkina Faso, Burma, Colombia, Cote d'Ivoire, Iraq, Jordan, Kenya, Mexico, Mozambique, Nepal, Pakistan, Philippines, Rwanda, Ukraine and Zambia) to be completed by May of 2018. These profiles are an invaluable introduction for businesses that are looking to make land-based investments in a given country, and are conscientious about investing in an ethical and responsible manner.

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H. INDIGENOUS ISSUES

1. Expert Mechanism on the Rights of Indigenous Peoples

On July 10, 2017, Legal Adviser to the U.S. Mission in Geneva Katherine Gorove delivered a U.S. intervention at the first annual session of the Expert Mechanism on the Rights of Indigenous Peoples (“EMRIP”) since its expansion to seven members as a result of the HRC mandate reform resolution (33/25) adopted in September 2016. See *Digest 2016* at 229-40 for discussion on the resolution on EMRIP reform. Ms. Gorove’s remarks are excerpted below and available at <https://geneva.usmission.gov/2017/07/11/item-3-new-mandate-of-the-expert-mechanism-on-the-rights-of-indigenous-peoples-activities-and-methods-of-work/>.

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The United States thanks the EMRIP Chair for his presentation on EMRIP’s mandate, as amended by Human Rights Council Resolution 33/25. We would like to join others in welcoming new members to the mandate this week. We are at the stage when stakeholders are determining how the resolution will be implemented, and we offer the following comments for your consideration.

The U.S. government and U.S. tribal leaders place priority on reforming EMRIP so that it can better help member states achieve the goals of the UN Declaration on the Rights of Indigenous Peoples. In this regard, tribal leaders say that EMRIP can usefully call attention to immediate and systemic concerns of indigenous peoples and suggest ways to address them. The activities in the resolution’s [operative paragraphs] 2 and 9—including identifying and

promoting good practices, providing technical advice upon States' request, and requesting and receiving information from relevant sources—empower EMRIP to do this. We recommend that the technical advice offered should further awareness-raising and capacity-building.

Although EMRIP's involvement with a particular Member State is voluntary, as a country has to initiate requests for technical assistance, we encourage States to utilize this tool to better the situation of their indigenous peoples. With EMRIP's revised functions, we have a mechanism in place ready to assist some of the world's most vulnerable populations.

Many stakeholders support a coherent, coordinated approach throughout the UN to promote and protect the rights of indigenous peoples. The resolution reinforces this by calling for coordination between EMRIP, the Special Rapporteur on the Rights of Indigenous Peoples, the Permanent Forum for Indigenous Issues, the UN Voluntary Fund for Indigenous Peoples, and other UN bodies and processes. It also asks that EMRIP and the Special Rapporteur not duplicate each other's work. We suggest that the topics of EMRIP's annual studies to the HRC differ from the subjects of the Special Rapporteur's reports. Both the EMRIP and Special Rapporteur reports can examine situations that are inconsistent with the ends of the Declaration as well as good practices.

Although the EMRIP reform resolution came with a [Program Budget Implication] of roughly \$2.5 million, we accepted this because EMRIP needs additional resources to carry out its expanded mandate. Duplicative functions among UN entities working on indigenous peoples will gradually be reduced, and the near-term PBI will result in savings in the long run.

Stakeholders can be proud of the EMRIP reform resolution of last fall. Developing and adopting the resolution allowed stakeholders to reform an existing UN institution to help fulfill an important purpose: achieving the ends of the Declaration. It is not often that opportunities arise in the UN to do this.

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2. Enhanced Participation

See *Digest 2016* at 240-51 and *Digest 2015* at 226 regarding the UN General Assembly's dialogue on "ways to enable the participation of indigenous peoples' representatives and institutions in meetings of relevant United Nations bodies on issues affecting them," or "enhanced participation." This endeavor followed up on a recommendation made in the Outcome Document of the 2014 World Conference on Indigenous Peoples. The U.S. State Department continued its conversations with U.S. tribal representatives about enhanced participation and other topics in 2017. The United States also continued to engage with the four advisers on enhanced participation, appointed by the President of the General Assembly in 2016, and actively participated in negotiations that resulted in the adoption of General Assembly Resolution 71/321 in September 2017.

On January 26, 2017, the United States held another consultation with U.S. tribal representatives. The remarks by James Bischoff of the Department of State's Office of the Legal Adviser at the consultations are excerpted below.

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[Selection Criteria]

Because this GA process is focused on indigenous representative institutions, the selection criteria must identify those who truly represent indigenous peoples. Some indigenous peoples have governments, like those in the United States, while other indigenous peoples organize themselves differently and lack formal governments. Because of these diverse indigenous organizational structures, it is often not easy to distinguish entities that actually represent an indigenous people or peoples from those who falsely make that claim.

The United States has said that the selection body should use a non-exhaustive and flexible set of criteria to evaluate applications for enhanced participation. Self-identification would be an indispensable factor. Government recognition would be important, but cannot be an absolute requirement. In some countries, there is no recognition process. In others, the government refuses to acknowledge that indigenous peoples live in the country. ... India's view is that the entire population is indigenous. We think that approach is not sufficiently precise. Other factors we suggested include ancestral connections with lands, territories, or resources; a shared history, indigenous language, or indigenous culture; and self-governance. Other countries have made similar proposals.

But certain countries want more control over the process. They want the final say over which groups within their countries, if any, get to participate in the UN in their own right. This viewpoint has manifested itself in two different ways.

First, some countries—notably China—want some sort of government veto power over the accrediting body's selection of an indigenous institution for enhanced participation. This could take the form of a "non-objection" procedure. When the accrediting body designates a particular indigenous institution for enhanced participation status, the government of [the] country where the indigenous institution is located would have a certain amount of time to object to the accreditation, essentially vetoing it.

A variation on this process is that an indigenous representative institution could not receive accreditation without state recognition. Under this scenario, a country's government could prevent accreditation by withholding domestic recognition.

Second, other nations—notably India—have proposed that the UN General Assembly resolution establishing this process provide a definition of what constitutes an "indigenous people." The accrediting body would then use this definition when evaluating applications.

As a definition, India has suggested using language drawn from Article 1(b) of [International Labor Organization] Convention 169 on Indigenous and Tribal Peoples. This wording says that the Convention applies to peoples regarded as indigenous because they descended from populations that inhabited the country at the time of conquest, colonization, or the establishment of present state boundaries.

India's proposal omits the Convention's Article 1(a), which says that the Convention also applies to "tribal peoples" in independent countries whose conditions distinguish them from other sections of the national community and whose status is regulated by their own customs or traditions.

...India has hundreds of tribal peoples which it does not regard as distinct indigenous peoples. According to India, all Indians are indigenous and the central government adequately protects their rights. India does not want every culturally and linguistically distinct group to claim greater status through the UN's enhanced participation process. Many Asian nations share

this concern, fearing that if certain groups are given enhanced status in the UN, they will use that status to amplify their concerns both internationally and domestically, potentially leading to ethnic strife or even conflict in their countries.

But arriving at a definition of “indigenous” that satisfies everyone is extremely difficult to do. That is why the UN Declaration does not contain a definition of indigenous peoples.

The U.S. delegation had initial reactions to India’s call for a definition. We noted that if only the second prong of the ILO definition is used, most Asian and African indigenous peoples would be excluded. Unlike the Americas and Australia, for example, those countries are not populated today by a majority of European descent. If this definition is used in other contexts, the UN Declaration would not apply to what we and others regard as a significant portion of the world’s indigenous populations. The U.S. position has always been that indigenous peoples exist throughout the world. This is consistent with the view of Special Rapporteurs and many independent experts.

We suggested that perhaps the draft UNGA resolution could specify that the accrediting body’s determinations would only be for the purposes of enhanced participation, and would not definitively determine who is an indigenous people for any other purpose. Some ... nations, indigenous representatives, and the four advisers also spoke against having a definition.

But such a solution will likely not satisfy India, China, and other states. They are concerned about the prospect of a UN body granting enhanced participation to certain tribal groups in their countries without the central government’s consent.

At the end of the day, we may be faced with a stark choice: acquiesce to a procedure that allows states to veto accreditation decisions; make state recognition a requirement for accreditation; or define “indigenous” such that it applies only to indigenous peoples in “colonized” countries. The alternative may be that the entire exercise ends in failure due to lack of consensus.

Several months of consultations and negotiations remain. In order to arrive at a definitive position on this difficult question, we want to flag it for your consideration and hear your views. We also welcome any other views you may have about selection criteria.

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On January 30, 2017, the United States met bilaterally with the four advisers to share its views on enhanced participation. On January 31, the advisers held public consultation sessions with states and indigenous peoples’ representatives on the effort’s four main topics. The United States delivered interventions on each topic. The U.S. interventions are excerpted below and available at <https://www.state.gov/s/l/c8183.htm>. First, below is the U.S. intervention on “venues of participation,” delivered by U.S. Delegate Linda Lum.

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The United States supports enhanced participation procedures for appropriate UN bodies and meetings throughout the entire UN system. These are meetings on issues affecting indigenous peoples, and on which indigenous peoples have perspectives which can inform the discussion,

There are many UN entities working on the diverse set of topics which affect or are of particular interest to indigenous peoples and their governing institutions. Along with the Permanent Forum on Indigenous Issues and EMRIP, examples of these are ECOSOC and its subsidiaries; the Human Rights Council which is a GA subsidiary; and certain sessions of the General Assembly Second and Third Committees. Among the UN funds and programs, these would include UNCTAD, UNDP, UNEP, UNFPA, UN-HABITAT, UNHCR, UNWRA, UN Women, and WFP. Among the specialized agencies, these would include the ILO, FAO, UNESCO, ICAO, IMO, WIPO, and IFAD.

This is not an exhaustive listing. Rather, these organizations strike us as the ones most relevant to indigenous peoples. The United States welcomes continued dialogue with indigenous peoples on what additional UN bodies are of particular interest to them.

As others have said, the General Assembly is, of course, not authorized to establish procedures for the other UN Charter-based organs—namely ECOSOC and the Security Council—or for many of the UN programs, funds, and specialized agencies.

To accommodate this reality, we see merit in the idea of including language along the lines of other General Assembly resolutions that “request the Secretary-General” to take certain actions and then “urge,” “encourage,” or “invite” other UN entities to do the same.

On whether indigenous institutions should participate in both open and closed UN meetings, the United States supports indigenous institutions’ participation in open UN meetings. Closed meetings should be reserved for member states and member state observers, as there are some issues which may require deliberations among state-centered actors only in order to be productively resolved.

We agree that granting enhanced participation privileges to indigenous institutions should not undermine the intergovernmental nature of the UN.

On the appropriate nomenclature, the terms “permanent observer status” and “consultative status” have connotations that are unhelpful to our present aim of enhancing participation for indigenous governing institutions. Because this is uncharted territory, we can reflect further on the appropriate terms to use in the draft General Assembly resolution.

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Next follows the U.S. intervention on “Participation Modalities” (Segment 2),
delivered by Ms. Lum on January 31, 2017.

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On participation modalities, the United States supports a new and separate category for indigenous representative institutions. They would have this unique status and be identified in the UN as such, and have their own participation procedures and selection criteria.

Establishing this new category for indigenous representative institutions would not affect how NGOs working on indigenous issues participate in the UN now. NGOs can seek to participate through the NGO accreditation process.

During the April 2016 online consultation, the United States suggested a new set of participation procedures that uses the current PFII procedures as a template and makes

appropriate modifications. The new procedures would identify representatives of indigenous governing or analogous institutions and set forth rules for how they may participate. We have brought copies of that mark-up with us today, and would be happy to share it with anyone who wants to see it.

We envision that the new procedures would enable indigenous governing institutions to attend sessions of the relevant UN bodies, submit written input, and make oral statements in accordance with a meeting's rules of procedure.

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Next follows the U.S. intervention on "Selection Mechanism" (Segment 3), delivered on January 31, 2017 by Mr. Bischoff.

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We continue to believe that a new body is needed, as opposed to using existing bodies such as the PFII, EMRIP, and the NGO Committee. The new body should consist of state and indigenous representatives.

It would appear that the body would have to exist within the General Assembly as opposed to ECOSOC, because of the institutional division of responsibilities within the UN.

Both the member state and indigenous members be chosen from the UN's seven indigenous socio-cultural regions, rather than the UN's five geographic regions, following the lead of the Permanent Forum and now EMRIP. Focusing on the seven regions for the selection mechanism would make it appropriately representative of the world's indigenous population.

We do not have an exact number of members in mind. There should be enough members to handle the workload, but not so many that decision-making would be unwieldy. Fourteen—seven indigenous representatives and seven state representatives—may be workable at first. The appropriate number would depend on the number of incoming applications. It also seems likely that even if 14 are needed to handle an initial surge of applications, this number may need to be reduced as time goes on and we settle into a more steady state.

We do not yet have a set position on the number of annual in-person meetings the body would have—whether one, two, or three would be enough. Video meetings and other electronic means can and should augment the in-person sessions to increase efficiency and keep costs down.

The selection body should determine its own working methods, guided by cost considerations, fair decision-making, and efficiency. Because the PFII Secretariat has expertise in vetting applications, it may be able to provide important support to the selection mechanism, though this needs further thought since the Permanent Forum is an ECOSOC subsidiary and this is a General Assembly body.

We envision that an applicant seeking enhanced participation privileges would respond to a questionnaire and submit supporting documentation. This process would probably be better than oral testimony, at least in most instances. Oral testimony is expensive to arrange.

Deliberations on the applications should be private to allow for frank discussion, but to further transparency into how decisions are made, the selecting mechanism should provide the reasons for its negative decisions in writing.

The body should aim to work by consensus. Because the selection mechanism cannot be efficient unless decisions are made in a timely way, firm deadlines should be set for processing applications.

The selection mechanism should have the final say on who receives enhanced participation privileges, without the General Assembly having to affirmatively approve its decisions, or being able to veto its decisions.

On financial considerations, we would follow the usual practice and ask the Secretariat about the UN budgetary implications associated with the selection mechanism. Containing costs and ensuring efficiency remains a U.S. priority.

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Next follows the U.S. intervention on “Selection Criteria” (Segment 4),
delivered on January 31, 2017 by Mr. Bischoff.

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The United States agrees with most of the Selection Criteria section of the Elements for Discussion paper. Because this General Assembly process is focused on indigenous representative institutions, the selection criteria must identify those who truly represent indigenous peoples. Indigenous peoples, of course are not the same thing as ethnic or national minorities.

The selection body should use a non-exhaustive and flexible set of criteria to evaluate applications for enhanced participation. Self-identification would be an essential factor. Government recognition would be important, but cannot be an absolute requirement because some countries do not have a domestic recognition process. We agree with the Elements Paper that other relevant factors include, but are not necessarily limited to, ancestral connections with lands, territories, or resources; a shared history, indigenous language, or indigenous culture; and self-governance.

As Professor Anaya said, these flexible factors are drawn from decades of UN practice and that of regional human rights bodies, and they have been applied to identify indigenous peoples in all regions of the world. So we are not in completely uncharted waters.

Once given enhanced participation status, indigenous institutions should have the authority to designate their own representatives through their own procedures.

We agree that the goal should be to extend enhanced participation status to indigenous peoples’ representatives from all regions. But we should not require that an equal number of indigenous governing institutions be accredited for each of the seven socio-cultural regions. Because of variations in population, numbers of indigenous peoples and their distribution, and how many actually apply for enhanced participation, the number of indigenous institutions ultimately accredited will almost certainly vary from region to region.

The accrediting body's determinations are only for the purpose of enhanced participation, and not for any other purpose. It may be useful to state this clearly in an [operative] paragraph of the draft GA resolution.

Some countries want a government veto power over the accrediting body's selection of an indigenous institution for enhanced participation. We do not support having states use a non-objection procedure in the General Assembly to decide on accreditation. A non-objection procedure would potentially exclude indigenous institutions that states do not recognize, or whose views do not coincide with those of specific states. It would politicize the process and undermine its transparency.

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On February 15, 2017, the four advisers released an updated Elements Paper and they hosted a further round of UN consultations on February 28, 2017. Excerpts follow from the U.S. interventions on the Elements Paper's sections entitled "Decision," "Venues of Participation," and "Participation Modalities," delivered by Ms. Lum.

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In the Paper's "Decision" section, the United States supports establishing a distinct participatory status for indigenous peoples' representative institutions. This new status would be unique to indigenous institutions, and would not set a precedent for any other action or status for any other group. The new status would in no way undermine the UN's intergovernmental character. The Elements Paper's explicit language to this effect should be enough to assuage any remaining concerns to the contrary.

The "Decision" correctly goes beyond the suggestion of some member states that it would be enough simply to fine-tune existing indigenous mechanisms, rather than establish a new status for indigenous representative institutions' participation in other UN bodies. It serves to recall that all member states committed, by consensus, to the goals set forth in the World Conference outcome document. This includes the goal that led to the process we are currently undertaking. So it is unfortunate that a number of States have stepped forward recently to express skepticism about this entire exercise. ...

[We also suggest adding language clarifying that] the selection mechanism is not empowered to decide who is indigenous or who is a people for any purpose or status other than participation in UN bodies on issues affecting them. The selection mechanism does not, and cannot, have the power to make such sweeping determinations.

... It is particularly important to make clear that indigenous representative institution status in no way undermines the participatory rights that NGOs currently enjoy.

On the "Venues of Participation" section, the verbs in the chapeau paragraph should be changed so that UNGA itself decides to enable participation in UNGA and its subsidiary bodies, and "urges/encourages/invites other bodies and organizations throughout the UN system to consider enabling participation." ...

The “Options” paragraphs that follow attempt alternative solutions to two of the most complicated issues still before us in these consultations, but which are still underdeveloped.

First, in what UN bodies would indigenous representative institutions participate? Second, what do we mean by “issues affecting them?” This is a vague term that comes directly from the World Conference outcome document. Who decides what issues affect indigenous peoples? Would such decisions be made on a meeting-by-meeting basis, or *ex ante* in this UNGA resolution?

We may be able to avoid having to answer the question about “issues affecting them” by allowing indigenous representative institutions to participate in any open meeting or conference in specified UN bodies. This was our proposal during the previous rounds of consultations last month. We had named UNGA subsidiaries and other entities that seemed to us to be the most relevant to indigenous peoples, adding that our list was not exhaustive and welcoming suggestions on refining the list. That remains the U.S. position. ...

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[With respect to “Participation Modalities,] [t]he United States agrees that the new participation procedures should enable indigenous representative institutions to attend sessions of the relevant or specified UN bodies, submit and distribute written input, and make oral statements in accordance with the venue or meeting’s rules of procedure.

We also concur that the resolution should specify that indigenous representative institutions would not be allowed to vote; raise points of order; deliver rights of reply; propose draft resolutions or new agenda items; routinely negotiate resolutions; or submit, propose amendments to, or co-sponsor resolutions. These are responsibilities reserved for member states, and in some instances, non-member observers. ...

On how to equitably allocate speaking slots and time limits, it would be more fair and efficient to have indigenous governing institutions inscribe on a first-come, first-served basis, rather than trying to divide the time equally among the seven indigenous regions. As we have emphasized at past consultations, indigenous representative institutions from all seven regions should always have the opportunity to be selected for participatory status and to provide input at meetings, but it may be that not all regions are equally represented in each meeting. ...

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At the February 28, 2017 consultations, Mr. Bischoff delivered additional U.S. interventions on other sections of the advisers’ February 15 Elements Paper, including on “Selection Criteria” and some states’ suggestion that a definition of “indigenous” was needed. Excerpts follow.

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... It is important to underscore that the enhanced participation process originates from a consensus decision by member states, particularly since some states, based especially on what was said in interventions during the January consultations, seem to be skeptical about this entire exercise. ...

Paragraph 12, on ensuring that indigenous peoples from all regions have the opportunity to participate in the United Nations, is also needed. This relates to a point we have stressed numerous times. This process is about giving indigenous peoples from all regions the opportunity for enhanced participation, a point well made by this formulation. The process should not require precise geographical parity among indigenous representative institutions ultimately selected, nor precise parity in speaking slots in discrete meetings.

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... The selection mechanism's determinations are only for the purpose of granting enhanced participation privileges for indigenous representative institutions. The body's decisions should not be interpreted as sanctioning broader determinations about who is and who is not indigenous—or a “people”—for any other purpose, nor should its decisions affect any other groups' participatory rights in UN bodies. This resolution should not serve as a precedent for affecting or expanding the participatory rights of any other group. We can draft it so that it does not create any such precedent. Concerns that we cannot safeguard against unintended consequences are misplaced.

We agree the correct approach to selection determinations is a set of criteria flexibly applied, not a prescriptive definition. I will speak more to this in a moment.

The two paragraphs about the diversity of indigenous peoples across the world are helpful. This same language was critical in order to satisfy concerns of the Africa Group during Declaration negotiations. We would add, after “is in fact indigenous,” “... for purposes of indigenous representative institution status.”

We agree that self-identification is a key criterion and that state recognition is important but not indispensable. We agree with the other criteria, which derive from decades of consistent UN practice dating at least as far back as 1986.

We are not certain, though, that self-identification plus state recognition would, in all cases, be sufficient if none of the other criteria were present. So we would suggest adding language to give the mechanism the ability to look at the other criteria exceptionally even where the state recognizes the applicant. ...

We also agree with language on review of these procedures, perhaps after five years, to improve them as appropriate. This seems far better than the tepid “wait and see” approach that several have advocated today.

If I may take a moment to turn back to one of the key questions in these consultations: whether we need a prescriptive definition of “indigenous,” as several of our Asian friends have posited. This idea resurrects a very contentious debate from negotiations of the Declaration, where some governments insisted on a definition, but most governments and indigenous peoples felt that a definition was neither necessary nor desirable.

Amid this phase, the late Chairperson Erica-Irene Daes conducted two analyses, in 1995 and 1996. She concluded that indigenous peoples are “not capable of a precise, inclusive definition, which can be applied in the same manner to all regions of the world.” She proposed instead a programmatic approach that flexibly considers certain factors that may distinguish indigenous peoples from other groups, such as whether the group was already present at the time of the arrival of other groups with different cultures, voluntary perpetuation of cultural distinctiveness, self-identification, and an experience of subjugation. As time went on, the debate over a definition became less and less central to the negotiations. Eventually, governments dropped their insistence on a definition. The Declaration contains no definition.

Professor Anaya, in his capacity as Special Rapporteur [on the Rights of Indigenous Peoples], opined in several studies that certain Asian and African groups were indigenous, despite the adjacent presence of other ethnically similar groups for centuries, due to factors such as self-identification, a history of subjugation within a pattern of encroachment, and a set of human rights problems they commonly face related to their distinct group identities.

The African Commission on Human and Peoples Rights has also opted to follow what it deemed the “UN approach,” focusing not on a strict definition but on the major characteristics that identify indigenous peoples in Africa—those whose cultures and ways of life differ from the dominant society and are under threat, and who are marginalized and subjugated by the dominant parts of society, even where that dominant society is itself primarily of African descent.

It is true that ILO Convention 169’s Article 1—which is not a definition but a “scope of application” provision unique to that treaty—could be read to create a dichotomy between “indigenous” peoples (basically, those who live in countries overtaken by settlers from Europe or elsewhere) and “tribal” peoples (those who live in countries whose societies were not overrun from afar).

But we should recall two points. First, that Convention is very sparsely ratified, with only 22 parties, and even its predecessor Convention 107 only had 27 parties. Second, in practice the two prongs have not generally been applied in isolation from one another. As Chairperson Daes said in her 1996 study, the indigenous/tribal distinction “is of no practical consequence, since the Convention guarantees both categories of people exactly the same rights.” We are aware of no precedent for excising one prong of Article 1 for use in another context to the exclusion of the other prong. Daes also opined that drawing a line between “colonized” groups and other groups would create an “unjustified distinction” between long- and short-distance subjugation, and that it was “logically impossible to establish a cut-off distance.” Daes concluded there was “no satisfactory reasoning for distinguishing between ‘indigenous’ and ‘tribal’ peoples” in the UN’s practice. The Secretariat of the Permanent Forum reached the same conclusion in a 2004 study.

In sum, decades of practice in the international arena have favored the programmatic approach of applying flexible criteria in addition to self-identification. Past attempts at a prescriptive and exclusive definition of “indigenous” have failed, and they will likely meet a similar fate if pursued further in this setting.

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On April 21, 2017, the four advisers released a “zero draft” of an enhanced participation General Assembly resolution, taking into account input received during the several rounds of consultations. In April 2017, the annual UN Permanent Forum on Indigenous Issues session was held with the theme of celebrating the 10th anniversary of the UNDRIP. The United States held a listening session with U.S. tribal representatives on April 26 at which enhanced participation was discussed, among other topics. During an April 28 plenary meeting of PFII, States and indigenous peoples’ representatives discussed enhanced participation, among other topics. U.S. delegate Linda Lum delivered the U.S. intervention, excerpted below.

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The topic of enhancing the participation of indigenous representative institutions at the UN has been on stakeholders' minds for decades. Indigenous representative institutions should not, as current procedures dictate, be required to obtain ECOSOC nongovernmental organization status to take part in UN meetings. The fact that disagreement remains on how to correct this demonstrates that the issue raises extremely complex legal and policy considerations.

It would benefit us all to find appropriate ways to enhance the participation of indigenous representative institutions. We have seen instances when a broader range of views have informed UN debates. ... During the consultation process with the four advisers, it was reiterated that the UN must remain an organization that is intergovernmental in nature; that the sovereignty and territorial integrity of states must be respected; and that the current process focused on indigenous representative institutions must not serve as a precedent for affecting or expanding the participatory rights of any other group. No one has challenged these principles.

While disagreements remain on certain proposals put forward for enhanced participation, there are some areas that have attracted broad agreement. This gives us hope that there will be significant progress on enhancing the participation of indigenous representative institutions as appropriate when the exercise concludes. The United States is committed to working toward this goal.

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Separately during the PFII session, the four advisers held two consultations (on April 26 and May 3, 2017) to hear states' and indigenous representatives' initial views on the zero draft. The four advisers also held one-on-one meetings with member states to discuss the zero draft.

State-to-state negotiations began on May 5, 2017, and continued into the summer. The negotiations revealed significant disagreements among states, far more than states had apparently been willing to publicly express during the winter 2016–17 consultations. The advisers released a revised draft of the resolution on May 19, 2017 that was the subject of further state-to-state negotiations on May 25 and 26. Some states expressed concerns about unforeseen consequences from granting broad participatory rights to indigenous peoples' representative institutions in the General Assembly, and the negotiations demonstrated persistent disagreement about how states might object to accreditation for participation by a particular representative institution.

A further round of state-to-state negotiations took place on June 9, 2017, in which an influential group of states continued to oppose the initiative entirely or to express serious concerns about key elements. A final round of negotiations on a revised draft of the resolution likewise failed to result in consensus on a substantive text.

On July 12, 2017, as part of EMRIP's annual meeting, a public session was held that took stock of enhanced participation negotiations. The United States delivered a statement expressing disappointment that the negotiations on enhanced participation had not resulted in consensus. The U.S. intervention is available at

<https://geneva.usmission.gov/2017/07/12/emrip-item-7-indigenous-peoples-participation-in-the-un-system/>. Excerpts follow.

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Indigenous peoples' effective participation in the UN system is a top priority for the United States, and we have long championed hearing indigenous peoples' perspectives at the UN. For more than a year, stakeholders have considered how to enhance the participation of indigenous peoples' representative institutions in UN sessions. Demonstrating our commitment to this process, the U.S. government regularly held consultations with U.S. tribal leaders and NGO representatives to determine how best to proceed in advancing a UN General Assembly resolution on enhanced participation of indigenous peoples' representative institutions in UN bodies. Last week intergovernmental negotiations in New York drew to a close. Despite the best efforts of the four advisers, many member states, and indigenous peoples to craft a substantive consensus Chair's text, agreement could not be reached. Instead, the UN General Assembly will likely adopt a short and procedural text that calls for continued consideration of the topic.

The United States is disappointed that these differences could not be resolved, in part due to extremely complex policy considerations, but also due to many states' concerns about the consequences of UN participation for indigenous communities in their territories.

Despite this unfortunate setback, the United States takes a firm view the participatory rights that indigenous peoples already have at the UN—exercised by indigenous peoples' representative institutions and non-governmental organizations—as the baseline requirement that should not be diminished. We will continue to support and encourage indigenous groups to participate in meetings of interest to them, through non-governmental organizations or other means, in Geneva, New York, or elsewhere. The United States will continue to work to advance the rights of indigenous peoples set forth in the UN Declaration on the Rights of Indigenous Peoples, and encourages other member states to do the same.

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On July 20, the advisers released a much shorter draft resolution that removed the key substantive elements of the prior drafts. This draft called for, *inter alia*, further discussion of the issue in the UN General Assembly and a report by the Secretary-General on enhanced participation.

On August 10, the advisers circulated a final compromise draft of the resolution. In its key parts, the resolution welcomed the dialogue that had occurred since 2016; encouraged PFII, EMRIP, and the Special Rapporteur on the Rights of Indigenous People to "continue addressing enhanced participation;" encouraged further efforts by UN bodies to address enhanced participation through inclusion of indigenous representatives in modalities meetings, and the like; requested the Secretary General to report to the General Assembly by 2019 to issue a report with recommendations on further measures to enable participation, and to seek input from States and indigenous

peoples in compiling the report; and decided to continue consideration of the issue in 2020.

The General Assembly adopted this resolution, with minor modifications, by consensus on September 8, 2017 as Resolution 71/321. The United States joined consensus on the resolution and did not issue an explanation of position, having already expressed its disappointed views during the July EMRIP session.

3. U.S. Visit and Report by Special Rapporteur on the Rights of Indigenous Peoples

In February 2017, the Special Rapporteur on the Rights of Indigenous Peoples conducted a country visit to the United States. In August 2017, she submitted her report to the HRC on her visit to the United States (U.N. Doc. A/HRC/36/46/Add.1). At the 36th session of the HRC in September, during the annual dialogue with the Special Rapporteur and the EMRIP Chair, the United States provided a statement on the Special Rapporteur's report, delivered by Katherine Gorove. That statement follows and is available at <https://geneva.usmission.gov/2017/09/20/interactive-dialogue-with-the-special-rapporteur-on-the-rights-of-indigenous-peoples-and-emrip/>.

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The United States thanks Special Rapporteur Tauli-Corpuz for her presentation. During the Special Rapporteur's ... visit to the United States, our federal agencies welcomed the opportunity to outline their efforts on behalf of U.S. indigenous peoples. We would like to comment on her report on the SR's visit, which focused on extractive industries.

The report makes helpful recommendations on actions the U.S. government can take to assess the environmental and health effects of infrastructure projects on indigenous peoples. It also contains useful proposals on how to address violence against indigenous women and girls.

There are, however, some assertions and conclusions in the report with which the United States respectfully disagrees. For example, the report concludes that the U.S. government's framework for consultations with tribal leaders—including those on energy and infrastructure projects—result in ad hoc application on an agency-by-agency basis, lack accountability, and are ineffective [para. 14]. We would like to clarify and highlight that several U.S. government agencies routinely consult with tribal governments on energy and infrastructure issues in accountable and effective ways that allow for tribes' timely and good faith involvement. We take our tribal consultation responsibilities seriously and strive to involve senior-level officials and other subject-matter experts, as appropriate. The United States has a complex statutory and regulatory framework in place governing federal decisions on various aspects of energy and infrastructure projects that affect when and how consultations with federally recognized tribes may occur. Each statute, regulation, order, policy, and protocol must be considered individually and in relationship with each other to determine how best to conduct government-to-government consultations with Indian tribes. Moreover, the uniqueness of each tribal entity must also be taken into account. Because of these factors, there is no single consultation model appropriate

for all situations, and the form a particular consultation should take needs to be tailored to each instance.

The United States also respectfully disagrees with the assertions and conclusions in the report that the U.S. government did not hold the required consultations on the Dakota Access Pipeline [paras 26 and 64]. We conducted numerous consultations with affected Indian tribes over a period of three years for the areas under our jurisdiction.

Finally, the report's closing section, entitled "Criminalization of Indigenous Dissent" [paras. 93-95], gives the misimpression that dissent by indigenous persons is criminalized in the United States. No indigenous activist has been jailed on charges of dissent in the United States. While the U.S. Constitution's First Amendment protects disagreement with policies of the U.S. government, violent acts in response to government policies are illegal and subject to all lawful sanctions.

Turning now to the thematic report and presentation of the Special Rapporteur, focusing on climate change and its impacts on indigenous peoples, we wish to highlight a few of our efforts. We have acted to reduce the impacts of climate change on indigenous communities. A partnership of federal agencies and organizations led by the National Oceanic Atmospheric Administration (NOAA) established the online Climate Resilience Toolkit, which helps the general public and indigenous tribes plan for and adapt to climate change. In 2016 the [Department of the Interior's] Bureau of Reclamation provided tribes with more than \$6 million in grants and technical assistance to adapt to the impact of severe drought affecting tribes in several U.S. states. The funds helped tribes create comprehensive drought response plans and improve existing water facilities. The DOI also gave almost \$3 million in technical assistance grants to help tribes develop, maintain, and protect their water and related resources.

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4. Annual Thematic Resolutions on the 10th Anniversary of the UNDRIP

2017 marked the 10th anniversary of the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP"). U.S. statements at the Permanent Forum on Indigenous Issues ("PFII") annual session, the EMRIP's annual session, the HRC's September session, and the UN General Assembly made note of the anniversary and U.S. support for the UNDRIP. As discussed in Chapter 7, the United States also confirmed its support for the UNDRIP in proceedings before the Inter-American Commission on Human Rights in September 2017.

On April 25, 2017, U.S. delegate Linda Lum delivered a statement at the PFII session addressing the anniversary and the measures taken to implement the UNDRIP. That statement follows.

* * * *

On the tenth anniversary of the UN Declaration on the Rights of Indigenous Peoples, the United States joins all stakeholders in highlighting progress toward achieving its goals. The U.S. government maintains a government-to-government relationship with U.S. federally recognized tribes, and honors its trust responsibility to federally recognized tribes. U.S. agencies look to the Declaration as they work to help improve conditions in federally recognized and, as appropriate, other indigenous communities. Moreover, agencies consult regularly with tribes about proposed actions implicating tribal interests. At this time, ten federal agencies collaborate on supporting the Declaration. In a December 2016 interagency training session, participants developed a deepened understanding of the Declaration and identified opportunities for further cooperation.

At the 2016 White House Tribal Nations Conference, Secretaries in the Executive Branch of the U.S. government, other senior U.S. officials, and tribal leaders gathered to have constructive discussions, including on issues that are prominent within the UN Declaration. The most recent 2016 White House Tribal Nations Conference Progress Report, entitled “A Renewed Era of Federal-Tribal Relations,” is online and describes the many tribal-related policies and programs in place in the United States.

Bearing in mind that international repatriation, environmental protection, and cultural preservation are areas that the Declaration covers, we would like to mention some recent developments.

Led by the Departments of State, Interior, Justice, and Homeland Security, the U.S. government works to strengthen mechanisms for international repatriation. We support Native American tribes and Native Hawaiian organizations in their efforts to repatriate sensitive cultural items, including sacred objects, objects of cultural patrimony, ancestral remains, and funerary objects. U.S. officials have initiated dialogue with French authorities regarding auction sales held in Paris which are of great concern to Native American tribes. The U.S. government also supports tribal efforts to repatriate ancestral remains and other cultural heritage items held by foreign museums or collectors in several European nations. We appreciate cooperation from other member states on these efforts.

Nine government agencies signed a September 2016 Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights, which commits to protecting tribal treaty rights in agency decision-making processes.

Consistent with its 2013 “Plan to Support the UN Declaration on the Rights of Indigenous Peoples,” the Advisory Council on Historic Preservation has issued formal guidance for federal agencies on how the Declaration and U.S. historic preservation regulations intersect. The Advisory Council is preparing a report on “The National Historic Preservation Act as a Model for the Protection of Sacred Places in Other Nations,” and plans to complete the report this year.

As a final point, we applaud the adoption of the September 2016 HRC resolution on the Expert Mechanism on the Rights of Indigenous Peoples. That resolution empowers EMRIP members to call attention to abuses and other areas requiring attention, enabling it to respond more effectively to member states and indigenous peoples’ concerns. Kristen Carpenter, a U.S. expert, will be serving a one-year term on EMRIP.

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On July 12, 2017, the U.S. intervention at EMRIP addressed the topic: “Ten Years of the Implementation of the UN Declaration on the Rights of Indigenous Peoples: Good Practices and Lessons Learned.” That intervention is excerpted below.

* * * *

The United States is pleased to take part in this interactive dialogue, and thanks EMRIP for its preliminary report on implementing the UN Declaration on the Rights of Indigenous Peoples. We are committed to improving the situation of indigenous peoples in the United States and throughout the world, including through achieving the objectives of the Declaration. While progress has been made toward achieving the ends of the Declaration, we recognize that more must be done. We are pleased that, as the draft report notes, the UN human rights treaty bodies and the Universal Periodic Review process are examining the situation of indigenous peoples throughout the world, including with regard to the aspirational goals set out in the Declaration. We commend the report’s mention of human rights defenders who work in defense of the Declaration’s goals.

In the United States, U.S. agencies across the federal government look to the Declaration as they work to improve conditions for federally recognized tribes and, as appropriate, for other indigenous communities. In addition, agencies consult regularly with tribes about proposed actions affecting tribal interests.

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The U.S. Agency for International Development is expanding its engagement with indigenous peoples by integrating consideration of their rights into all of its projects and programs. USAID is in the process of drafting an Indigenous Peoples Policy and developing ways to facilitate its effective implementation.

* * * *

On September 29, 2017, Jason Mack delivered the U.S. explanation of position on the annual resolution on human rights and indigenous peoples at the 36th session of the HRC. U.N.Doc. A/HRC/RES/36/14. His statement explains why the United States could join consensus on the resolution but could not, for the first time in several years, cosponsor it. The U.S. explanation of position is excerpted below and available at <https://geneva.usmission.gov/2017/09/29/u-s-explanation-of-position-on-indigenous-peoples-hrc36-resolution-l-27/>.

* * * *

We thank Guatemala and Mexico for the annual resolution on human rights and indigenous peoples. We were disappointed that we could not reach a compromise on language that would have allowed us to co-sponsor this resolution. The United States welcomes the tenth anniversary of the UN Declaration on the Rights of Indigenous Peoples—an instrument with significant moral and political force that the United States looks to in its dealings with federally recognized Native American tribes—even though the Declaration is not itself binding and does not state or reflect international law.

While the Declaration has helped inspire the development of domestic laws in some countries and has influenced the development of guidelines such as the World Bank Safeguards and the Organization of American States’ nonbinding American Declaration on the Rights of Indigenous Peoples, the phrase “progressive development” in preambular paragraph 3 could have broader implications than would be appropriate or factually accurate.

For this reason, we asked for the removal of the word “progressive” and it is unfortunate that our recommendation was not accepted.

As is well known, the United States places priority on promoting the rights and well-being of indigenous peoples in relevant UN processes and forums. We were pleased to play an active role in reforming the mandate of the Expert Mechanism on the Rights of Indigenous Peoples and in the UN General Assembly Process to enhance the participation of indigenous peoples at the UN. We hope to continue our active work in this body, promoting the rights of indigenous peoples.

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On December 19, 2017, the UN General Assembly adopted Resolution 72/155 on the rights of indigenous peoples. U.N. Doc. A/RES/72/155. Laurie Shestack Phillips had provided the U.S. explanation of position on the draft resolution on November 20, 2017. That statement is excerpted below and available at <https://usun.state.gov/remarks/8137>.

* * * *

Mr. Chair, the United States joins consensus on L.16, Revision 1 on the “Rights of Indigenous Peoples” Resolution and thanks Ecuador and Bolivia for helping us arrive at a consensus text.

In explanation of position, the United States reaffirms its support for the UN Declaration on the Rights of Indigenous Peoples, as explained in our 2010 Announcement of Support.

With regard to this resolution’s references to the 2030 Agenda for Sustainable Development, we addressed our concerns in a detailed statement delivered earlier this morning.***

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*** Editor’s note: The general statement delivered on November 20 is discussed in Section E.1, *supra*.

I. TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

The United States made two submissions to the Committee Against Torture on the Draft Revised General Comment on the implementation of Article 3 of the Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (“the CAT”), in the context of Article 22. Written submissions to the Committee are available at <http://www.ohchr.org/EN/HRBodies/CAT/Pages/Submissions2017.aspx>. First, on March 31, 2017, the United States filed a joint response discussing Paragraphs 19-20 of Draft General Comment No.1 (2017), on behalf of itself along with Canada, Denmark, and the United Kingdom. The joint response, discussing non-refoulement, with a particular focus on diplomatic assurances, is excerpted below (with most footnotes omitted).

* * * *

3. It is the view of these States Parties that paragraphs 19 and 20 of the draft General Comment do not reflect the current practice of many States Parties to the CAT, and that the treatment of diplomatic assurances in the draft General Comment should take into consideration the many circumstances in which States Parties may use them to promote respect for the prohibition on torture and consistent with their obligations under Article 3.

4. Regarding paragraph 20, these States Parties also do not agree with, and are not aware of an accepted basis for, the assertion that diplomatic assurances are inherently “contrary” to the principle of non-refoulement provided for in Article 3. Although we agree with the Committee that assurances must not be used as a loophole to undermine the principle of non-refoulement, we note that when used appropriately, diplomatic assurances have served as an effective tool for States Parties to help ensure compliance with Article 3, including as a means of confirming that an individual would not face torture in a receiving State.

5. First, paragraph 20 refers specifically to assurances *provided by a State Party to the CAT*. Although the circumstances of every case must be assessed individually, it cannot as a logical matter be *per se* unlawful for a State Party to transfer¹ an individual to another State Party with an assurance that the receiving State Party will comply with its preexisting CAT obligations. Reaffirming CAT obligations is consistent with the object and purpose of the CAT, which is to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.” The Committee’s recommendation as it stands may actually undermine the efforts of States Parties in certain situations to promote respect for the prohibition on torture in the context of transfers, both in an individual case and by encouraging improved standards more generally.

6. Second, as matter of practice, some States Parties might seek diplomatic assurances as a purely prudential matter, even in the absence of particular concerns that the individual in question is at risk of torture. This may be done for a variety of policy reasons, including to

¹ For purposes of this document, we refer to ‘expel, return (‘refouler’) or extradite’ as used in Article 3 collectively as “transfer” for ease of reading.

emphasize to a receiving State the importance that the transferring State Party places on humane treatment generally, independent of whether the transferring State Party has reached the conclusion that the specific individual in question may be in danger of being subjected to torture.

7. Third, as noted above, we agree with the Committee that diplomatic assurances cannot be used as a “loophole” to undermine the principle of non-refoulement, and we do not view them as appropriate in all cases. We strongly reject the suggestion that all transfers accompanied by such assurances are contrary to Article 3. Indeed, diplomatic assurances can be used precisely so as to avoid breaching the principle of non-refoulement. Article 3 itself states that “[f]or the purpose of determining whether there are [substantial] grounds, the competent authorities shall take into account *all relevant considerations*” (emphasis added). We do not agree that the commitments of a receiving State with regard to humane treatment of the individual or individuals to be transferred cannot constitute a “relevant consideration” for the purposes of Article 3. The essential question in evaluating any particular use of diplomatic assurances is whether, taking into account the content of the assurances, their credibility and reliability, and the totality of other relevant factors relating to the individual and the government in question, there are substantial grounds for believing that the individual would be in danger of being tortured in the country to which he or she is being transferred.

8. With respect to the definition of diplomatic assurances in paragraph 19, the Committee should account for the fact that, in practice, such assurances may include an express commitment by the receiving State to permit monitoring by the transferring State Party or by an independent third party for the purpose of verifying that the individual is being treated humanely, rather than simply an “undertaking” by the receiving State. Such monitoring mechanisms are intended to ensure that any diplomatic assurances can be verified as a safeguard against torture. Diplomatic assurances may be relied upon by a transferring State Party as one consideration in determining whether there are substantial grounds for believing that an individual would be in danger of being subjected to torture in the receiving State.

9. In light of these observations, these States Parties recommend that the Committee reconsider its sweeping conclusion in paragraph 20, and focus instead on the risk that diplomatic assurances could be used to undermine the principle of non-refoulement in certain circumstances. We urge the Committee to acknowledge that diplomatic assurances that are used properly and that are assessed to be credible and reliable can appropriately be considered as one factor in the analysis conducted by the transferring State Party as to whether there are substantial grounds for believing that an individual would be in danger of being subjected to torture in the receiving State.

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On April 5, 2017, the United States filed its observations on the Draft General Comment. That submission is excerpted below (with some footnotes omitted).

* * * *

2. The observations of the United States focus on those paragraphs 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 observations make a number of specific points 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 new General Comment on Articles 3 and 22.

I. General Observations

3. The United States reiterates its view that where the text of the CAT 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 governmental authority.” We have concluded that 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.

4. In 2008, the United States stated its view that Article 3 of the CAT, which does not use the phrase “territory under its jurisdiction,” does not apply outside U.S. sovereign territory.

5. As a matter of policy, the United States upholds the principle of non-refoulement as reflected in CAT Article 3 with respect to all transfers, regardless of location. This policy is set forth in Section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998, which provides that “[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.” However, the United States does not accept the Committee’s view, expressed throughout the draft General Comment, including in **paragraphs 9² and 10³**, that Article 3 applies to transfers occurring outside U.S. sovereign territory.

6. In the interest of clarity, the United States recommends that the Committee use the precise language of Article 3 when describing the treatment of individuals to whom the obligation applies. By its terms, Article 3 applies when “there are substantial grounds for

² The United States notes that the use of “**or** on board a ship or aircraft” in this paragraph creates the impression that ships and aircraft are not considered “territory under [the State’s] jurisdiction” but rather constitute a new, non-territorial category. The United States has taken the view that U.S.-flagged ships and aircraft qualify as “territory under [U.S.] jurisdiction” for purposes of the CAT, and are therefore covered by the CAT provisions that use this territorial language. Article 3 of the CAT, however, does not use this territorial language.

³ Draft **paragraph 10** indicates that Article 3 applies to territories under foreign military occupation. The United States agrees that a time of war does not suspend the operation of the CAT, which continues to apply even when a State is engaged in armed conflict. The law of armed conflict and the CAT contain many provisions that complement one another and are in many respects mutually reinforcing. In accordance with the doctrine of *lex specialis*, where these bodies of law conflict, the law of armed conflict would take precedence as the controlling body of law with regard to the conduct of hostilities and the protection of war victims. However, a situation of armed conflict does not automatically suspend nor does the law of armed conflict automatically displace the application of the CAT. The United States also agrees that occupied territory would likely be considered “territory under [a State’s] jurisdiction” for the purposes of the CAT if the occupying power exercises the requisite control as a governmental authority in the occupied territory. However, including because Article 3 does not use the phrase “territory under its jurisdiction” to define its territorial scope, we have taken the position that Article 3 applies only to expulsion, return, or extradition from the sovereign territory of the United States.

believing that [an individual] would be in danger of being subjected to torture [...].”⁴ The United States suggests that the Committee use this terminology throughout its General Comment, including in **paragraph 8**, rather than risk confusion by paraphrasing or substituting other terms not contemplated by the States Parties.

7. The United States understands the Committee’s desire to encompass various concepts within the term “deportation,” as indicated in **draft footnote 6**. However, many States consider “deportation” to be a term of art referring to certain types of immigration removal, and using the term to capture other forms of transfers obscures the significant differences between immigration removals and extraditions. Thus, the United States suggests that the Committee use throughout the draft General Comment either the precise, full language from CAT Article 3, or a broader term defined by the Committee to constitute shorthand for this language that will be more easily understood by States to include non-immigration operations such as extradition to avoid possible confusion (for example, “transfer” could be used).

8. Similarly, the United States recommends that the Committee clarify its distinction between the “State of origin” and “State of deportation.” Article 3 applies regardless of whether the receiving State is the individual’s “State of origin.” Various paragraphs of the draft General Comment suggest that past treatment or potential future treatment in an individual’s “State of origin” is relevant to a determination with respect to a different State to which the individual might be transferred. Moreover, some may misread the term “State of deportation” to mean the sending State. Thus, the United States recommends that the Committee consider using a single term, such as “receiving State,” throughout the General Comment (including in **paragraph 30**).

9. Finally, the United States observes that this draft General Comment repeatedly asserts what States Parties “should” do or not do, without clarifying whether the Committee believes the given principle reflects a legal obligation under the CAT or a suggestion or best practice. In several of our specific observations below, the United States presents its view as if the Committee’s intention is to assert a legal obligation. Nonetheless, the United States would not ordinarily read the use of the term “should” in the final General Comment to reflect the Committee’s assertion of a legal obligation, rather than a suggestion or a best practice.

II. Specific Observations

a. Paragraph 12

10. The United States does not agree that a determination that a person cannot be returned to a particular country consistent with Article 3 automatically entitles that person to remain in the country in which he or she is located. For example, Article 3 would not preclude removing the person to a third country where there are no substantial grounds for believing that the individual would be in danger of being subjected to torture. Article 3 also does not prohibit transferring an individual to a receiving State where there previously were substantial grounds for believing he or she would be in danger of being subjected to torture, if country conditions or other material circumstances have changed to reduce or eliminate that risk. As a result, the United States recommends that the Committee consider revising **paragraph 12** to avoid the implication that allowing the individual to remain in the territory is the only option consistent with Article 3.

⁴ The United States reiterates its understanding upon ratification of the CAT that “the phrase, ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture,’ as used in Article 3 of the Convention, [means] ‘if it is more likely than not that he would be tortured.’”

11. Evidence providing substantial grounds for believing that an individual would be in danger of torture upon further transfer from the receiving State to a third State would be considered, as appropriate, along with other factors, as part of a determination of whether there are “substantial grounds for believing that he would be in danger of being subjected to torture” if transferred. Article 3 would not be implicated simply due to a general or non-specific risk of potential transfer to a third State after the initial transfer.

b. Paragraph 13

12. Although collective transfer could pose a risk of an Article 3 violation, the United States disagrees that collective transfer constitutes a per se violation of Article 3. For example, a collective transfer to a State where there are no substantial grounds for believing that any of the individuals being transferred would be in danger of being subjected to torture would not constitute a violation of Article 3. As a result, the United States recommends that the Committee phrase **paragraph 13** in terms of a heightened risk of violation, rather than a per se violation. In the United States, all individuals subject to immigration removal or extradition are provided an opportunity to raise a claim that their transfer to a particular country would be inconsistent with CAT Article 3, and all such claims are considered on an individual basis in accordance with applicable regulations and procedures.

c. Paragraph 14

13. The United States does not interpret Article 3 as imposing such a broad range of legal obligation on States Parties to refrain from taking measures that might unintentionally cause individuals to leave its territory. There might well be extreme circumstances in which a State intentionally enacts measures for the purpose of inducing individuals with a need for protection under Article 3 to leave the country without being afforded a meaningful opportunity to have their Article 3 claims considered by a competent authority, in which case Article 3 might be implicated. Those situations, however, must be distinguished from those where States adopt immigration, security, or budgetary policies that may cumulatively cause certain non-citizens in need of protection to depart from the country voluntarily. In addition, even with this change, examples such as “cutting funds for assistance programs to asylum seekers” are overbroad in light of States’ discretion to determine budgetary levels for assistance programs. Moreover, suggesting that any cuts to assistance risk putting a State in violation of Article 3 could have the perverse effect of dissuading States from providing additional and discretionary forms of assistance in the first place. We recommend that the Committee consider modifying this sentence to “withholding basic forms of humanitarian assistance from asylum-seekers.”

d. Paragraphs 18 and 30

14. The United States suggests that the Committee consider the practice of a range of States Parties in further developing the list of best practices contained in both **paragraphs 18** and **30**, in order to make this General Comment as useful a reference tool for States Parties as possible. In particular, we note that many of the best practices in these paragraphs as currently drafted appear to relate to deportations and other immigration-related transfers, but do not take into account the significant differences between immigration removals and extraditions.

15. Specifically, the United States notes that the qualifier “when necessary” in **paragraphs 18(b)** and **43** is ambiguous and difficult to apply. In the United States, certain indigent criminal defendants have a right to appointed legal counsel, but individuals in immigration proceedings do not have such a right (although they may obtain legal services, including *pro bono* representation, on their own, and the United States has several programs aimed at facilitating access to such legal services).

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19. The United States is concerned that **paragraph 21** as drafted may be read to imply that if a State does not make “adequate” mental health care services available to victims of torture, that State would itself be committing torture. Although the United States agrees that there might be particular instances where the availability of adequate medical services should factor into the transfer decision, our view is that the CAT does not suggest that a State is responsible for torture if it generally does not provide certain forms of health care services for individuals not in its custody. As a result, the United States suggests that the Committee clarify the distinction between intentional denial of medically necessary and otherwise available services in order to intentionally inflict severe pain or suffering, which may amount to torture under certain circumstances, and the more common situation, where a State does not guarantee certain health care services to all.

e. Paragraph 22

20. The United States notes that this paragraph, as drafted, extends far beyond a State Party’s obligations under Article 3, which applies during the process of determining whether to expel, return, or extradite an individual to another State. Once an individual has been transferred to a State in a manner consistent with Article 3, the transferring State does not maintain an ongoing, indefinite obligation to monitor all transferred individuals, who may number in the thousands, or to permit them to reenter the transferring State’s territory. In addition, this draft paragraph appears to encourage States to intervene in the domestic legal proceedings of other States, and to conduct routine monitoring in the territory of other States regardless of any risk of torture at the time of transfer. The United States recommends that the Committee delete **paragraph 22**, or else revise it to suggest that States Parties may consider requests for assistance from transferred individuals who subsequently face torture in the receiving State.

f. Paragraph 25

21. The United States notes that the terminology used in this paragraph is not clear, including the use of the term “notification of adherence to the extradition treaty.” If the Committee means to suggest that States formulate reservations when becoming party to extradition treaties that might conflict with the Convention, we note that reservations are uncommon in the context of bilateral treaties and would have to be accepted by the other party for the treaty with the reservation to enter into force between the parties.

22. If, instead, the Committee intends to assert that bilateral extradition treaties should contain a savings clause aimed at the CAT, the United States recommends that the Committee consider the utility of such a clause and examine the practice of States Parties to the CAT in this regard. For example, the United States does not include such a clause in its bilateral extradition treaties. However, as a matter of practice, we have not interpreted our bilateral extradition treaties to require extradition when a particular extradition would be inconsistent with Article 3 of the CAT. We suggest that the Committee should consider how States Parties understand and apply their extradition treaties. **Paragraph 25** would be unnecessary, if, like the United States, other States Parties do not understand their bilateral extradition treaties to require extradition when Article 3 of the CAT is implicated.

g. Paragraph 29

23. The United States disagrees with the legal and logical premise of this paragraph. Evidence of prior exposure of an individual or similarly situated family members to [cruel,

inhuman or degrading treatment or punishment, or] CIDTP, although relevant evidence in an Article 3 determination, does not always constitute an indication that the individual is at risk of torture for purposes of an assessment under Article 3. That is especially so where there has been an intervening, material change in country conditions in the receiving state. As a result, the United States recommends that **paragraph 29** clarify that prior exposure to CIDTP “may constitute” an indication of risk of torture, depending on the individual’s particular circumstances.

h. Paragraph 30

24. As a general matter, the United States notes that not all the factors enumerated in this paragraph will be relevant in every Article 3 assessment, given the particularized and personal nature of these assessments. Thus, the United States suggests changing “State parties should consider, in particular” in **paragraph 30** to “State parties should consider, as appropriate, within the context of all relevant circumstances.”

25. With regard to **paragraph 30(a)**, the United States disagrees with the implication that many of the specific examples cited should be treated as evidence of a risk of torture regardless of the context. For example, the fact that an individual was previously detained in the receiving State and alleges that he/she was not given notice of the reason for that arrest in a language that he/she understood does not typically provide evidence that the individual would be subjected to torture upon transfer to that State.

26. With regard to **paragraphs 30(a)(iv-v)**, the United States notes that these paragraphs go beyond what is required by the International Covenant on Civil and Political Rights (ICCPR), and as a result should not be cited by the Committee as evidence of denial of a “fundamental guarantee.” As a result, the United States recommends their deletion.

27. With regard to **paragraphs 30(c)** and **30(m)**, the United States notes that these subparagraphs include actions by private individuals over which the State does not exercise control, which the State has not instigated, and/or to which the State has not consented or acquiesced (including certain kinds of gender-based violence or sexual violence). The definition of torture in Article 1 of the CAT only includes actions “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” As a result, mistreatment that would not constitute torture under the definition provided in Article 1 of the CAT because it is inflicted by a private individual without instigation, consent, or acquiescence of the State does not provide evidence that an individual is in danger of being subjected to torture post-transfer within the meaning of Article 3. Although in **paragraph 30(c)** the Committee inserts “amounting to torture” later in the paragraph, there is some potential for misinterpretation here. The United States therefore recommends that **paragraph 30(c)** be revised to reference “whether [...] the person has been or would be a victim of violence, including gender based/sexual violence, that constitutes torture under the definition provided in Article 1 of the Convention.” We also recommend that **paragraph 30(m)** be revised to reference “reprisals amounting to torture or extrajudicial killing have been or would be committed against him/her, members of the family, or witnesses of his/her arrest or detention,” deleting the rest of the paragraph.

28. The United States recommends that **paragraph 30(f)** distinguish more clearly between treatment or punishment constituting torture under customary international law, and treatment or punishment constituting torture according to the recommendations of the Committee or under the jurisprudence of other mechanisms, whose definitions may not be legally binding on any or all States Parties.

29. With regard to **paragraphs 30(g-j)**, the United States notes that these paragraphs refer to general allegations or evidence of certain violations by the receiving State that might not always be relevant in a particularized, personal determination of risk of torture for an individual. For example, the articles of the Geneva Conventions referred to in **paragraphs 30(i) and 30(j)** contain numerous provisions that apply to certain transferees and that do not relate to risk of torture. As a result, the United States would recommend narrowing these paragraphs where any such violations “would be relevant to an assessment of the risk of torture.”

30. With regard to **paragraphs 30(k-l)**, the United States does not agree that a sending State could refuse to transfer an individual on the grounds that the receiving State has a law permitting application of the death penalty in a manner consistent with international law, particularly in instances where the death penalty would not be pursued against that individual. The United States does not agree that the existence of a law permitting use of the death penalty in a State makes that State more likely to torture a particular individual, especially if that individual would not be subject to the death penalty upon transfer. Finally, the United States does not agree that a “prolonged period . . . of death row detention” necessarily creates a risk of torture, particularly if that delay is largely driven by an individual’s access to a robust appellate process. The United States therefore recommends that **paragraph 30(k)** be amended to refer only to deportation to a State “where there is substantial grounds for believing that the death penalty will be applied to the transferee and in a manner that is considered as a form of . . .” The United States further recommends deletion of **paragraph 30(l)** as unnecessary.

31. With regard to **paragraph 30(o)**, the United States disagrees with using the term “fundamental child rights,” as there is no hierarchy among the rights of the child. We also recommend deleting the phrase “or indirectly,” since recruitment of a person under age 18 as a combatant not participating directly in hostilities is not necessarily a violation of the child’s human rights. In addition, the language on “providing sexual services” should be modified to correspond to abuses and violations defined in the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography.

i. Paragraphs 31-32

32. The United States reiterates the views expressed with regard to **paragraphs 30(c) and 30(m)** above, and notes that actions by a private, non-State actor that are not at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity do not constitute torture for purposes of the CAT. Accordingly, the United States recommends that **paragraph 31** be deleted or revised to reflect the need for official instigation, consent, or acquiescence in order for an anticipated future action in the receiving State to constitute torture for purposes of Article 3, and to limit the scope of this paragraph to torture rather than all CIDTP.

33. Further, Article 3 imposes obligations only on States Parties to the CAT and not on non-State actors, such as international organizations, except in circumstances in which their actions can be attributed to a State Party under principles of State responsibility. As a result, the United States recommends that **paragraph 32** be revised to clarify that it reflects a best practice or recommendation of the Committee rather than a statement of legal responsibility.

j. Paragraph 37

34. There is no requirement under Article 3 on States Parties to enact specific domestic processes to ensure compliance, including in particular that any decision related to Article 3 must be subjected to independent review. Article 3 does not require judicial review of all refoulement decisions. As the Committee itself has recognized, States can choose the measures through

which they fulfill Article 3, so long as they are effective and consistent with the object and purpose of the Convention. The United States recommends that the Committee carefully consider the practice of States Parties in this regard. The United States is also concerned that the “without obstacles of any nature” language in **paragraph 37** is overly broad.

k. Paragraphs 40-42

35. The United States respects the Committee’s authority to determine its own procedures for hearing individual communications under Article 22 of the CAT, but believes that the reversal of the burden of proof outlined in **paragraph 40** is not well-grounded in principle and could detract from the fairness of proceedings under Article 22 vis-à-vis States Parties. The same is true of the draft articulation of “benefit of the doubt” in **paragraph 55**, which is not clearly defined and which could also negatively affect the fairness of such proceedings without further clarity on its application. The United States does not read “administrative and/or judicial procedures” in **paragraph 41** to refer to terms of art under domestic law.

l. Paragraph 45

36. The United States notes that the phrase “situations conducive to genocide” used in **paragraph 45** is not well-defined, making it unclear what action or practice is being recommended. In addition, the United States disagrees with the Committee’s inclusion of a state of armed conflict as part of the list of per se “gross, flagrant, or mass violation of human rights,” and disagrees with the implication that a state of armed conflict necessarily affects an individual’s risk of being subject to torture if returned to the State concerned. The mere fact that a receiving State is engaged in an armed conflict—potentially on the territory of another State altogether, or thousands of miles away from the territory where the individual is to be transferred—does not, in the view of the United States, provide relevant evidence on its own for a sending State’s Article 3 assessment.

m. Paragraphs 46 and 48

37. The United States is concerned that the use of the phrase “any of the indications” in **paragraph 46** may imply that the presence of a single factor from the list in **paragraph 30** would lead the Committee to find a violation of Article 3. This appears to be inconsistent with the Committee’s assertion that determinations under Article 3 must be individualized, and should take into account all relevant factors for a particular individual. Moreover, **paragraph 30** itself presents the factors as “non-exhaustive pertinent examples of human rights situations which *may* constitute an indication of a risk of torture” (emphasis added), rather than factors that would each automatically indicate a risk of torture. As noted in our comments above on **paragraph 30**, we urge the Committee to make **paragraph 30** even clearer that the presence of any such factors should be considered as part of a holistic determination. The United States recommends that the Committee revise this paragraph for consistency to ensure the Committee’s view that determinations under Article 3 be personal rather than automatic, and to reflect that a determination under Article 3 should be made on a case-by-case basis, taking all relevant circumstances into account.

38. The United States reiterates this comment with regard to **paragraph 48**. The United States recommends that the Committee revise the first sentence of this paragraph for clarity; it is difficult to discern the exact purpose of the sentence, and it appears to be circular in nature. In particular, it is not clear what the phrase “by itself” is intended to communicate, especially to the extent that the “risk” in question is the overall risk of torture, and not one specific factor indicating a risk of torture.

n. Paragraph 49

39. The United States recommends that the Committee revise **paragraph 49** for clarity or delete it as unnecessary. Although the United States agrees that there could be circumstances in which the assertion expressed in the paragraph would be true, this idea is encompassed in the principle—one that is already articulated throughout the draft General Comment—that an Article 3 determination must be personal and particularized, taking into account all relevant factors at the time the determination is made. The United States therefore recommends that the Committee reconsider its inclusion of this paragraph.

o. Paragraphs 50-51

40. The United States is of the view that **paragraphs 50** and **51** are too categorical and do not sufficiently account for all circumstances relevant to a specific, individualized determination of a risk of torture. For example, a sending State may take into account whether an individual being transferred will be held in detention in a particular facility that has less effective torture prevention mechanisms than other facilities, or will reside in a local or regional jurisdiction that may have less effective torture prevention mechanisms than other jurisdictions, thereby creating a greater risk of torture than if the individual were to be held in a different facility or region. The United States believes that such factors are legitimate considerations as part of a determination of whether there are substantial grounds for believing that the individual would be in danger of being subjected to torture, and recommends that the Committee revise these paragraphs to account for a more holistic approach to the personal, particularized determination under Article 3 for each individual.

p. Paragraph 53

41. The United States recommends, consistent with the comments provided above concerning **paragraph 20**, that the Committee consider including questions in **paragraph 53** related to the existence, content, and reliability of any diplomatic assurances provided by the receiving State as factors relevant to the determination of whether there are substantial grounds for believing that a particular individual would be in danger of being subjected to torture. As a matter of practice, many States Parties to the CAT, including the United States, take this factor into account as part of their assessments under Article 3.

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On October 13, 2017, U.S. Special Advisor Lloyd Claycomb addressed the Third Committee following a briefing by the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (“CIDTP”). Mr. Claycomb’s remarks to the Third Committee are excerpted below and available at <https://usun.state.gov/remarks/8015>.

* * * *

We reaffirm and continue to uphold the bedrock principle that torture and cruel, inhuman, or degrading treatment or punishment are categorically and legally prohibited always and everywhere, they violate U.S. and international law, and offend human dignity.

The United States ratified the Convention Against Torture subject to several understandings. One of those understandings is that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control. We therefore disagree with the premise that the Convention's prohibition on torture applies in extra-custodial situations as well as the conclusions stemming from that premise.

In the United States, the matter of police use of force is one largely controlled by the U.S. Constitution, other U.S. laws and obligations, interpretations by the U.S. Supreme Court and other judicial bodies of those laws, as well as police agency policies and procedures. However, we must express serious concern with language in the Special Rapporteur's report, referencing "soft law" documents in the criminal justice field that were never intended to serve as legal instruments or binding obligations on member states—but rather as voluntary standards and norms.

We would like to reiterate, however, that we strongly support the work of the Special Rapporteur and firmly believe that the absolute prohibition of torture is a peremptory norm that is binding on all States, and from which no derogation is permitted.

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The U.S. statement when joining consensus on the resolution on Third Committee Agenda Item 73(a), on torture and other CIDTP, follows:

The United States is pleased to cosponsor this resolution on torture and other cruel, inhuman, or degrading treatment or punishment. The absolute prohibition of torture is a fundamental precept for the United States. Torture and other cruel, inhuman, or degrading treatment or punishment is a violation of law and an affront to human dignity, and it is contrary to our values. The United States places great importance on complying with U.S. legal obligations related to torture and cruel, inhuman, or degrading treatment or punishment, and has done significant work to continue to ensure that U.S. detention and interrogation practices comply with such obligations, including such obligations under international humanitarian law. We are deeply committed to preventing violations of the prohibition against torture and cruel, inhuman, or degrading treatment or punishment; to pursuing justice on behalf of victims; and to denying perpetrators safe haven in our country. We encourage other States to consider current U.S. policies and practices as best practices for the implementation of their obligations. We also note that our co-sponsorship of this resolution does not reflect an endorsement of all of the findings and conclusions in the reports of the Special Rapporteur.

J. FREEDOM OF PEACEFUL ASSEMBLY AND ASSOCIATION

In June 2017, UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Maina Kiai released his report on his official visit to the United States in July 2016. Jason Mack delivered the U.S. statement on June 6, 2016, in response to Special Rapporteur Kiai's Country Report on the United States. That statement is excerpted below and also available at

<https://geneva.usmission.gov/2017/06/07/statement-in-response-to-special-rapporteur-kiais-country-report-on-the-united-states/>.

* * * *

Thank you Mr. Vice President. The United States thanks Maina Kiai for his service and his work on diverse topics. We were pleased to host Mr. Kiai and appreciate the opportunity to respond to different aspects of his report on the United States. The report raises some concerns regarding international law. It asserts U.S. law permitting certain time, place, and manner restrictions falls short of international law standards and that international law favors a notification rather than permission system. These assertions are not based on ICCPR obligations. The few sources cited for them are flawed; for example, one cites best practices rather than obligations. Complete prohibition of assembly at certain places also does not constitute a violation of international law because some areas pose safety or national security concerns that are not possible to mitigate, as recognized in Article 21 of the ICCPR. Nor does international law require that disruption of ordinary life must be tolerated, a position that the Special Rapporteur bases on European human rights sources that are not globally relevant. The report also has problematic assertions that States must remedy non-State Party actions that affect human rights.

We provided over 17 pages of comments addressing many inaccuracies regarding U.S. laws, particularly laws on labor and counterterrorism. The U.S. Government's Strategic Implementation Plan to counter violent extremism underscores that U.S. policy is not to stigmatize specific groups, but rather to invest in objective, independent research and to promote transparency in its countering violent extremism work. U.S. terrorism sanctions are not based on war powers, but on Congressional authority to respond to emergencies. U.S. sanctions designations are fair and transparent. The government must have a reasonable basis, have substantial evidence, and its designations may be challenged immediately either administratively or in federal courts and the government must demonstrate that sanctions criteria are met. We also believe that the report's criticisms regarding sanctions against charity groups are incorrect and unwarranted. The U.S. government has engaged in sustained, direct outreach with those groups, recognizes the positive role that humanitarian and charitable organizations play, and provides multiple mechanisms for those organizations to seek clarification and guidance from the government.

Migrant workers are entitled to significant protections under U.S. law, including whistleblower protections for H-1B visa holders and regulations that prohibit recruitment fees. Migrant workers' labor rights are respected, regardless of their immigration status. The Special Rapporteur's concern that visas for trafficking victims are difficult to obtain and cover a small proportion of workers overlooked the availability of U-visas for victims of various criminal activities, including trafficking, involuntary servitude, fraud in foreign labor contracting, false imprisonment, and obstruction of justice, and that are helpful to the investigation or prosecution of the crime. A number of U.S. agencies can serve as certifying agencies for this visa, and the United States has reached the 10,000 annual cap on U-visas for several years, indicating the program is used frequently.

We would also like to respond to the Special rapporteur's statement that he was disappointed to learn that the Attorney General had ordered a review of all consent decrees, which Mr. Kiai mischaracterized as prioritizing respect for law enforcement over accountability for abuses. Nothing in the Department of Justice's review states that respect for law enforcement

is prioritized over accountability. One of our key principles is that “local law enforcement must protect and respect the civil rights of all members of the public.”

We appreciate that Special Rapporteurs provide context for a country report; we encourage such scene setting to be kept within the parameters of the mandate.

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K. FREEDOM OF EXPRESSION

On March 24, 2017, at the 34th session of the HRC, Mr. Mozdierz delivered an introductory statement on behalf of the United States regarding the resolution on freedom of opinion and expression. The U.S. statement is excerpted below and available at <https://geneva.usmission.gov/2017/03/24/u-s-explanation-of-vote-on-freedom-of-opinion-and-expression/>.

* * * *

The United States is pleased to introduce for adoption Resolution L.27 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 would extend the mandate of the Special Rapporteur for three years. It has over 60 co-sponsors.

Nearly 70 years ago, the Universal Declaration of Human Rights enshrined the right to freedom of opinion and expression for everyone. That right is as vitally important today as it was in 1948, and renewal of the mandate of the Special Rapporteur underscores its continuing importance. It is crucial to a healthy and well-functioning democratic society; it promotes justice and the rule of law by allowing everyone to share information that affects them; it provides opportunities for the exchange of ideas that promote economic growth and innovation; and it contributes to peace by facilitating mutual understanding.

Moreover, the right to freedom of opinion and expression is inextricably linked to enjoyment of other universal human rights and fundamental freedoms.

The United States is proud to stand with the cosponsors in urging the Council to adopt this resolution by consensus.

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At the 72nd session of the UN General Assembly, the United States co-sponsored the resolution entitled “The Safety of Journalists and the Issue of Impunity.” U.N. Doc. A/RES/72/175. The resolution was adopted on December 19, 2017. The U.S. general statement on the resolution during the Third Committee’s discussion in November is excerpted below.

* * * *

The United States is pleased to co-sponsor this resolution on the safety of journalists and the issue of impunity. We commend journalists around the world for the important role they play, and for their commitment to the free exchange of ideas.

The United States values freedom of expression, including for the press, as a key component of democratic governance. Democratic societies are not infallible, but they are accountable, and the exchange of ideas is the foundation for accountable governance. In the United States and in many places around the world, the press fosters active debate, provides investigative reporting, and serves as a forum to express different points of view, particularly on behalf of those who are marginalized in society. We are pleased to see this resolution recognize the crucial role of journalists and media workers in the contexts of elections.

We also commend those in the press who courageously do their work at great risk. The press is often a target of retaliation by those who feel threatened by freedom of expression and transparency in democratic processes. Journalists are often the first to uncover corruption, to report from the front lines of conflict zones, and to highlight missteps by governments. This work places many journalists in danger, and it is important for governments and citizens worldwide to speak out for their protection and for their vital role in open societies.

We understand the resolution's references to privacy, including its appropriate safeguards, in light of Article 17 of the ICCPR.

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L. FREEDOM OF RELIGION

1. Designations under the International Religious Freedom Act

On December 22, 2017, the Secretary of State re-designated Burma, China, Eritrea, Iran, North Korea, Sudan, Saudi Arabia, Tajikistan, 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 ten "Countries of Particular Concern" were so designated "for having engaged in or tolerated particularly severe violations of religious freedom." 83 Fed. Reg. 1451 (Jan. 11, 2018). The Secretary also placed Pakistan on a Special Watch List for severe violations of religious freedom. The "Presidential Actions" or waivers designated for each of those countries by the Secretary are listed in the Federal Register notice. The State Department issued a press statement on January 4, 2018, available at <https://www.state.gov/r/pa/prs/ps/2018/01/276843.htm>, announcing the designations, and stating further:

The protection of religious freedom is vital to peace, stability, and prosperity. These designations are aimed at improving the respect for religious freedom in these countries. We recognize that several designated countries are working to improve their respect for religious freedom; we welcome these initiatives and

look forward to continued dialogue. The United States remains committed to working with governments, civil society organizations, and religious leaders to advance religious freedom around the world.

2. U.S. Annual Report

On August 15, 2017, the U.S. Department of State submitted the 2016 International Religious Freedom Report to the United States Congress. See August 15, 2017 State Department special briefing, available at <https://www.state.gov/r/pa/prs/ps/2017/08/273457.htm>. The report is available at [state.gov/religiousfreedomreport/](https://www.state.gov/religiousfreedomreport/). Secretary Tillerson's remarks on the release of the 2016 International Religious Freedom Annual Report on August 15, 2017 are excerpted below and available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/08/273449.htm>. In his remarks, Secretary Tillerson conveys the conclusion that ISIS is clearly responsible for genocide.

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This report is a requirement pursuant to the International Religious Freedom Act of 1998—legislation that upholds religious freedom as a core American value under the Constitution's First Amendment, as well as a universal human right. This law calls for the government to, quote, "[Stand] for liberty and [stand] with the persecuted, to use and implement appropriate tools in the United States foreign policy apparatus, including diplomatic, political, commercial, charitable, educational, and cultural channels, to promote respect for religious freedom by all governments and peoples."

Almost 20 years after the law's passage, conditions in many parts of the world are far from ideal. Religious persecution and intolerance remains far too prevalent. Almost 80 percent of the global population live with restrictions on or hostilities to limit their freedom of religion. Where religious freedom is not protected, we know that instability, human rights abuses, and violent extremism have a greater opportunity to take root.

We cannot ignore these conditions. The Trump administration has committed to addressing these conditions in part by advancing international religious freedom around the world. The State Department will continue to advocate on behalf of those seeking to live their lives according to their faith.

The release of the [2016 International Religious Freedom Report](#) details the status of religious freedom in 199 countries and territories, and provides insights as to significant and growing challenges. Today I want to call out a few of the more egregious and troubling examples.

As we make progress in defeating ISIS and denying them their caliphate, their terrorist members have and continue to target multiple religions and ethnic groups for rape, kidnapping, enslavement, and even death.

To remove any ambiguity from previous statements or reports by the State Department, the crime of genocide requires three elements: specific acts with specific intent to destroy in

whole or in part specific people, members of national, ethnic, racial, or religious groups. Specific act, specific intent, specific people.

Application of the law to the facts at hand leads to the conclusion ISIS is clearly responsible for genocide against Yezidis, Christians, and Shia Muslims in areas it controls or has controlled.

ISIS is also responsible for crimes against humanity and ethnic cleansing directed at these same groups, and in some cases against Sunni Muslims, Kurds, and other minorities.

More recently, ISIS has claimed responsibility for attacks on Christian pilgrims and churches in Egypt.

The protection of these groups—and others subject to violent extremism—is a human rights priority for the Trump administration.

We will continue working with our regional partners to protect religious minority communities from terrorist attacks and to preserve their cultural heritage.

As the 2016 report indicates, many governments around the world use discriminatory laws to deny their citizens freedom of religion or belief.

In Iran, Baha'is, Christians, and other minorities are persecuted for their faith. Iran continues to sentence individuals to death under vague apostasy laws—20 individuals were executed in 2016 on charges that included, quote, “waging war against God.” Members of the Baha'i community are in prison today simply for abiding by their beliefs.

We remain concerned about the state of religious freedom in Saudi Arabia. The government does not recognize the right of non-Muslims to practice their religion in public and applied criminal penalties, including prison sentences, lashings, and fines, for apostasy, atheism, blasphemy, and insulting the state's interpretation of Islam. Of particular concern are attacks targeting Shia Muslims, and the continued pattern of social prejudice and discrimination against them. We urge Saudi Arabia to embrace greater degrees of religious freedom for all of its citizens.

In Turkey, authorities continued to limit the human rights of members of some religious minority groups, and some communities continue to experience protracted property disputes. Non-Sunni Muslims, such as Alevi Muslims, do not receive the same governmental protections as those enjoyed by recognized non-Muslim minorities and have faced discrimination and violence. Additionally, the United States continues to advocate for the release of Pastor Andrew Brunson, who has been wrongfully imprisoned in Turkey.

And in Bahrain, the government continued to question, detain, and arrest Shia clerics, community members, and opposition politicians. Members of the Shia community there continue to report ongoing discrimination in government employment, education, and the justice system. Bahrain must stop discriminating against the Shia communities.

In China, the government tortures, detains, and imprisons thousands for practicing their religious beliefs. Dozens of Falun Gong members have died in detention. ...[P]olicies that restrict Uighur Muslims' and Tibetan Buddhists' religious expression and practice have increased.

Religious freedom is under attack in Pakistan, where more than two dozen are on death row or serving a life imprisonment for blasphemy. The government marginalizes Ahmadiyya Muslims, and refuses to recognize them as Muslim. It is my hope that the new prime minister and his government will promote interfaith harmony and protect the rights of religious minorities.

Finally, in Sudan the government arrests, detains, and intimidates clergy and church members. It denies permits for the construction of new churches and is closing or demolishing existing ones.

We encourage the Government of Sudan to engage concretely on the religious freedom action plan provided by the department last year.

Unfortunately, the list goes on.

No one should have to live in fear, worship in secret, or face discrimination because of his or her beliefs. As President Trump has said, we look forward to a day when, quote, “people of all faiths, Christians and Muslims and Jewish and Hindu, can follow their hearts and worship according to their conscience,” end quote.

The State Department will continue its efforts to make that a reality. Recently nominated Ambassador-at-Large for International Religious Freedom, Governor Sam Brownback, will be the highest-ranking official ever to take up this important post. We look forward to his swift confirmation.

I thank my many colleagues at the department and overseas who contributed to this report, and specifically the Office of International Religious Freedom, including Senior Advisor on Global Justice Issues Pam Pryor, Special Advisor for Religious Minorities Knox Thames, and the previous ambassador-at-large, David Saperstein.

We look forward to working with Congress, and the administration, to continue America’s indispensable role as a champion of religious freedom the world over. Thank you very much.

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Excerpts follow from the special briefing by Michael Kozak of the Bureau of Democracy, Human Rights, and Labor on the 2016 International Religious Freedom Annual Report.

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...[T]he International Religious Freedom Act of 1998 requires the Secretary of State to prepare and transmit to Congress an annual report on international religious freedom describing the status of religious freedom in foreign countries and U.S. actions and policies in support of religious freedom worldwide.

Department of State officers in our embassies and consulates around the world, working with the State Department’s Office of International Religious Freedom, obtain input from governments, media, NGOs, and others to come up with the content that goes into the report. The purpose of the report is to give Congress and the Executive Branch data to inform judgments about foreign assistance, allocation of diplomatic resources, and other issues, including adjudication of asylum and refugee requests. It is not designed to pass judgment or to rank other countries, but rather to create a fact-based review for use in U.S. Government decision-making.

The instructions for preparing the report are the same for all countries. We do not single out countries or religious groups for special treatment. The record should be based on a country’s actions, not on anybody’s preconceived notions. The report does not automatically affect policy, but it does provide the factual input to policy decisions that get made during the year.

I would also note that ... this is the first religious freedom report to be issued under this administration—as the Secretary pointed out in his remarks, the administration is making a strong commitment to advancing religious freedom for all. The President, the Vice President, and the Secretary have all emphasized religious freedom as a priority of the administration. As the Secretary mentioned, Governor Brownback is the highest-ranking person to be nominated for the ambassador-at-large position since its creation in 1998. The U.S. has multiple ways to advance these rights across the world, and congressional actions add to them and last year strengthened those mechanisms. We will continue to lead the international community and partner with allies on ways to advance this issue.

Just a few highlights, and a bit in the good news program. First, that ISIS is being defeated. And since the defeat of ISIS in great chunks of Iraq, it means that religious minorities can return to their liberated towns and villages, and the next challenge is to see that they have security and that their homes are rebuilt. There is also good news in terms of positive U.S. engagement. For example, due to steady engagement, and despite the severe religious freedom problems that the Secretary mentioned, Sudan this year released some people who were imprisoned for their religious beliefs.

Vietnam also, as a consequence of heavy U.S. engagement, improved its religion law. At the same time, in both countries the situations remain of great concern, and so we will stay engaged. But this is the kind of activity that we're looking for, incremental progress in improving religious freedom.

We've also had some positive overtures from the Uzbek Government, such as the president[']s offer [of] amnesty to some religious prisoners. And if implemented, this would address a key religious freedom concern in Uzbekistan. We've also, as the Secretary mentioned, asked the Sudanese Government to engage on religious freedom concerns and to work on an action plan for improving religious freedom in that country.

One note is that there is a growing consensus on the need to act. The genocidal acts of ISIS awakened the international community to the threats facing religious minorities. And in response, the U.S., with our Canadian partners, created a network of more than 20 countries focused on advancing religious freedom. It's called the International Contact Group for Freedom of Religion or Belief.

There is also increasing religious tolerance in some parts of the world. In Marrakech, Islamic scholars got together and issued a declaration promoting equal citizenship for religious minorities. In Tunisia, there was a remarkable display of government support for the annual pilgrimage to the Djerba island synagogue. And in the Persian Gulf, the United Arab Emirates and Oman allowed the construction of churches to host large expatriate communities, as well as Hindu temples and Sikh gurdwaras.

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M. OTHER ISSUES

1. Privacy in the Digital Age

On March 23, 2017, at the 34th session of the HRC, the United States provided an explanation of position on the resolution on the right to privacy in the digital age. The

statement is excerpted below and available at
<https://geneva.usmission.gov/2017/03/23/u-s-explanation-of-position-on-hrc-resolution-on-the-right-to-privacy-in-the-digital-age/>.

* * * *

The United States appreciates the efforts of Germany and Brazil, and we join consensus on today's resolution because it reaffirms privacy rights, as well as their importance for the exercise of the right to freedom of expression and holding opinions without interference, and the right of peaceful assembly and freedom of association. These rights, as set forth in the International Covenant on Civil and Political Rights and protected under the U.S. Constitution and U.S. laws, are pillars of democracy in the United States and globally.

We are pleased the resolution recognizes that the same rights that people have offline must also be protected online, including the right to privacy. While the resolution expresses concern that the automatic processing of personal data in the commercial context for profiling may lead to discrimination or other negative effects on human rights, it is also worth noting that data flows and data analytics can create great benefits for economies and societies when combined with appropriate safeguards of data protection and safeguards against discriminatory use. Further, while the resolution expresses concern about obtaining free, explicit, and informed consent to the commercial re-use of personal data, we also note that in many commercial contexts, other mechanisms for choice may be appropriate, such as opt-out agreements. In other situations, a reasonable inference of meaningful consent may be drawn from the actual behavior of consumers. For instance, many legitimate businesses use models conditioning the provision of free or low-cost goods or services to consumers in exchange for use of their personal information. We understand the reference to consent in this paragraph as emphasizing those contexts where such explicit consent is important, not to contexts where such a requirement serves little purpose.

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. The United States further reaffirms its longstanding position that a State's obligations under the Covenant are applicable only within that State's territory, and interpret the resolution, including PP18, consistent with that view. Further, we reiterate that the appropriate standard under Article 17 of the ICCPR as to whether an interference with privacy is impermissible is whether it is unlawful or arbitrary and welcome the resolution's reference to this standard. While the resolution references a view held by some regarding consistency with what they refer to as the principles of legality, necessity, and proportionality, Article 17 does not impose such a standard.

Further, the United States understands that this resolution does not imply that states must join human rights instruments to which they are not parties, or that they must implement those instruments or any obligations under them. The United States understands that any reaffirmation of prior documents in these resolutions applies only to those states that affirmed them initially.

We hope that further work on this topic can touch on other areas relating to privacy rights beyond the digital environment.

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2. Protecting Human Rights While Countering Terrorism

The United States co-sponsored resolution 72/180 in the UN General Assembly, “Protection of human rights and fundamental freedoms while countering terrorism.” The U.S. statement in the Third Committee on the resolution follows. The resolution was adopted on December 19, 2017.

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The United States is pleased to again co-sponsor this resolution.

We strongly support the reaffirmation that States must comply with their international legal obligations in their efforts to combat terrorism, including, as applicable, their obligations under international human rights law, international refugee law, and international humanitarian law. In particular, the United States supports the call for States to take all steps necessary to ensure that persons deprived of their liberty benefit from the guarantees to which they are entitled under international law. We note that the guarantees that will apply in a particular situation will depend on the applicable law, and that this will include judicial guarantees in some but not all cases. We understand that any recommendations to States to conduct investigations or inquiries to be predicated upon credible allegations or indications. We understand the resolution’s references to privacy, including its appropriate safeguards, in light of Article 17 of the ICCPR.

We welcome the recognition of the important role of education, employment, inclusion and respect for cultural diversity, in helping to prevent terrorism and violent extremism. We also welcome the recognition of the need for a whole of UN and whole of society approach and will be looking to the UN Office of Counter Terrorism to enhance coordination and coherence in supporting the efforts of member states in implementing the UN Global CT Strategy.

Additionally, the United States firmly believes that all States should respect human rights while countering terrorism without distinction of any kind, as articulated in Article 2 of the Universal Declaration of Human Rights. Civil society is a critical part of our work in countering terrorism, and we want to highlight that any regulation or restriction on members of civil society should be consistent with the International Covenant on Civil and Political Rights.

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The United States also voted in favor of resolution 72/246, “Effects of terrorism on the enjoyment of human rights.” The resolution was adopted by the General Assembly on December 24, 2017. The U.S. statement in the Third Committee follows.

We do not recognize any obligation under international human rights law to prevent terrorism or protect individuals from terrorist attacks, but urge all states to comply with their applicable international legal obligations while countering terrorism. In this regard, we note that different bodies of international law may be applicable to states’ efforts to counter terrorism depending on the circumstances. We also believe the new report called for in this resolution is not

an effective or appropriate use of limited resources, given the many reports that already exist on this topic.

3. Purported “Right to Development”

On November 16, 2017, Ms. Simpson delivered the U.S. explanation of vote on draft resolution A/C.3/72/L.26/Rev.1 on the purported “Right to Development.” The U.S. explanation is available at <https://usun.state.gov/remarks/8148>, and excerpted below.

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The United States has an ongoing, demonstrated commitment to alleviating poverty and promoting development globally. This commitment originated before the United States joined with other members of the United Nations to form the International Bank for Reconstruction and Development in 1944. Our commitment continues today. The U.S. government collaborates with developing countries, other donor countries, non-governmental organizations, and the private sector to support other countries in achieving sustainable economic growth, poverty reduction, and the whole range of development. We are also strongly supportive of the Secretary-General’s development system reform efforts, which endeavor to make the UN development system as efficient and effective as possible, and maximize the assistance that reaches those in need.

We see a strong link between human rights and development. However, for several reasons the United States has long-standing concerns about the concept of a “right to development:”

First, there is not yet a commonly understood definition of such a right. Any definition would need to be 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.

Second, we are concerned that the “right to development” has been framed by some in ways that would seek to protect states rather than individuals. States are responsible for implementing the human rights obligations they have assumed, regardless of external factors, including the availability of development and other assistance.

Because of these concerns, along with our reservations about specific provisions of this resolution, we will vote “no” on this resolution on the “right to development.”

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Cross References

Statelessness, **Ch. 1.A.1.**

Asylum, Refugees, and Migrant Protection Issues, **Ch. 1.C.**

Trafficking in persons, **Ch. 3.B.3.**

Alien Tort Statute and Torture Victims Protection Act, **Ch. 5.B.**

IACHR hearing on freedom of association, assembly, and expression, **Ch. 7.E.2.**

Corporate responsibility regimes, **Ch. 11.E.6.**

Human rights sanctions, **Ch. 16.A.**

Conflict avoidance and atrocity prevention, **Ch. 17.C.**

CHAPTER 7

International Organizations

A. UNITED NATIONS

1. UNESCO

On April 7, 2017, the Department of State announced that it had renewed the Charter of the U.S. National Commission for the UN Educational, Scientific, and Cultural Organization (“UNESCO”). The State Department media note making the announcement is excerpted below and available at

<https://www.state.gov/r/pa/prs/ps/2017/04/269546.htm>.

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The Department of State has renewed the Charter of the U.S. National Commission for the United Nations Educational, Scientific, and Cultural Organization (UNESCO). The purpose of the Commission is to provide expert advice to the U.S. Department of State on issues related to education, science, communications and culture; the formulation and implementation of U.S. policy towards UNESCO; and international cooperation at UNESCO. The Commission also serves as a focal point for UNESCO programs involving American citizens, and assists in publicizing U.S. engagement with UNESCO.

The objective of the Commission is to bring to the Department a source of expertise, knowledge, and insight on these issues. The Commission includes representatives of American organizations and institutions having an interest in education, science, communications and culture, including professional associations, educational institutions, and non-governmental organizations (NGOs), as well as representatives of federal, state and local governments, and at-large individuals. The Commission shall meet at least annually.

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On October 12, 2017, the State Department announced that the United States was withdrawing from UNESCO. The press statement making the announcement is excerpted below and available at

<https://www.state.gov/r/pa/prs/ps/2017/10/274748.htm>.

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On October 12, 2017, the Department of State notified UNESCO Director-General Irina Bokova of the U.S. decision to withdraw from the organization and to seek to establish a permanent observer mission to UNESCO. This decision was not taken lightly, and reflects U.S. concerns with mounting arrears at UNESCO, the need for fundamental reform in the organization, and continuing anti-Israel bias at UNESCO.

The United States indicated to the Director General its desire to remain engaged with UNESCO as a non-member observer state in order to contribute U.S. views, perspectives and expertise on some of the important issues undertaken by the organization, including the protection of world heritage, advocating for press freedoms, and promoting scientific collaboration and education.

Pursuant to Article II(6) of the UNESCO Constitution, U.S. withdrawal will take effect on December 31, 2018. The United States will remain a full member of UNESCO until that time.

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On October 12, 2017, the U.S. Mission to the UN released a statement by Ambassador Nikki Haley on the U.S. withdrawal, which is excerpted below and available at <https://usun.state.gov/remarks/8009>.

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In July, when UNESCO made its latest outrageous and politically based decision, designating the Old City of Hebron and the Tomb of the Patriarchs as part of Palestinian territory, the United States clearly stated that this decision would negatively affect our evaluation of our level of engagement with the organization. The United States will continue to evaluate all agencies within the United Nations system through the same lens.

“The purpose of UNESCO is a good one. Unfortunately, its extreme politicization has become a chronic embarrassment. The Tomb of the Patriarchs decision was just the latest in a long line of foolish actions, which includes keeping Syrian dictator Bashar al-Assad on a UNESCO human rights committee even after his murderous crackdown on peaceful protestors. Just as we said in 1984 when President Reagan withdrew from UNESCO, U.S. taxpayers should no longer be on the hook to pay for policies that are hostile to our values and make a mockery of justice and common sense,” said Ambassador Nikki Haley.

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2. Responsibility of International Organizations

Mark Simonoff, Minister Counselor for the U.S. Mission to the United Nations, addressed the Sixth Committee on October 13, 2017 on the topic of “Responsibility of International Organizations.” Mr. Simonoff’s remarks are excerpted below and available at <https://usun.state.gov/remarks/8016>.

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The United States wishes to reiterate its thanks to the International Law Commission for its work on this topic. We also thank the Secretary-General, and in particular the Office of Legal Affairs, for preparing two reports in advance of this session. The Secretary-General’s report A/72/81, which contains a compilation of decisions of international courts and tribunals, and his report A/72/80, which contains comments and information received from governments and international organizations, once again highlight the great diversity in character, structure, and functions of international organizations, as well as the varying opinions among states on the principles that should govern the responsibility of international organizations, and how those principles should apply, especially as between an international organization and its members.

We reiterate our view, particularly in light of the scarcity of practice in this area, that many of the rules contained in the Draft Articles fall into the category of progressive development rather than codification of the law, a point that the General Commentary introducing the Draft Articles expressly recognizes. 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. This is an important assessment to keep in mind when considering whether these Draft Articles—many of which contain similar or identical phrasing to the corresponding Articles on State responsibility—adequately reflect the differences between international organizations and states. In this connection, we again highlight our view that the principles contained in some of the Draft Articles—such as those addressing countermeasures and self-defense—likely do not apply generally to international organizations in the same way that they apply to states.

In light of these considerations, and in light of the significant differences of opinion that remain regarding which principles should govern and how they should operate, the United States continues to hold the view that the Draft Articles should not be transformed into a Convention.

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3. Rule of Law

Minister Counselor Simonoff also addressed the Sixth Committee on October 5, 2017 at a meeting on “Rule of Law Intervention.” His remarks are excerpted below and available at <https://usun.state.gov/remarks/8021>.

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The United States would like to thank the Secretary-General for both of his reports on this agenda item. We also thank the Deputy Secretary-General for her briefing at the Sixth Committee. We deeply value the efforts of the Rule of Law Coordination and Resource Group and the work of the Rule of Law Unit in particular. As the Secretary-General's report demonstrates, the United Nations continues to provide many Member States with valuable assistance on an array of rule of law activities.

Rule of law is at the heart of the UN Charter. Indeed, the UN Charter represents the pinnacle of our international legal system. The Charter was designed in part "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." The Charter speaks of "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small." The Charter includes among its purposes the peaceful resolution of disputes "in conformity with the principles of justice and international law."

Among the General Assembly's functions, as set out in the Charter, is making recommendations for the purpose of "encouraging the progressive development of international law and its codification." And of course in the Sixth Committee, when we consider, debate and build on the important work of the International Law Commission and other items, we breathe life into these words of the Charter. So fundamental to the UN Charter is the rule of law at the international level that the International Court of Justice was identified in the UN Charter as one of the principal organs of the United Nations. The rule of law demands that all people, in all corners of the world, whether stateless or not, receive the benefits conferred by the UN Charter.

Rule of law at the domestic level entails, among other things, the possibility of subjecting decisions of the government to judicial review. It means when a court rules against the government, even regarding controversial governmental actions, that the government respects and abides by that ruling. Rule of law means honoring the applicable domestic constitutional framework whenever a governmental decision is challenged. Rule of law at the domestic level requires an honest, fair and just judiciary. Rule of law functions best with an independent and impartial judiciary. Judges must not be swayed by political pressure, must not be susceptible to bribes or other corrupt influences. In order for populations to accept judicial decisions, judges need to be exemplars of the utmost integrity, and must be model citizens, devoted to the rule of law.

Regarding this session's subtopic, "Ways and means to further disseminate international law to strengthen the rule of law": We appreciate, as noted earlier, the valuable work of the Rule of Law Coordination and Resource Group and the Rule of Law Unit. We also commend the work of private legal associations for their efforts to disseminate international law, such as the American Bar Association and the American Society of International Law, to name two American groups which make a significant contribution to education and assistance in the international legal field, not to mention the numerous US law schools with strong and robust international law programs.

The United States also wishes to commend the excellent work of the Office of Legal Affairs in disseminating international law to strengthen the rule of law. The Under Secretary

General for Legal Affairs and the Assistant Secretary General for Legal Affairs engage in important outreach through the delivery of addresses and briefings on the latest developments in international law, both at meetings and venues in New York and in other academic and governmental settings in other countries. We value the important work of the Codification Division in disseminating international law to a broad audience well beyond the halls of the United Nations Headquarters in New York and Geneva, and in particular the successful efforts of those who work on the program of assistance. In addition, we are also grateful for the crucial work of the Treaty Section, whose web site, in particular, provides timely information to the entire world about each and every treaty action and notification. I could go on to sing the praises of OLA and its efforts to disseminate international law, from the Office of the Legal Counsel's work to negotiate and implement new instruments advancing international criminal justice to the General Legal Division's work to facilitate domestic prosecutions, to the Division for Oceans and the Law of the Sea's tireless efforts to advance international understanding of the law of the sea. Suffice it to say that the Office of Legal Affairs plays a vital role in disseminating and strengthening the rule of law at the international level.

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4. UN Role in Advancing International Law

Emily Pierce, Counselor for the U.S. Mission to the United Nations addressed the Sixth Committee on October 16, 2017 at a meeting on the United Nations Program of Assistance in the Teaching, Study, and Wider Appreciation of International Law. Ms. Pierce's remarks are excerpted below and available at <https://usun.state.gov/remarks/8047>.

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The United States thanks the Secretary-General for his report on the United Nations Program of Assistance in the Teaching, Study, Dissemination, and Wider Appreciation of International Law. The Program of Assistance, which was established in 1965, continues to make an indispensable contribution to the education of students and practitioners in international law—some of whom sit with us today in the Sixth Committee—and merits our continuing, strong support.

The United States is pleased to participate on the Advisory Committee of the United Nations program of Assistance, which made important progress in enhancing its impact and broadening its accessibility around the world. We were impressed by the number of applicants for the International Law Fellowship Program—450 for 21 fellowships—and for the United Nations Regional Courses in International Law—463 for about 80 spots. We thank the UN Program of Assistance for doing all it can to provide as many scholarships as possible within existing resources to accommodate the greatest number of students for these courses. We also thank those countries and organizations that have made in-kind and financial contributions to make these courses a reality.

We appreciate the Program of Assistance's efforts to reach those practitioners and students of international law who are not able to participate in the courses, in particular through the 54 new lectures that were recorded for the Lecture Series of the United Nations Audiovisual Library of International Law. The United States highlights the work done to translate these lectures, as well as to do off-site recordings in order to promote broader geographical and linguistic representation. We also recognize the efforts underway to make the Audiovisual Library available via podcast, which should contribute greatly to increased access in developing countries.

Particularly in the context of a heightened focus on the rule of law, it is clear that knowledge of international law is a key component to furthering the rule of law at the national and international levels. Through a firm understanding of international law, new generations of lawyers, judges and diplomats gain a deeper appreciation of the complex instruments that govern so many aspects of this interconnected world. The Program of Assistance is one of the many important tools that help to strengthen the rule of law.

The United States recognizes the significant role of the Office of Legal Affairs, in particular the Codification Division, in implementing the Program of Assistance. We very much appreciate the ways the Codification Division has been able to keep important programs going in the face of limited resources, including with respect to desktop publishing and the International Law Handbook, and we encourage it to continue its commendable efforts to secure voluntary contributions to fund that work. There is no question that the Program of Assistance activities are valuable and well-run and worthy of support. We believe it is important that this excellent program thrives for years to come.

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5. Administration of Justice at the UN

On October 9, 2017, Ms. Pierce addressed the Sixth Committee meeting on "Administration of Justice at the United Nations." Her remarks are excerpted below and available at <https://usun.state.gov/remarks/8024>.

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We would like to thank the Secretary-General, the Internal Justice Council, and the Office of the United Nations Ombudsman and Mediation Services for their reports. I wanted to follow up on the three areas we highlighted in our statement last year: 1) accountability; 2) efficiency; and 3) transparency.

With respect to accountability, we were pleased to see the progress made through the Secretary-General's revised bulletin on protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations. We note the IJC's report that there still exists a substantial fear of retaliation among staff. In this light, we reiterate that this issue may merit further exploration, as there are many, and often subtle, ways retaliation can manifest itself. We would also be interested in more information from the Secretary-General about the system of referrals in light of the recommendations of the IJC. We note the Secretariat's report that during the reporting period there were no findings on the accountability of managers.

With respect to efficiency, we welcome the Secretary-General's reporting that the Management Evaluation Unit's work to conduct management reviews of administration decisions appears to have resulted in a decrease in the amount of litigation pursued at the United Nations Dispute Tribunal and the United Nations Appeals Tribunal. We also acknowledge the significant contribution of the activities of the Office of the United Nations Ombudsman and Mediation Services to the prevention of disputes and the informal resolution of disputes. In addition, we recognize the Investigations Division of OIOS's report that measures have been put in place to maintain a downward trajectory in the average length of time of investigations. We agree with the Secretary-General that informal resolution of disputes as early as possible should be encouraged, but recognize that deadlines are there to ensure prompt resolution of disputes. We therefore reiterate that care should be taken to ensure that requests for deadline extensions are not abused.

We also appreciate the efforts that have been made to improve transparency, including through outreach missions by the Office of Staff Legal Assistance and the United Nations Dispute Tribunal to help inform staff and managers about the internal justice system. We support the IJC's recommendations that we should consider what additional practical steps could be taken to enhance knowledge and understanding of the system, in particular regarding the availability of staff legal assistance. We also support harmonizing and consolidating the rules, regulations and administrative issuances with a view toward reducing redundancies and eliminating contradictions, as a means to help make the entire process more transparent to staff. In this regard, we welcome the work already underway by the Office of Human Resources and Management. We also support the IJC's recommendation regarding enhancing staff access to documentation and information, in particular that where feasible, the Management Evaluation Unit should provide complaining parties with documents and other information relied upon by the Unit in deciding to sustain the decisions of line managers.

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6. Committees of the UN

a. *Charter Committee*

Ms. Pierce also addressed the Sixth Committee on October 10, 2017 at a meeting on the report of the "Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization." Ms. Pierce's remarks are excerpted below and available at <https://usun.state.gov/remarks/8023>.

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We welcome consideration of the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, and this opportunity to provide a few observations on the Committee's recent work. The United States would first like to highlight the positive movement in the work of the Charter Committee, which was achieved through the redoubling of efforts of Committee members to work together. Second, we would

like to discuss areas where there is a critical need to extend such honest efforts, in particular toward improving the Committee's productivity and rationalization of its work.

First, building upon the momentum from the 2016 meeting of the Charter Committee, members first met for an informal intersessional discussion on February 2 to discuss the proposals of the Non-Aligned Movement and Ghana. We were encouraged by the constructive tone taken by those who participated in the discussions. Through such discussions, Charter Committee members built a basis upon which delegations came together during the 2017 Committee session to finalize the NAM proposal, based on consensus, to hold an annual, thematic debate in the Special Committee to discuss the means for the peaceful settlement of disputes. We look forward to the first such debate on the exchange of information on state practices regarding the use of negotiation and enquiry. In addition, we thank our fellow Committee members for the positive spirit with which we approached the negotiations, allowing us to take a positive step forward.

We believe that there is more progress to be made by Committee members. It made good practical sense that, during the Charter Committee session in 2016, Committee members agreed to biennialize the consideration of the "third country effects of sanctions" item on the Committee agenda. Biennialization reflects a better, albeit imperfect, balance between the views of those who believe that the 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 the future. The United States encourages Committee members to continue to build further still on the momentum from the 2017 session to make additional progress, specifically as it relates to improving efficiency and productivity of the Committee, including by giving serious consideration to such steps as biennial meetings 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—despite the progress through biennialization—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 matter of third states affected by the application of sanctions, as stated in the Secretary-General's report A/72/136, "...the need to explore practical and effective measures of assistance to third states affected by sanctions has been reduced accordingly. 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 2003." Such being the case, we believe 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 in the future that this issue no longer merits discussion in the 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 the 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 they should be practical, non-political, and not duplicate efforts elsewhere in the United Nations. In this regard, we refer to the proposals made 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 much such information so much readily available than in the past.

As we have noted in this Committee, and the Special Committee before, if a proposal such as that of Ghana is aimed at strengthening peacebuilding and related cooperation between the UN and regional organizations could give value-added by helping to fill gaps, then it should be seriously considered by the Committee.

Finally, we welcome the Secretary-General's report A/72/184, regarding the Repertory of Practice of the 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 the United Nations organs, and we much appreciate the Secretariat's hard work on them.

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b. *Committee on Relations with the Host Country*

On November 2, 2017, Mr. Simonoff addressed the Sixth Committee on the report of the Committee on Relations with the Host Country. His remarks are excerpted below and available at <https://usun.state.gov/remarks/8071>.

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Mr. Chairman, the United States is proud to serve as host country to the United Nations. We recognize that we are both providing an important service to the UN community as well as fulfilling our many responsibilities.

The Committee on Relations with the Host Country is a valuable forum in which to discuss relevant issues relating to the presence of this large, diverse, and dynamic diplomatic community in New York City, one of the largest, most diverse and most dynamic cities in the world. The Committee's meetings provide the United States with an opportunity to listen to, understand and address the concerns of the UN community.

The United States greatly values the cooperation and the constructive spirit of the members of the Committee in its work and the assistance provided by the United Nations Secretariat in this regard. We also appreciate the interest and participation in meetings of numerous observer delegations. The ability of delegations that are not members of the

Committee to participate in the Committee's meetings has helped make the Committee's deliberations open and more representative of the UN diplomatic community.

The Host Country Section of the U.S. Mission has worked hard to assist Member States during the past year. For example, between January 1, 2017 and November 1, 2017 more than 4,400 visas were issued to members of the UN diplomatic community. We look forward to continued collaboration and positive interactions with all of our colleagues in the UN community.

Mr. Chairman, the United States would like to express particular appreciation for the efforts of the Chairman of the Committee on Relations with the Host Country, Ambassador Kornelios Korneliou as well as Legal Adviser to the Cyprus mission, Vasiliki Krasa. We also wish to thank the United Nations Legal Counsel, Miguel Serpa Soares and Assistant Secretary-General for Legal Affairs, Stephen Mathias, for their assistance and guidance in the Committee's work. We wish to recognize the efforts of Mr. Surya Sinha, Secretary of the Committee. We also express our appreciation for the many valuable services provided to the United Nations diplomatic community by our colleagues in New York City government and its component municipal agencies.

Mr. Chairman, regarding the statement of the Russian Federation, the United States conferred privileges and immunities on the Russian property in Upper Brookville, New York, pursuant to an arrangement dating back decades. This arrangement does not fall within U.S. obligations under the UN Headquarters Agreement—or the Vienna Convention on Diplomatic Relations, to the extent that convention's provisions are incorporated implicitly through provisions of the Headquarters Agreement.

The United States has never considered this property to be part of the "premises" of the mission. "Premises of the mission" is a very narrowly defined term. Under Art. 1(i) of the Vienna Convention on Diplomatic Relations, the premises of the mission "are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of mission." Premises away from the mission are exceptional. Under Article 12 of the Vienna Convention, "The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established." The United States did not give express consent to the Russian Federation establishing offices in Upper Brookville.

Although the property is owned by the Russian Federation, this does not make it part of the "premises" of the Russian Mission. It is not the case that all property owned by the Russian Federation in the New York area and used by staff of the Russian Mission for recreational purposes or for receptions is considered "premises" of the mission.

In conclusion, this property did not fall within the provisions of the Headquarters Agreement or the Vienna Convention.

This matter should be left to the United States and the Russian Federation to handle bilaterally so that they can reach a mutually satisfactory resolution of the issue.

Some delegations raised restrictions on private non-official travel of members of certain Missions. Such restrictions do not violate Headquarters Agreement because the restrictions at issue do not interfere with travel for UN official business. Consistent with the UN Headquarters Agreement, the United States provides Mission members and delegations with unimpeded access to the Headquarters District. The United States is not required to permit all of these individuals to travel to other parts of the United States unless they do so for official UN meetings or official

UN business. Travel to unofficial events or for recreational purposes is not required by the Headquarters Agreement or any other international agreement.

In closing, let me reiterate how proud the United States is to be the Host Country to the United Nations. We look forward to continuing to work closely with all of you in resolving issues that may arise during the coming year.

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7. UN Women

Stefanie Amadeo, U.S. Deputy Representative to ECOSOC, addressed the annual session of the UN Women Executive Board on June 27, 2017. Her remarks are excerpted below and available at <https://usun.state.gov/remarks/7882>.

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Thank you, Madam President. We thank Executive Director Phumzile Mlambo-Ngcuka for her leadership of UN Women. The United States strongly supports UN Women's work, which is aligned with key U.S. goals for advancing gender equality and women's empowerment. These include advancing women's leadership and political participation; creating economic opportunities for women; preventing and responding to gender-based violence; and empowering adolescent girls. We are pleased that the Secretary-General has included UN Women on the principal-level Executive Committee, as this has helped raise awareness of these concerns throughout the UN system.

Turning to UN Women's 2018-2021 Strategic Plan, UN Women has made steady progress toward a comprehensive plan, Integrated Results and Resources Framework and Integrated Budget. We support your efforts to strengthen normative frameworks related to gender equality and women's empowerment; assist member states to strengthen their activities on behalf of women and girls; and promote accountability within the UN system around gender equality. Overall, the plan articulates a clear vision of how UN Women will focus its efforts in the 2018-2021 planning period. It targets areas within the mandate while recognizing that decisions have to be made about resource spending. We appreciate your commitment to using evidence in the development of this planning document, including increasing focus on larger-scale projects—Flagship Programme Initiatives—instead of small-scale, short-duration projects. We support the focus on monitoring, reporting, and evaluation of UN Women's efforts, which assures donors that their contributions are put to good use. We encourage you to ensure that adequate financial resources are invested in the evaluation function.

We commend UN Women's efforts to leverage its unique position in the UN system to help close the global digital gender gap, and appreciate that you have included information and communication technology as a "driver of change" in your next strategic plan. Harnessing innovative solutions will be a key way for UN Women to enhance the organization's efficiency and effectiveness and increase your ability to deliver results on the ground. We strongly encourage you to work with other funds and programs and share best practices as you work to implement these changes.

We commend UN Women for focusing on cultivating important partnerships with others besides member states and the UN, including with civil society, businesses, foundations, and the media. It is impressive to see that your non-government resources have nearly doubled in 2016, largely as a result of private sector interest in the results of the Flagship Programme Initiatives. We support many of the findings in the report on corporate evaluation of UN Women's strategic partnerships. An important recommendation is that UN Women establish a commonly agreed framework for strategic partnerships as a part of its 2018-2021 Strategic Plan. As UN Women seeks to work more in humanitarian contexts, it is also important to think about how its work complements the efforts of UN agencies which already take a leadership role and have strong operation field presences. We recommend that UN Women think about the kind of gender-related work and partnerships that are still needed in humanitarian emergencies and which would complement existing roles and responsibilities in the humanitarian architecture. We urge you to implement these important and timely recommendations.

Your results framework shows a clear link between outputs and outcomes, which taken together ultimately achieve the impact UN Women seeks. In the implementation phase of the Strategic Plan, we will look for alignment of programs of work with the plan and for evaluation reports to provide evidence for decision-making and progress made against the plan.

The United States remains deeply committed to empowering women, and we look forward to continuing our close collaboration with UN Women and other member states on these important issues facing women and girls around the world.

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8. Observer Status in the General Assembly

On November 3, 2017, Counselor Pierce provided a statement to the Sixth Committee on U.S. views on the prospect of granting observer status in the General Assembly to the Secretariat of the Ramsar Convention on Wetlands. Ms. Pierce's remarks are excerpted below and available at <https://usun.state.gov/remarks/8087>.

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Thank you, Chair. We thank the delegation of Uruguay for its engagement with us on our questions regarding the Ramsar Secretariat's eligibility for observer status in the General Assembly. We regret that after our consultations, we remain convinced that, though Ramsar's activities cover matters of interest to the Assembly, a treaty secretariat does not qualify as an intergovernmental organization.

The United States supports the critically important work the Ramsar Secretariat is doing to facilitate implementation of wetlands conservation decisions by Ramsar Parties. Wetlands provide many environmental services, including clean water, flood abatement, wildlife habitat, recreation, tourism, fishing and groundwater discharge and recharge.

The United States also greatly values the contributions that the Ramsar Secretariat can make to the discussions in the United Nations on topics relevant to Ramsar's work. We share the desire of Uruguay and other delegations to find creative, practical ways to create opportunities

for the Ramsar Secretariat to make such contributions. We are reviewing participation modalities for relevant meetings, including those of the High Level Political Forum and ECOSOC, to ensure that, when eligible, the Ramsar Secretariat has a seat in the room at critical discussions. We also strongly encourage organizers of relevant side events and meetings at the UN to invite Ramsar Secretariat representatives to participate and to request the UN to facilitate appropriate entry of Ramsar Secretariat representatives for such events and meetings. In addition, we urge the International Union for the Conservation of Nature, IUCN, which hosts the Ramsar Secretariat in Geneva, Switzerland, to designate Ramsar Secretariat representatives as part of IUCN delegations to UN meetings and conferences relevant to Ramsar's work. We express our readiness to work with Uruguay, the Ramsar Secretariat, the co-sponsors of this application, and other interested delegations towards this important shared goal.

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9. Role of Security Council to consider human rights

On April 18, 2017, Ambassador Haley delivered remarks at a UN Security Council thematic debate on human rights. She made the point that the Security Council should respond to human rights violations in fulfilling its role of maintaining international peace and security. Her remarks are available below and at <https://usun.state.gov/remarks/7772>.

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Thirty years ago, my predecessor, Daniel Patrick Moynihan, made the case that human rights have a special place in foreign policy. It had been just two years since the General Assembly passed its outrageous resolution equating Zionism with racism. Moynihan thought tolerance and compassion could use a win at the UN, and as usual, he was right. The first argument he offered for paying more attention to this subject was that human rights are inalienable rights. When we embrace human rights we embrace the values that are held, among others, by all the world's major religions. Indeed, one of the purposes of the United Nations is "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Ambassador Moynihan did not stop with arguing that protecting human rights is the right thing to do. He also argued that it's the smart thing to do. And it is. Despite his advice in the 1970s, this Council has never had a meeting focused exclusively on human rights. Today, we will do that.

We've had meetings devoted to specific situations in specific countries, but we've never dedicated a meeting to the broader question of how human rights violations and abuses can lead to a break down in peace and security. The traditional view has been that the Security Council is for maintaining international peace and security, not for human rights. I am here today asserting that the protection of human rights is often deeply intertwined with peace and security. The two things often cannot be separated.

In case after case, human rights violations and abuses are not merely the incidental byproduct of conflict. They are the trigger for conflict. When a state begins to systematically violate human rights, it is a sign, it is a red flag, it's a blaring siren—one of the clearest possible indicators—that instability and violence may follow and spill across borders. It is no surprise that the world's most brutal regimes are also the most ruthless violators of human rights.

Consider North Korea. Systematic human rights violations help underwrite the country's nuclear and ballistic missile programs. The government forces many of its citizens, including political prisoners, to work in life-threatening conditions in coal mines and other dangerous industries to finance the regime's military. And because they do, this Security Council must devote considerable efforts to addressing North Korea's increasing threats to international peace.

Now consider Syria. In 2011, a group of 12 to 15 year-old teenage boys spray-painted a message on the wall of their school: "The people want the fall of the regime." For this, the Syrian regime arrested them. These children were brutally beaten, had their fingernails ripped out by grown men in government prisons, and tortured before they were returned to their parents. The outrage spawned more protests and more crackdowns, and the cycle repeated until the situation turned into a full-fledged war. And not just any war, but a war that has caused hundreds of thousands of deaths and millions of refugees. What began with the sort of human rights violations and abuses that this Council has been reluctant to address has become a security issue that we are focused to address repeatedly. It is a prime example of why we should take human rights violations and abuses more seriously from their beginning.

In other cases, governments use violence and human rights violations to stifle dissent. We've seen numerous instances where the Burundian government services use torture to crack down on protesters. This has forced hundreds of thousands of people to flee to neighboring countries and caused massive regional disruption. It is little wonder that the government has pushed back on the UN's and the AU's work in Burundi.

We continue to watch Burma, where the security forces have allegedly conducted episodes of violence and repression against ethnic Rohingya, who already face widespread ethnic and religious discrimination from governmental authorities and popular social movements, even despite the human rights gains achieved throughout the country as a result of Burma's ongoing democratic transformation. Such treatment drives desperate people to flee to neighboring countries at best or to radicalization at worst. These sorts of allegations demand real, independent investigations as soon as possible. This is why we supported the recent establishment of an international fact-finding mission to look into these allegations.

To be honest, there is hardly an issue on our agenda today that does not involve concerns about human rights, and future threats will continue to challenge us. This kind of violence is not inevitable. But if this Council fails to take human rights violations and abuses seriously, they can escalate into real threats to international peace and security. The Security Council cannot continue to be silent when we see widespread violations of human rights. Why would we tell ourselves that we will only deal with questions of peace and security, without addressing the factors that bring about the threats in the first place? We should be ready to engage early and often in the statements we make and in the measures we impose. It is clear that the connection between human rights and security is a topic worthy of this Council's serious consideration.

To be fair, over the years, the Security Council has addressed human rights issues in various ways. The Security Council has mandated many peacekeeping and political missions to monitor and report on human rights violations and abuses. Several Security Council-established

sanctions regimes include serious human rights violations or abuses as criterion for adding individuals to travel ban lists or asset freeze lists. These are tangible, real impacts that show what the Council can achieve for human rights when we set our minds to it. But there is so much more we can do.

The next international crisis could very well come from places in which human rights are widely disregarded. Perhaps it will be North Korea or Iran or Cuba. We don't know where the next revolt against basic violations of humanity will come. But we know from history that they will come. And when they do, the Security Council will be called upon to react. We are much better off acting on the front end, standing for human rights before the absence of human rights forces us to react.

It's past time for this Council to fulfill the mandate we were given 72 years ago. It's past time that we dedicate ourselves to promoting peace, security, and human rights. I thank my colleagues for their consideration.

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B. INTERNATIONAL COURT OF JUSTICE

1. General

On October 26, 2017, Carlos Trujillo, U.S. Special Adviser, delivered a statement at the 72nd session of the UN General Assembly on the report of the International Court of Justice ("ICJ") on its work over the past year. Mr. Trujillo's statement is excerpted below.

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The International Court of Justice plays an important role in adjudicating disputes among states, giving states who so consent a forum in which to settle their disputes peacefully in accordance with Article 33 of the UN Charter.

As the principal judicial organ of the United Nations, the International Court of Justice has, for over seven decades, played an important role in pursuit of the overarching goal, as set forth in the Charter, "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."

As in years past, we see states increasingly turning to the Court and to other international judicial tribunals to resolve their disputes. The Court has, in turn, increased its efforts to become more responsive to states, including by taking steps to increase its efficiency and to refine its procedures and working methods to keep pace with the rapidly changing times. By providing a trusted channel for states to resolve some disputes up front, and helping to diffuse others before they escalate, the Court continues to fulfill its Chapter XIV mandate.

The United States would also like to commend the Court for continued public outreach to educate key sectors of society about the role of the Court and to promote a better understanding of public international law. These efforts demonstrate the Court's enduring commitment to advancing the rule of law.

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2. Request for Advisory Opinion on the British Indian Ocean Territory

The United States opposed the General Assembly's request that the ICJ provide an advisory opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. On June 22, 2017, Michele J. Sison, U.S. Deputy Permanent Representative to the United Nations, delivered remarks before a UN General Assembly vote on the request for an advisory opinion. Her remarks are excerpted below and available at <https://usun.state.gov/remarks/7876>.

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Mr. President, the resolution before us today seeks to place before the International Court of Justice a bilateral territorial dispute concerning sovereignty over the Chagos Archipelago, which the United Kingdom administers as the British Indian Ocean Territory. By pursuing this resolution, Mauritius seeks to invoke the Court's advisory opinion jurisdiction not for its intended purpose, but rather to circumvent the Court's lack of contentious jurisdiction over this purely bilateral matter.

The United States has consistently recognized United Kingdom sovereignty over the Chagos Archipelago, which has been under continuous British sovereignty since 1814. For nearly four decades, the United States and the United Kingdom have operated a military base on Diego Garcia in the Chagos Archipelago, which contributes considerably to regional and international security.

The General Assembly's power to request advisory opinions is an important one; it allows the General Assembly to seek assistance from the ICJ in carrying out its functions under the UN Charter. However, we must be cautious not to allow this important power to be misused for political gain of individual states. While Mauritius is attempting to frame this as an issue of decolonization relevant to the international community, at its heart, it is a bilateral territorial dispute, and the UK has not consented to the jurisdiction of the ICJ. Were Mauritius' request to proceed, it would undermine the Court's advisory function and circumvent the right of states to determine for themselves the means by which to peacefully settle their disputes.

Any state currently engaged in efforts to resolve a bilateral dispute should vote against this resolution in recognition of the risk that supporting it suggests that any such dispute could be referred to the Court in this manner, without a state's consent, when the other party does not like how talks are proceeding. Establishing such a precedent is dangerous for all UN Member States. It could lead to normalization of litigating bilateral disputes through General Assembly advisory opinion requests, even when a state directly involved has not consented to the jurisdiction of the ICJ.

If, despite these serious concerns, this resolution is adopted, the ICJ would need to consider whether it would be appropriate for it to respond to this request. In our view, it would not. The advisory function of the ICJ was not intended to settle disputes between states.

A decision to refer this dispute to the ICJ would also interfere with ongoing efforts to achieve a solution through bilateral channels. As our UK colleague has discussed, the UK has

engaged in extensive and ongoing dialogue with Mauritius in an effort to address Mauritius' stated reasons for pursuing sovereignty and has made reasonable offers to Mauritius. We regret that Mauritius has chosen to circumvent these bilateral talks, and we continue to believe that this issue can only be addressed through efforts from both sides to negotiate a solution in good faith.

For the foregoing reasons, the United States will vote against this resolution, and encourages all Member States to do the same.

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Ambassador Sison also provided the U.S. explanation of vote before the UN General Assembly voted to request the advisory opinion. That statement follows and is available at <https://usun.state.gov/remarks/7877>:

Mr. President, as we stated in our remarks, the United States continues to view this as a purely bilateral matter that would have more appropriately been resolved through continued diplomatic engagement. Voting for this resolution will set a dangerous precedent, suggesting that the General Assembly could refer a bilateral dispute for an advisory opinion any time one party chooses this path over engaging in good faith negotiations. We urge all Member States to carefully consider the consequences of such a decision and to vote "no" on this resolution. Thank you.

C. INTERNATIONAL LAW COMMISSION

1. ILC's Work at its 69th Session

On October 25, 2017, Acting Legal Adviser Richard Visek delivered remarks at the General Assembly Sixth Committee meeting on the work of the International Law Commission ("ILC") at its 69th session. His remarks are excerpted below and available at <https://usun.state.gov/remarks/8051>. Mr. Visek addressed the topics of "Crimes Against Humanity," "Provisional Application of Treaties," "General Principles of Law," "Evidence before International Courts and Tribunals," and "Immunity of State Officials from Foreign Criminal Jurisdiction."

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Mr. Chairman, the United States has followed with great interest the Commission's work on the important topic of the immunity of state officials from foreign criminal jurisdiction. We appreciate the effort that Special Rapporteur Escobar Hernandez has put into addressing this complex and, at times, controversial issue.

As we have indicated in past statements, the United States is in general agreement with the Commission's work on immunity *ratione personae*, the status-based immunity that protects incumbent heads of state, heads of government, and foreign ministers. Despite some residual

disagreement on precisely which officials enjoy status-based immunity, the Commission's draft articles on this topic can be seen to rest on customary international law.

The same cannot be said for the Commission's work on immunity *ratione materiae*. As the combined work of two Special Rapporteurs has shown, there are basic methodological disagreements about how to identify customary international law, if any, in this area. In evaluating state practice, does one begin with a baseline of immunity, and then look for examples of exceptions? Or does one begin with a baseline of no immunity, and then look for examples of immunity? And how does one account for prosecutions that are not brought to begin with, where the exercise of prosecutorial discretion could conceivably rest on considerations of immunity, but could also rest on completely different grounds, such as the lack of available evidence, or the absence of probable cause?

The categorical propositions on immunity set forth in draft Articles 5 and 6 on immunity *ratione materiae* do not reflect the full extent of State practice: there have, in fact, been prosecutions of foreign officials, including by the United States, for a range of conduct including corruption, violent crimes, and cyber crimes. Premature generalizations such as those contained in draft Articles 5 and 6 risk being inaccurate and potentially misleading.

In part because of the difficulty of identifying and evaluating state practice and *opinio juris* in the form of prosecutions, or lack thereof, there is a tendency to focus on case law. However, the decisions of national courts on *ratione materiae* immunity remain sparse. As the Special Rapporteur observed in her Fifth Report, "there are very few national court decisions in which immunity was withheld in connection with the commission of any of the established international crimes" that Draft Article 7 identifies as exceptions to immunity. Moreover, these few decisions may be based on treaties, as in the *Pinochet* case, or on other considerations. Attempting prematurely to draw broad conclusions from a few decisions is both unwarranted as a legal matter and, in our view, unwise.

The Commission's work on this topic reached a critical phase last year, when the Special Rapporteur issued her Fifth Report, which includes Draft Article 7. The Fifth Report claims that there is a "clear trend" based on treaties, case law, legislation, and other state practice toward recognizing exceptions to immunity *ratione materiae* for certain international crimes. However, the Fifth Report, and state practice in this area, do not actually provide evidence of a "trend" in any particular direction. Perhaps surprisingly, the Commission, by majority vote at its 69th Session, ratified the idea of an asserted trend toward recognizing exceptions to immunity *ratione materiae* for certain international crimes. The Commission reached this conclusion despite the Special Rapporteur's finding that there are very few cases on point. In the view of the United States, there is insufficient state practice to illustrate a "clear trend," let alone the widespread and consistent state practice taken out of a sense of legal obligation required to create, or to demonstrate the existence of, sufficiently specific rules of customary international law to support the ILC's proposal.

The other rationale offered by the majority of Commissioners for adopting Draft Article 7 was that it declines to recognize immunity for the "most serious crimes of concern to the international community." We share the commitment to deterring and punishing these crimes, which we agree are very serious. However, the majority's approach in this instance does not acknowledge that immunity is procedural, not substantive, in nature. As emphasized by the International Court of Justice in the *Arrest Warrant* and *Jurisdictional Immunities* cases, immunity is purely procedural in nature, and operates irrespective of whether the alleged conduct is lawful or unlawful. In both cases, the ICJ held that the nature of the allegations does **not** affect

whether immunity exists under customary international law. Draft Article 7 ignores this basic proposition.

In addition to serious concerns about the lack of consistent state practice and *opinio juris* supporting Draft Article 7, we are troubled by the article's statement that immunity *ratione materiae* "shall not apply" to specified crimes. We understand that the Commission chose this language because of uncertainty about whether to characterize serious international crimes as involving "official acts" to begin with. But one cannot assess whether there is an exception to immunity without determining whether immunity would ordinarily attach to an act to begin with—the very question Draft Article 7 explicitly begs.

We are also concerned by the cursory explanation in the Commentary about why Draft Article 7 does not include an exception for crimes by foreign officials in the territory of the forum state. This fundamental issue of territorial conduct and its effect on criminal jurisdiction warrants much more serious attention and analysis. The Commission's limited discussion of this important and complicated issue makes its approach even more difficult to comprehend, and will create confusion rather than clarification. Likewise, the Commentary's brief treatment of corruption further confuses, rather than clarifies, the basis for the Commission's decision to exclude corruption from Draft Article 7.

The Committee's debate on Draft Article 7, which began last summer and continued into this summer, itself demonstrates that no consensus yet exists regarding the contours of immunity *ratione materiae*. The unusual split vote that led to the Committee's provisional adoption of the Draft Article further demonstrates that this topic does not command a true consensus of the Commission, and that the resulting language cannot be said to represent customary international law or even the progressive development of existing law.

This is not to say that all states have adopted an absolutist position regarding *ratione materiae* immunity; to the contrary, as noted above, there have indeed been prosecutions of foreign officials in some circumstances. Nor is it to say that there should not be any exceptions, even if immunity would ordinarily attach. However, in our view, the inconsistent nature of state practice means that premature attempts at codification can do more harm than good in this area.

We are deeply concerned that Draft Article 7 in its current form could disturb the current environment of relative stability and mutual restraint that generally characterizes States' conduct in this space. Lacking any other guidance, magistrates, judges, prosecutors, private parties initiating criminal cases, and scholars could look to Draft Article 7 as THE definitive and comprehensive expression of international law. With all due respect to the Commission, the development of law in this area properly belongs in the first instance to States. The Commission's work is at its strongest when it rests on a solid foundation of coherent methodology, even-handed assessment of evidence, and modesty of conclusions. Draft Article 7 exhibits none of these features, and risks creating the impression that the Commission is creating new law.

The United States looks forward to the Special Rapporteur's next and final report on procedural provisions and safeguards, which the Commission is expected to take up next summer. The Special Rapporteur has recognized the importance of developing safeguards against the abuse and politicization of jurisdiction. The United States is very interested in this final report and supports a full discussion of its proposals. The United States feels strongly that after the debate on procedural safeguards takes place, Draft Article 7 should be suspended until a consensus of the Commission can endorse all of the draft articles as sound and principled. After discussion of the final report, we believe it would be prudent for the Commission to put this

project on hold without further action by the Commission, until additional State practice provides a sufficient basis for meaningful generalizations to be drawn, and for the Commission's work to re-establish itself on a firmer footing.

Sometimes a group of talented legal scholars and practitioners can develop a well-supported set of guidelines to address a difficult international legal issue. But sometimes the best answer, at least to part of the question, is: we don't know—the law is unsettled, State practice is sparse and uneven, and the issue is not capable of being properly resolved at this time. In that situation, we lawyers should follow a principle of our medical friends and resolve to do no harm. I suggest that the Commission revisit Draft Article 7, and the timeline for this project, with that important principle in mind.

Mr. Chairman, the United States continues to follow with great interest the commission's work on the topic of crimes against humanity. Special Rapporteur Sean Murphy brings tremendous value to bear in the commission's work on this topic, including the challenging questions that this topic raises.

The development of the concept of "crimes against humanity" has played a critical role in the pursuit of accountability for some of the most horrific episodes of the last hundred years. Further, 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. Because crimes against humanity have been perpetrated in various places around the world, including by non-state actors, 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.

As we have previously noted, this topic's importance is matched by the complicated legal issues that it implicates. We are continuing to review the ILC's completed draft articles and commentary on this topic carefully, as they present a number of complex issues on which we are still developing our views. We are deeply grateful to Professor Murphy and to the other members of the commission for their work on a topic of such importance, and we eagerly look forward to providing our views to the commission. We expect that, under Special Rapporteur Murphy's stewardship, these complex issues will be thoroughly discussed and carefully considered in light of the views that we and other States will provide.

Mr. Chairman, turning to the topic of "Provisional application of treaties," the United States thanks the Special Rapporteur, Juan Manuel Gómez-Robledo, the Drafting Committee, and the working group for their contributions to the Draft Guidelines and commentaries that have been provisionally adopted by the Commission.

As the United States has stated, we believe the meaning of "provisional application" in the context of treaty law is well-settled—"provisional application" means that a State (or international organization) agrees to apply a treaty, or certain provisions of it, prior to the treaty's entry into force for that State (or organization). Provisional application gives rise to a legally binding obligation to apply the treaty or treaty provision in question, although this obligation can be more easily terminated than the treaty itself once the treaty has entered into force. We approach all of the ILC's work on this topic from that perspective.

Accordingly, while we are in agreement with many of the Draft Guidelines and commentaries as provisionally adopted, we have a number of concerns. We will discuss three of our concerns today.

First, we are concerned that the Draft Guidelines, especially Draft Guidelines 3 and 4 and their commentaries, fail to make clear that provisional application within the meaning of Article 25 of the Vienna Convention on the Law of Treaties requires the agreement of all of the States and international organizations incurring rights or obligations pursuant to the provisional application of the treaty. The lack of clarity arises from the draft's use of the passive voice in describing agreements for provisional application—for example saying that provisional application arises when “it has been so agreed” without indicating whose agreement is required. While the commentary to Draft Guideline 3 explains why the Draft Guidelines do not refer to the agreement of the “negotiating States” as in Article 25 of the Vienna Convention, it does not specify the group of States and international organizations that must instead agree. This problem could be corrected by using the active voice and by indicating whose agreement is required.

We are concerned that the ambiguity in the Draft Guidelines is compounded by confusing and potentially misleading language in the commentaries. For example, paragraph (7) of the commentary to Draft Guideline 3 makes reference to the agreement of “only some negotiating States” and “one or more negotiating States or international organizations” without making clear that only those States and international organizations that agree will be engaged in the provisional application of the treaty.

Second, we are concerned by the discussion in subsection (b) of Draft Guideline 4 and the accompanying commentary addressing what is described as a “quite exceptional” practice of establishing provisional application through a unilateral declaration by a State that is accepted by the other States and international organizations concerned. We do not believe that the examples cited in the commentary involve provisional application—within the meaning of Article 25 of the Vienna Convention—having been established through such a mechanism, and we are unaware of any other such practice. For this reason, we believe the discussion of such a hypothetical form of agreement to establish provisional application risks creating confusion, and we would urge that discussion of it be eliminated both from subsection (b) of Draft Guideline 4 and from paragraph (5) of the commentary.

The third concern deals with Draft Guideline 6, which provides that the provisional application of a treaty or part of a treaty “produces the same legal effects as if the treaty were in force” unless otherwise agreed. We are concerned that this may not be true in all respects. For example, as we have noted, provisional application can be more easily terminated than a treaty that is in force for that State. Moreover, we are studying whether—as suggested in the Special Rapporteur's last report and by some members of the Commission—Draft Guideline 6 means that all or many of the rules set forth in the Vienna Convention on the Law of Treaties apply to the provisional application of a treaty as they would if the treaty were in force. To avoid suggesting too close a parallel between provisional application and entry into force of a treaty, we believe that Draft Guideline 6 should be revised to read: “An agreement on provisional application of a treaty or part of a treaty produces a legally binding obligation to apply that treaty or part thereof.”

Mr. Chairman, again, we thank the Commission for its work on this important topic and look forward to following future work on these issues.

Finally, we would like to respond to the Commission's decision to include two new topics in its long-term programme of work. The first topic is on “general principles of law,” which is referred to in Article 38(1)(c) of the International Court of Justice's statute as one of the sources of international law the court is to apply. We appreciate the syllabus that Commission member Marcelo Vazquez-Bermudez developed for this topic. Yet, while we agree that the

nature, scope, function and manner of identification of “general principles of international law” could benefit from clarification, we are concerned that there may not be enough material in terms of State practice for the Commission to reach any helpful conclusions on this topic.

With respect to the second topic, “evidence before international courts and tribunals,” we share the sentiments expressed by Commission member Aniruddha Rajput that international adjudication is an important method of peacefully resolving international disputes, and that evidence is an integral part of the adjudicative process. However, we question both the need for and the practicability of discerning general rules of evidence from the heterogeneous practice of international courts and tribunals that has developed over time in light of each forum’s particular circumstances and experience.

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On October 27, 2017, Mr. Simonoff delivered remarks at the General Assembly Sixth Committee on the report of the ILC on the work of its 69th session, addressing the topic of protection of the atmosphere. Mr. Simonoff’s remarks are excerpted below and available at <https://usun.state.gov/remarks/8062>.

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...We continue to be concerned about the direction the Commission appears to be taking with respect to this topic.

Our original concerns, which have only intensified as this topic has progressed, run along two main lines.

First, we did not believe that this topic was a useful one for the Commission to address. Various long-standing instruments already provide general guidance to States in their development, refinement, and implementation of treaty regimes, and, 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 not be feasible and might potentially undermine carefully negotiated differences among regimes.

Second, we believed that such an exercise, and the topic more generally, was likely to complicate rather than facilitate ongoing and future negotiations and thus might inhibit State progress in the environmental area.

Accordingly, we opposed inclusion of this topic on the Commission’s agenda. Our concerns were somewhat allayed when the Commission adopted an understanding in 2013, which we hoped might prevent the work from straying into areas where it could do affirmative harm. Contrary to these expectations, however, all four reports that have thus far been produced have taken an expansive view of the topic. And while we had concerns with many aspects of the draft guidelines previously provisionally adopted by the Commission, the most serious related to the purported identification of “obligations” or “requirements” in contravention of the 2013 understanding that work on this topic would not impose new legal rules or principles on current treaty regimes. This year the Commission has strayed even further from this understanding by provisionally adopting a guideline that purports to inject consideration of the atmosphere not

only into the interpretation and application of treaties, but more broadly into the development of any new rule of international law.

Looking forward, we are particularly concerned by the Special Rapporteur's proposed long-term plan of work. If it were to be followed, the work would continue to stray outside the scope of the understanding and into unproductive and even counterproductive areas. For these reasons we call upon the Commission to suspend or discontinue its work on this topic.

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On November 1, 2017, Mr. Simonoff delivered further remarks in the Sixth Committee on the work of the ILC at its 69th Session, addressing the topics of: peremptory norms of general international law; succession of states in respect of state responsibility; and protection of the environment in relation to armed conflicts. Those remarks are excerpted below and available at <https://usun.state.gov/remarks/8118>.

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With respect to the topic of Peremptory Norms of General International Law, *jus cogens*, Mr. Chairman, we want to thank the special rapporteur, Professor Dire Tladi, for the substantial amount of work and analysis he has devoted to this project. We note that the Drafting Committee has provisionally proposed several new draft conclusions.

We appreciate that the topic of peremptory norms of international law is of considerable intellectual interest and recognize that a better understanding of the nature of *jus cogens* might contribute to our understanding of certain areas of international law, perhaps most notably human rights law. However, we continue to have a number of concerns with this topic. As we have explained on previous occasions, from a methodological point of view, we wonder if there is sufficient international practice on important questions, such as how a norm attains *jus cogens* status and the legal effect of such status vis-à-vis other rules of international and domestic law.

As a threshold matter, we believe that the criteria for the identification of peremptory norms must be based on, and be consistent with, Article 53 of the Vienna Convention on the Law of Treaties, VCLT. In this regard, we appreciate that the draft conclusions regarding the identification of peremptory norms proposed by the Committee correctly reflect the complete definition of peremptory norms set forth in Article 53. Nevertheless, a number of concerns remain and we would like to explain two of them here. First, we agree with the statement in paragraph one of Draft Conclusion 5 that customary international law is the most common basis for peremptory norms of general international law. However, contrary to what is asserted in paragraph 2 of the same conclusion, we are not aware of any examples of peremptory norms that are based on general principles of law. We would, therefore, suggest that the reference to such general principles be deleted or that the commentary explain that it has not been established that such principles could ever actually be a basis for peremptory norms of international law.

In addition, with respect to Draft Conclusion Nine of the Special Rapporteur's report, which deals with evidence of acceptance and recognition and has not yet been discussed by the Drafting Committee, we do not believe that judgments and decisions of international courts and

tribunals may serve as evidence of acceptance and recognition by States of norms as peremptory norms. Both Conclusion 13 of the Commission's Customary International Law project and Article 38 of the Statute of the International Court of Justice appropriately recognize judgments and decisions of international courts and tribunals only as a subsidiary means for determining rules of law. We believe that this is the approach that should be taken with respect to the identification of peremptory norms as well.

We thank the Special Rapporteur, Pavel Sturma, for his efforts in producing the first report on succession of states in respect of state responsibility, A/CN.4/708, which examines the scope of the project and sets out four proposed draft articles.

We appreciate that the Commission's work on the topic of succession of States in respect of State responsibility may lead to greater clarity in this area of the law. However, we are not confident that the topic will enjoy broad acceptance or interest from States, in view of the small number of States that have ratified the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention Succession of States in Respect of State Property, Archives, and Debts.

The issues raised by the topic of state succession in respect of State responsibility are complex, and careful and thoughtful consideration by governments will be required as the Commission continues to develop the draft articles. At this early stage, we urge the Commission to be clear when it believes it is codifying existing law as opposed to progressively developing the law.

In respect of Draft Article 3 as proposed by the Special Rapporteur, we note that the relevance of agreements to succession of States in respect of responsibility is described as depending in part on the type of agreement at issue. We are uncertain whether the distinctions among the types of agreements described in the draft article and commentary—including so-called devolution agreements, claims agreements, and other agreements—are well understood and established in State practice. We believe the draft article could benefit from further consideration as to whether these distinctions provide a sound basis on which to base general conclusions about State practice in this area. At the same time, we believe paragraph 4 of Draft Article 3 is correct to recognize the central importance of the principles reflected in Articles 34 through 36 of the Vienna Convention on the Law of Treaties, including the general rule that a treaty does not create rights or obligations for a third State without its consent, for the issues addressed in Draft Article 3.

We will continue to study the draft articles adopted by the Commission based on the reports produced by the Special Rapporteur.

Mr. Chairman, with respect to the topic "Protection of the Environment in Relation to Armed Conflicts," the United States would first like again to express its thanks for the efforts of the prior Special Rapporteur, Ms. Marie G. Jacobsson, in drafting reports that recognize the complexity and controversial character of many of these issues. We look forward to the contributions of the new Special Rapporteur, Ms. Marja Lehto.

We would like to note certain areas of concern from the proposed draft principles that emerged from the ILC's Drafting Committee in August 2016 that we hope the new Special Rapporteur will take into account.

First, with regard to the general scope of the project, we remain concerned by the interest and attention paid to addressing the concurrent application of bodies of law other than international humanitarian law during armed conflict. International humanitarian law is the *lex*

specialis in situations of armed conflict, and the extent to which rules contained in other bodies of law might apply during armed conflict must be considered on a case-by-case basis.

Second, we are similarly concerned that this would not be the appropriate forum to consider whether certain provisions of international humanitarian law treaties reflect customary international law. We emphasize that such an undertaking would require an extensive and rigorous review of State practice accompanied by *opinio juris*.

Third, we are concerned that several of the draft principles are phrased in mandatory terms, purporting to dictate what States “shall” or “must” do. Such language is only appropriate with respect to well-settled rules that constitute *lex lata*. Yet the principles indicate, in an introductory clause, that they are aimed in substance at “enhancing” the protection of the environment in relation to armed conflict—in other words, at influencing the progressive development of the law. Indeed, there is little doubt that several of these principles go well beyond existing legal requirements. For example, Draft Principle 8 introduces new substantive legal obligations in respect of peace operations and Draft Principle 16 expands the obligations under the Convention on Certain Conventional Weapons to mark and clear, remove, or destroy explosive remnants of war to include “toxic or hazardous” remnants of war.

Once again, we thank Ms. Marie Jacobsson and the Commission for their impressive work, and look forward to the efforts of Ms. Marja Lehto on this topic that is so important to all of us.

* * * *

2. Past ILC Work

See Chapter 4 for Mr. Simonoff’s remarks on the ILC’s draft articles on the effects of armed conflict on treaties.

D. REGIONAL ORGANIZATIONS

1. North American Development Bank

The United States and Mexico are parties to the Agreement Concerning the Establishment of a Border Environment Cooperation Commission (“BECC”) and a North American Development Bank (“NADB”), signed in Washington and Mexico City on November 16 and 18, 1993, respectively, and amended by a Protocol of Amendment signed by the parties on November 25 and 26, 2002, (the “Charter”). In 2017, they signed a second protocol amending the Charter in order to transform the BECC into a standing subsidiary component of NADB that is a fully integrated part of NADB. The Charter was amended by replacing the original text in its entirety with the text contained in Appendix I to the second protocol of amendment. The Protocol enters into force thirty days after an exchange of diplomatic notes between the Parties, notifying each other of the completion of domestic legal procedures for entry into force of the Protocol.

2. Organization of American States

a. *Venezuela*

On May 31, 2017, Under Secretary of State for Political Affairs Thomas A. Shannon, Jr. delivered remarks at the Organization of American States (“OAS”) regarding Venezuela. Those remarks are excerpted below and available at <https://www.state.gov/p/us/rm/2017/271487.htm>.

* * * *

Thank you, Mr. Chairman. To you, sir, to the Secretary General and to all my colleagues, I extend my respect and gratitude for your presence here today as we discuss the increasingly dire situation in Venezuela. Over the last 18 months, we have seen a dramatic erosion of constitutional rule in Venezuela. This extends from disputes over the National Assembly’s makeup and powers; the thwarting of the recall referendum late last year; the Supreme Court’s assumption of basic legislative functions in recent months; the ongoing imprisonment of opposition leaders and other restrictions on individual freedoms, including the use of military tribunals to try civilians; the violent repression of peaceful protests; and, most recently, the effort to seat a constitutional assembly to usurp the role of the National Assembly. All of these signal a rupture in Venezuela’s democratic and constitutional order.

At the same time, we have all been moved by the humanitarian hardships faced by 31 million Venezuelans. Economic stagnation has given way to hyperinflation and increasing economic instability. Venezuelan citizens struggle to maintain even basic access to food and medicine. The United States has condemned the government’s violent crackdown against the parties of the parliamentary majority and civil society. In just the past two months of political protests, as has been noted, more than 60 people have been killed, more than 1,000 injured, and nearly 3,000 detained, including 331 civilians charged criminally by military courts. I know many other states have been similarly disturbed by the course of events in Venezuela and ever more determined to do what we can to address it.

Mr. Chairman, beyond this region, the European Union and the Vatican have also expressed grave concerns regarding events unfolding in Venezuela. We also have seen a growing willingness among Venezuela’s neighbors to assist in finding a peaceful, democratic, and comprehensive solution to the problems facing the Venezuelan people. Let me underscore my nation’s continuing call for nonviolence in the streets of Venezuela. The rights of peaceful assembly and peaceful protest ought to be protected and not repressed.

The unfortunate decision by the Government of Venezuela to initiate the nation’s withdrawal from this organization will do nothing to resolve the country’s woes. Withdrawal will only deprive Venezuelans of the tools and institutions they need just when they need them most.

Mr. Chairman, instead of abandoning our hemispheric community of democratic nations and further isolating itself from the international community, we urge the Venezuelan Government to fulfill the commitments it freely made last fall during its participation in the Vatican-backed dialogue process—namely, to promote free elections, respect the independence

of the National Assembly, respect the freedoms of all of Venezuela's political prisoners, and meet the humanitarian needs of the Venezuelan people.

The Organization of American States can partner with other actors in the international community on a renewed effort to identify an agreed path out of the polarization and violence we see to Venezuela toward a better future.

The United States supports the proposal contained in the draft declarations calling for the establishment of a contact group to guide the next stage of our diplomatic efforts. We believe there is an international role in the rebuilding of trust among the main political actors in Venezuela, as well as the reduction of tensions among citizens and their institutions.

Any new effort must begin with concrete confidence-building steps of the kind laid out in our declarations today. Many of these are no more than fulfillment of existing constitutional obligations the government has bypassed or ignored. Our goal is to return to the full respect for the rule of law, the full respect for freedoms of political expression and participation.

Mr. Chairman, the collective commitment to promote and consolidate democracy that we, the nations of the Americas, have enshrined in core OAS instruments remains a model for other regions in the world. Today is an opportunity for us to demonstrate that this commitment remains alive and well and relevant to the current plight of our Venezuelan neighbors. Let us continue to show the world that inter-American solidarity can help find a path back to peace and prosperity for an essential member of our American family, always mindful that our solidarity is based on the respect and legitimacy that extends from the self-determination of peoples and not the self-perpetuation of governments. Thank you very much.

* * * *

b. *Model Law on the Simplified Corporation*

On June 20, 2017, the General Assembly of the Organization of American States adopted a resolution regarding the Model Law on the Simplified Corporation that had been approved by the Inter American Juridical Committee ("IAJC"). The General Assembly resolved to take note of the Model Law and requested that the IAJC and the Department of International Law disseminate the Model Law. OAS Member States were invited to adopt aspects of the Model Law that accord with their domestic laws and regulatory frameworks. The Model Law provides a simplified corporate structure, allowing micro-, small-, and medium-sized business enterprises ("MSMEs") to receive the benefits of incorporation with lesser degrees of complexity and lower cost than the norm. The model can also benefit larger businesses and facilitate foreign investment to improve economic growth.

The United States supported the approval by the OAS General Assembly of the IAJC Model Law on Simplified Stock Companies. Attorney-Adviser Michael Dennis delivered the following statement of support by the United States on December 1, 2016.

* * * *

We support the call of other delegations that the OAS General Assembly formally approve the IAJC Model Law on Simplified Stock Companies.

We appreciate the excellent report of the Department of International Law on the model law and its similarity to standards developed in other fora, particularly the World Bank, UN Commission on International Trade Law (UNCITRAL) and UNCTAD. We also want to thank Dr. Reyes for his highly informative presentation concerning the effect laws on simplified stock companies have had on informality and commercial development around the world, particularly in the OAS.

Micro-, small- and medium-sized enterprises (MSMEs) are the engines of economic growth and job creation in all OAS member states. They were identified as essential to the post 2015 UN development agenda as key to the achievement of sustainable development goals. It is envisaged that the funding of SDGS will come from commercial trade rather than development aid.

MSMEs typically constitute 95% or more of businesses in the OAS and employ a substantial portion of the work force. However, the vast majority of MSMEs in developing countries operate in the informal sector. UNCITRAL has reported that 90% of MSMEs in developing countries operate in the informal sector despite the need for a formal legal status to operate and enter into contracts. The OECD has also found that 60% of the world's workers (1.8 billion people out of 3 billion) are employed in the informal sector. According to the World Bank IFC, "[w]orldwide, women are three times more likely than men to be working in the informal economy."

The legal uncertainty under which informal businesses operate renders their transactions costlier and discourages attempts to grow, hire employees and seek credit. Courts and officials regard them as "irregular" entities subject to the invalidation of their contracts, plus fines. Informal businesses don't pay taxes or minimum wage nor do they offer maternity leave or health and safety protections afforded by international labor standards.

On the other hand, simplified business registration and incorporation promotes the rule of law. Greater formalization is the basis for inclusive growth, providing workers with the dignity of lawfulness and access to social services and protections. It reduces corruption and opportunities for extortion and gives workers peace of mind. Workers who pay taxes feel empowered to demand good infrastructure and governmental services. This increases governments' accountability and efficiency and ultimately increases economic growth.

An enabling legal environment providing for simplified business incorporation creates the gateway through which businesses enter the formal economy and provides them:

- Greater certainty of operation;
- Access to previously unreachable markets; and
- The capacity to compete and seek a fair treatment under the law.

The benefits of simplified business incorporation are not limited to the businesses themselves.

- Entering the formal sector obligates businesses to pay taxes and comply with labor laws.
- Easier start-up laws generate more businesses, lower prices, and increase product availability.

For these reasons, ILO Labor Standard (R204) recommends that ILO Members facilitate workers' transition from the informal to the formal economy. The World Bank has also found that economies with modern business registration "grow faster," "promote greater

entrepreneurship and productivity,” “create jobs,” “boost legal certainty,” and “attract larger inflows of foreign direct investment.”

As the Juridical Committee concluded, for a majority of small entrepreneurs in the OAS, becoming and remaining formal is a very complicated endeavor. According to the Committee: The lack of a progressive legislative framework permitting simpler and more modern business associations is often described as a major impediment to economic development within our hemisphere. Under many national legal codes, only certain types of business associations are permitted.... These business forms have roots in European legal codes of the last century and often require businessmen to follow elaborate and costly notarial and administrative processes.

As highlighted in the Committee report, the framework for the Model Law on Simplified Companies is drawn from successful legislative reforms in both developed and developing countries, including in the OAS. The Model Law blends features of two business forms: partnerships and corporations. We agree with the conclusion of the Committee that by combining both corporate and partnership-like components, the Model Law promotes significant contractual flexibility, while preserving the benefits of limited liability and asset partitioning.

As noted by the Department of International Law, the best practices underlying the Model Law are substantially similar to standards developed by UNCITRAL, UNCTAD, and the World Bank. Additionally, APEC is using the same core elements to evaluate its member economy laws on simplified registration and incorporation. The study is based on the following 10 criteria, specifically whether the law permits:

- creation of a simplified company by one or more persons;
- full- fledged limited liability;
- maximum freedom of contract;
- a flexible organizational structure;
- optional minimum capital;
- use of a general-objectives clause;
- fiscal transparency and simplified accounting;
- simple registration and incorporation requirements;
- optional use of intermediaries (e.g., lawyers, notaries, or witnesses);
- flexible means of enforcing shareholder agreements.

It is designed to assist APEC economies in identifying legal gaps to help them develop an enabling legal environment for business startups.

In summary, we hope the CAJP omnibus resolution for the General Assembly will formally approve the Model Law. We believe widespread implementation of the Model Law would assist OAS states in providing an enabling legal framework for simplified incorporation that will: (1) empower small businesses; (2) promote international economic growth based on trade not aid; and (3) enable women to participate more fully in the global supply chain. This reform has the potential to make a difference for many people across the OAS and give them a job, a future and a hope.

* * * *

E. OAS: INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Charter of the OAS authorizes the Inter-American Commission on Human Rights (“IACHR” or “Commission”) to “promote the observance and protection of human

rights” in the Hemisphere. The Commission hears individual petitions and provides recommendations principally on the basis of two international human rights instruments, the American Declaration of the Rights and Duties of Man (“American Declaration”) and the American Convention on Human Rights (“American Convention”). The American Declaration is a nonbinding statement of principles adopted by the countries of the Americas in a 1948 resolution. The American Convention is an international treaty that sets forth binding obligations for States parties. The United States has signed but not ratified the American Convention. As such, the IACHR’s review of petitions with respect to the United States takes place under the substantive rubric of the American Declaration and the procedural rubric of the Commission’s Statute (adopted by OAS States via a nonbinding resolution) and the Commission’s Rules of Procedure (“Rules”) (drafted and adopted by the Commissioners themselves).

In 2017, the United States continued its active participation before the IACHR through written submissions and participation in a number of hearings.⁷ The IACHR also unveiled a number of measures aimed at implementing more efficient case-management. For example, the Executive Secretariat started applying a Commission decision from October 2016 that allows the Secretariat to administratively join, on the Commission’s behalf, the admissibility and merits stages of existing cases if certain criteria are met. See <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-16-en.pdf>. In 2017, the Secretariat announced admissibility and merits joinder in several cases in which the United States had filed responses. These cases satisfied one or more of the criteria set forth in the Commission’s 2016 decision, *i.e.*, they involve the death penalty, are subject to an outstanding request by the Commission for precautionary measures, or were filed with the Commission before 2006. The cases in which the Commission announced joinder in 2017 are: *Four Million American Citizen Residents of Puerto Rico* (13.154); *Walter Mickens* (13.220); *René Schneider* (13.221); *Melissa L., Jesús L., and Yolanda L.R. (Undocumented Workers)* (13.222); *Rosello et al.* (13.326); *Manuel Valle* (13.339); *Jurijus Kadamovas et al.* (13.352); *Nelson Ivan Serrano Saenz* (13.356); *Héctor Rolando Medina* (13.358); *Julius O. Robinson* (13.361); and *Linda Carty* (13.362).

As another strategy to reduce its backlog of cases, in 2017, the IACHR began adopting streamlined admissibility reports of far fewer pages than before. The United States welcomed this strategy in its July 31, 2017 filing in *Rosello* (Case No. 13.326). The IACHR also archived, under Article 42 of its Rules of Procedure, three petitions in which there had been no activity for years, effectively closing the proceedings without a decision on admissibility or merits: *Benatta* (P-18-09), *Thomas et al.* (P-990-06), and *Enwonwu* (12.206).

Despite these efforts at improved efficiency, the IACHR only issued one merits report in a case involving the United States (*Saldaño*, 12.254) and two admissibility reports (*Igartua*, 13.154, and *Rosello*, 13.326). The United States responded to a preliminary version of the *Saldaño* merits report in January 2017.

Significant U.S. activity in matters, cases, and other proceedings before the IACHR in 2017 is discussed below. The United States also corresponded in other matters and cases not discussed herein. The 2017 U.S. briefs and letters discussed below, along

with several of the other briefs and letters filed in 2017 that are not discussed herein, are posted in full (without their annexes) at <https://www.state.gov/s/l/c8183.htm>.

1. Substantive Response Briefs and Letters

a. *Case No. 12.729 (Summerlin): Archival of Long-Dormant Case and Petitioner's Duty to Keep IACHR Updated About Status of Domestic Proceedings*

On January 9, 2017, the United States filed a letter in Case No. 12.729, requesting the IACHR archive or close the case based on its discretion to reconsider admissibility and to dismiss if there has been effective domestic relief, emphasizing the need for the petitioner to keep the IACHR updated. Excerpts follow from the January 9 letter to IACHR Executive Secretary Paulo Abrão.

* * * *

This letter serves as a request that the Commission archive this matter for lack of activity. Alternatively, the Commission should ask the Petitioners to provide detailed, updated information regarding the status of their various claims, should declare inadmissible those claims which have been the subject of effective domestic relief, and should at minimum declare inadmissible or archive the claims of any Petitioner who has died of causes unrelated to the death penalty.

The Commission found this Petition admissible on October 29, 2009, with respect to all named Petitioners except Mr. Daniel W. Cook, for whom the Commission found all claims inadmissible. On July 21, 2011, the Commission issued a decision on the merits for Mr. Jeffrey Timothy Landrigan, one of the nine original Petitioners, whose claims had been separated from those of the other remaining Petitioners.

We are unaware of any activity on the claims of the remaining 97 Petitioners since October 2009. Our own research indicates that of those individuals still associated with the Petition, nearly half have had significant developments in their status since the Petitioners' last filing that would significantly affect the status of their claims, and may (or does) moot their claims entirely. According to public records, at least 19 of the Petitioners have had their death sentences overturned, reduced to life in prison, or have otherwise been resentenced to non-capital prison terms; at least five of them have been released from prison; at least nine of them have died of unrelated causes; and at least 14 of them have been executed.

Furthermore, as the Commission knows, the United States strongly supports the Commission and the important role it has historically played in promoting human rights throughout the Hemisphere. Accordingly, the United States has a strong interest in the maintenance of the Commission's efficient functioning in a severely constrained budgetary environment. In the United States' view, archiving this entire Petition due to the long period of inactivity would be an appropriate course of action in light of the Commission's limited resources, the urgent need to clear out its backlog of cases, and the Commission's many other priorities with respect to the United States and the other countries of the Hemisphere.

Alternatively, if the Commission chooses not to archive this Petition, it should ask the Petitioners' representatives for detailed information as to the current status of the domestic proceedings of each of the 97 Petitioners—many of whom, as explained above, are deceased, no longer in prison, or no longer serving capital sentences—so that it may properly evaluate the continued admissibility of each Petitioner's claims. It is, after all, petitioners and their representatives—not the State—who should proactively keep the Commission updated as to material developments that could affect the disposition of their claims before the Commission. Despite many material developments over the past seven years, the United States is unaware of any such update provided by Petitioners' representatives.

With such updated information at its disposal, the Commission should then reconsider its admissibility report with respect to the Petitioners who have received effective relief in the domestic system, as it has the discretion to do, and declare those Petitioners' claims inadmissible under Article 34(c) of the Rules of Procedure in light of the supervening information. ...

* * * *

b. *Petition No. P-300-09 (Bullock): Dismissal of IACHR Petition in Light of Untimeliness; Domestic Settlement; Fourth Instance Formula; Nonbinding Nature of American Declaration*

On January 13, 2017, the United States filed its supplemental response to Petition No. P-300-09 (*Bullock*). The United States transmitted an initial response on November 28, 2014, to which the petitioner responded with a letter containing additional information on June 1, 2015 (transmitted on September 28, 2016 to the United States). The supplemental response filed in 2017 urges IACHR dismissal when the matter has been voluntarily settled in the domestic system.

* * * *

Since his 1984 conviction, Mr. Bullock has received several payments from state and local governments in the United States. The November 2014 U.S. response to this Petition cited two of those payments: first, in 1986, Mr. Bullock brought a claim against the City of Chicago, Illinois, for false arrest related to his 1983 arrest for the rape and kidnapping that led to his 1984 conviction and incarceration. The City of Chicago settled that claim with Mr. Bullock for a sum of \$3,000. ...

Second, also in 1986, Mr. Bullock brought a claim against Cook County, Illinois, for allegedly failing to protect him from gang violence while he was incarcerated in the county jail pending trial The County settled that claim with Mr. Bullock for \$20,000, and we are not aware that Mr. Bullock has challenged the sufficiency of this settlement in U.S. courts.

Beyond those two payments, Mr. Bullock received a third payment. ... Mr. Bullock filed a claim in the Illinois Court of Claims ... and was awarded a payment from the State of Illinois on August 5, 1998 in the amount of \$120,300, specifically as compensation for his unjust imprisonment of 12 years, which the Court "calculated ... as being the maximum allowed by the statute" in Mr. Bullock's case. Mr. Bullock disputed the amount of this award, but failed to appear at three subsequent status hearings (he did appear at other status hearings, where he

requested a continuance). ... Thus, his award of \$120,300 was finalized on March 15, 2001, and this compensatory payment was reported publicly in the Illinois Court of Claims Annual Report for Fiscal Year 2001.

Mr. Bullock also brought a series of claims against the City of Chicago for alleged violations of his rights relating to his conviction and imprisonment. Mr. Bullock filed at least five lawsuits in relation to the circumstances surrounding his 1983 arrest between 1986 and 1987, ... After his exoneration, Mr. Bullock also filed a civil lawsuit under 42 U.S.C. § 1983 However, the U.S. District Court for the Northern District of Illinois ... did not find in Mr. Bullock's favor.

Mr. Bullock filed a motion for reconsideration of his claim, and in 2003, the court found that there had been no concealment of evidence from Mr. Bullock... In other words, the court found no deliberate wrongdoing by the City of Chicago, and therefore did not find in Mr. Bullock's favor. Mr. Bullock appealed this decision to the U.S. Court of Appeals for the Seventh Circuit, which affirmed the district court's finding on a variety of grounds, including that Mr. Bullock's claims were meritless and untimely filed. A petition to have this case reheard was denied on February 11, 2005.

The United States is aware of no further activity in Mr. Bullock's domestic proceedings after February 2005. Mr. Bullock filed his Petition before the Commission on March 3, 2009.

B. DISCUSSION

For a petition to be admissible before the Commission, it must satisfy several procedural requirements under the Commission's Rules of Procedure ("Rules"). Article 34(a) of the Rules provides that "[t]he Commission shall declare any petition or case inadmissible when ... it does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure" Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments" For the United States, the American Declaration is the only "applicable instrument."

In this petition, Mr. Bullock alleges that the United States has violated his rights under Articles II, XVIII, and XXV of the American Declaration. However, Mr. Bullock's claims must be dismissed because they are untimely and because Mr. Bullock has already received a domestic remedy for these claims. Separately, the Commission lacks competence in light of the "fourth instance formula" to review the Petition and it should also be dismissed on this basis. Mr. Bullock has raised each of his claims through the domestic court system and is simply unhappy with the result. The Commission may not sit as a "court of fourth instance" to second-guess the factual and legal determinations of the domestic courts and juries. These grounds for dismissal are discussed, in turn, below.

1. The Petition Must Be Dismissed as Untimely

Article 32(1) of the Rules requires that petitions be "lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies." Article 28(7) stipulates that compliance with this statute of limitations is a threshold requirement for the Commission's consideration of petitions. In this matter, the compensation paid by the State of Illinois to Mr. Bullock for his wrongful conviction was finalized in March 2001, and the subsequent litigation arising from the same facts concerning Mr. Bullock's conviction and imprisonment was concluded in February 2005. However, Mr. Bullock did not file his petition with the Commission until more than four years later, in March 2009, and he provides no explanation for this long delay. The Commission has repeatedly

dismissed as inadmissible petitions that have been filed after the six-month period of time set forth in Article 32(1). In keeping with the requirements of Articles 28(7) and 32 of the Rules, as applied by the Commission in many prior matters, the Commission must find Mr. Bullock's claims inadmissible in their entirety because his petition was not timely filed.

2. The Petition Must Be Dismissed ...

Mr. Bullock has voluntarily settled claims and received compensation arising out of his wrongful arrest, conviction, and imprisonment. He has already received compensation in the amount of \$120,300 from the State of Illinois related to his wrongful conviction and imprisonment, and voluntarily settled his claims against the City of Chicago relating to his 1983 arrest for \$3,000. He cannot now assert that the United States has violated the American Declaration with respect to those settled matters because he has already received a remedy.

* * * *

The settlements, compensatory payments, and ensuing dismissals of Petitioner's cases in Illinois state courts, U.S. federal district court, and a U.S. federal court of appeals show that Mr. Bullock received adequate and effective remedies for his claims, to which he freely and fully agreed, through the process of exhausting remedies through the U.S. court system. In his June 1, 2015 letter, Mr. Bullock appears to assert that his settlements and compensation from the State of Illinois and the City of Chicago were insufficient, and encloses as "evidence" of this insufficiency a series of newspaper articles documenting settlements awarded to victims of completely unrelated actions by employees of the City of Chicago. These include compensation paid to a paraplegic who was fatally shot by a Chicago police officer in 2007, compensation paid to a man who was injured by a vehicle driven by a city worker, compensation paid to individuals who were discriminated against on the basis of race in a firefighters' entrance exam, individuals injured by a fire in a city building, and individuals subjected to physical abuse during interrogations by city police. None of these settlements are even remotely related to Mr. Bullock's claims, which concern a wrongful arrest, conviction, and imprisonment.

The only remotely related cases that are cited by Mr. Bullock are in his October 16, 2009 letter. These cases outline jury verdicts awarded to individuals who were convicted as a result of unlawful actions by City of Chicago officials. Yet Mr. Bullock's case is not analogous to any of these cases: courts have not found that Mr. Bullock was the victim of any unlawful action or intentional wrongdoing by City officials. Instead, he was the subject of a mistaken eyewitness identification that led to an incorrect conviction. The State of Illinois has a law in place to deal with just such a situation: as described above, Illinois law provides for a process by which individuals who are later exonerated of crimes based on innocence or a pardon by the Governor of Illinois are eligible for compensation from the State. Mr. Bullock pursued such a claim and succeeded, receiving compensation that he and his attorney freely accepted. The fact that Mr. Bullock is unhappy with the amount of his compensation is insufficient to state facts that tend to establish a violation of the American Declaration, and any such claim before the Commission is manifestly groundless.

As a result, the Commission should reject Mr. Bullock's claims as manifestly groundless under Article 34(a) and (b) of the Rules.

3. The Petition Must Be Dismissed Under the Commission's Fourth Instance Formula

The Commission must also dismiss the Petition because the Commission lacks competence to sit as a court of fourth instance. The Commission has repeatedly stated that it may not "serve as an appellate court to examine alleged errors of internal law or fact that may have

been committed by the domestic courts acting within their jurisdiction”—a doctrine the Commission calls the “fourth instance formula.”

The fourth instance formula recognizes that the Commission cannot substitute for the States’ domestic judiciaries, and nothing in the American Declaration, the Charter of the Organization of American States (OAS), the Commission’s Statute, or the Rules gives the Commission the authority to act as an appellate body. ...

As the United States has consistently maintained, it is not the Commission’s place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a state’s domestic courts in weighing evidence and applying domestic law, nor does the Commission have the resources or the requisite expertise to perform such a task.

* * * *

4. The Commission May Not Issue Binding Orders with Respect to the United States, Under the American Declaration or Otherwise

Finally, the United States reaffirms its longstanding position that the American Declaration is a nonbinding instrument that does not itself create legal rights or impose legal obligations on Member States of the OAS; and the Commission may issue recommendations but not binding orders.

Nevertheless, the United States has undertaken a political commitment to uphold the American Declaration. As the Commission well knows, the United States takes its American Declaration commitments and the Commission’s recommendations very seriously. The protections afforded individuals in the U.S. criminal justice system are among the strongest and most expansive in the world, and the U.S. Constitution—which governs both federal and state criminal proceedings—establishes a wide range of rights and legal protections for individuals charged with criminal offenses, as do other federal and state laws and regulations.

* * * *

c. *Petition No. MC-454-14 (Owen): Inadequate Information Provided by Petitioners; Untimeliness of Petition; Fourth Instance Formula*

On April 3, 2017, the United States filed its response to the request for precautionary measures by parents of two minors. The parents challenged a Kansas state court’s custody determinations. The U.S. response, excerpted below, notes the failure by the petitioners to provide sufficient information, the petition’s untimeliness, and the application of the fourth instance formula as a ground for dismissing the petition.

* * * *

In the interim, we wish to point out that, if the Commission treats the Petitioners’ filing as a petition seeking a determination of admissibility and on the merits under the Rules of Procedure (“Rules”)—and not only a request for precautionary measures—the filing appears to be untimely. Pursuant to Article 32(1) of the Rules, “[t]he Commission shall consider those

petitions that are lodged within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.” As discussed above, Petitioners have indicated that their custody case in the domestic court system was dismissed on February 26, 2014, nearly three years before your office transmitted their filing to the United States. The petition itself is undated, so we have no way of knowing whether the petition was lodged within a period of six months following the date on which the alleged victim has been notified of the decision that allegedly exhausted the domestic remedies. Pursuant to Article 28(7) of the Rules, a petition addressed to the Commission shall demonstrate “compliance with the time period provided for in Article 32 of the[] Rules of Procedure.” Pursuant to Articles 26(2) and 27, the “Commission shall consider petitions ...only when the petitions fulfill the requirements set forth...in the Rules of Procedure” and “[i]f a petition or communication does not meet the requirements set for in these Rules of Procedure, the Executive Secretariat may request the petitioner or his or her representative to fulfill them.”

Finally, it is worth observing that Petitioners have requested that the Commission provide them with “a hearing on [their] court cases.” However, as the Commission has explained on numerous occasions, the Commission is not a court of fourth instance. The Commission may not “serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction”—a doctrine the Commission calls the “fourth-instance formula.” Where, as here, a petition “contains nothing but the allegation that [a domestic] decision was wrong or unjust in itself, the petition must be dismissed” under the fourth instance formula.

* * * *

d. *Petition No. MC-184-17 (Rahim): Lack of Competence; Nonbinding Nature of Precautionary Measures; Failure to Exhaust Domestic Remedies; Illegality of Torture Under International Law*

On July 14, 2017, the United States filed its response to a Commission request for information on a precautionary measures request lodged by a petitioner at the Guantanamo Bay Naval Station detention facility.

* * * *

The United States respectfully submits that the Commission should refrain from requesting precautionary measures in this case because the Commission lacks the authority to require such measures. Moreover, such measures are not warranted in any event for the reasons set forth below.

As a preliminary matter, Mr. Rahim is detained under the Authorization for Use of Military Force (AUMF) (U.S. Public Law 107-40), as informed by the law of war, in the ongoing conflict with al-Qaida, the Taliban, and associated forces. ... Mr. Rahim was reviewed by the Periodic Review Board (PRB or “Board”) on September 19, 2016. ...The PRB found that Mr. Rahim merited continued law of war detention...

Lack of competence

Mr. Rahim alleges that the United States has “violated” certain specific rights recognized in the American Declaration of the Rights and Duties of Man (“American Declaration”). As noted in numerous prior submissions, the United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS). ...

Even if the Commission considered the American Declaration to be binding on the United States, it could not apply it to certain claims of Mr. Rahim because during situations of armed conflict, the law of war is the *lex specialis*. ...

Precautionary measures***Lack of authority to issue precautionary measures***

Your office’s communication dated May 10, 2017 notes that a request has been made for precautionary measures in this case. The United States respectfully reiterates that the Commission does not have the authority to require that States adopt precautionary measures. The reasons for the U.S. position on precautionary measures have been stated in detail in past submissions...

* * * *

Inadmissibility

As noted above, in his petition for precautionary measures Mr. Rahim additionally requests the Commission to undertake admissibility and merits determinations based on the allegations presented in the petition. The Commission should decline this request to proceed to the admissibility stage because Mr. Rahim’s petition is inadmissible for failure to exhaust domestic remedies. Furthermore, the Commission should not request precautionary measures in instances where Petitioner has not exhausted available domestic remedies, where those remedies hold the prospect of providing him or her with effective relief. In this case, Petitioner has filed a petition for a writ of *habeas corpus*, as described below, and as a result should not benefit from the Commission’s intervention at this stage because a successful *habeas* petition would provide certain relief he now seeks from the Commission.

* * * *

As a courtesy, we here provide some general information regarding U.S. law, policy, and practice regarding detention authorities; safeguards against torture and ill-treatment in U.S. custody; and medical treatment in detention, including, where relevant, information specific to Mr. Rahim.

Detention authority, procedural protections during habeas proceedings in Federal court, and Executive Order 13492

As noted above, all Guantanamo detainees have the ability to challenge the lawfulness of their detention in U.S. federal court through a petition for a writ of *habeas corpus*. Detainees have access to counsel and to appropriate evidence to mount such a challenge before an independent court. Except in rare circumstances required by compelling security interests, all of the evidence relied upon by the government in *habeas* proceedings to justify detention is disclosed to detainees’ counsel, who have been granted security clearances to view the classified evidence, and the detainees may submit written statements and provide live testimony at their

hearings via video link. The United States has the burden in these cases to establish its legal authority to hold the detainees. Detainees whose *habeas* petitions have been denied or dismissed continue to have access to counsel pursuant to the same terms applicable during the pendency of proceedings. The U.S. government respects the critical role of detainees' counsel in these proceedings and, more broadly, the fundamental importance of that role in the U.S. system of justice. It will continue to make every reasonable effort to ensure that counsel can communicate effectively and meaningfully with their clients.

As holders of a valid U.S. security clearance, detainees' lawyers are obligated to protect classified information acquired in the course of their representation of individuals detained at Guantanamo according to applicable U.S. law, regulations, and signed agreements between the holder of the clearance and the U.S. government. All holders of U.S. security clearances are subject to these same obligations. In accordance with Executive Order 13526, in no case may information be classified in order to "conceal violations of law, inefficiency, or administrative error" or "prevent embarrassment to a person, organization, or agency."

Additionally, in 2009, then-President Barack Obama issued Executive Order 13492, which required a comprehensive review of the status of Guantanamo detainees to determine their appropriate disposition by way of release, transfer, prosecution, or continued detention pursuant to the law of armed conflict. That review was completed on January 22, 2010, and Mr. Rahim was designated for continued law of war detention at that point. Detainees such as Mr. Rahim at Guantanamo are now eligible for review by the PRB, as described above, which continues its work of assessing whether continued law of war detention of certain detainees is necessary to protect against a continuing significant threat to the security of the United States. Since the PRB began its work in October 2013, it has held 78 full hearings, with the results of 77 now made publicly available. Of those 77 determinations, 38 detainees were designated for transfer, 36 of whom have been released from U.S. custody and resettled or repatriated. The pace of hearings increased in 2015 and 2016, with hearings and file reviews as listed on the PRB website. The PRB is not designed to assess the lawfulness of a detainee's detention. If, however, at any time during the periodic review process, material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.

Detainees are assisted in proceedings before the PRB by a U.S. government-provided personal representative, and may also be assisted by private counsel at no expense to the U.S. government. Each detainee, aided by his representative, is permitted to participate in the review process by presenting to the PRB a written or oral statement, introducing relevant information, including written declarations, and answering any questions posed by the PRB. Additionally, the detainee may call reasonably available witnesses who are willing to provide information relevant and material to the PRB's determination of whether continued law of war detention of the detainee is necessary to protect against a significant threat to the security of the United States.

A detainee's personal representative receives full access to the information considered by the PRB, except in rare instances where doing so would put national security at risk. Any private counsel also receives such information, provided he or she possesses an appropriate security clearance. In cases where information considered by the PRB is withheld from a detainee's personal representative or private counsel, substitutes or summaries of the withheld information are provided. The PRB ensures that any substitutes or summaries are sufficient to provide the personal representative and private counsel with a meaningful opportunity to assist the detainee during the review process.

Mr. Rahim was represented in his initial PRB hearing by two personal representatives, who were provided with the information considered by the PRB as described above. Mr. Rahim is also represented by private counsel in his efforts before the PRB, but that counsel did not file his paperwork in time to receive the necessary security clearance to participate in Mr. Rahim's PRB proceeding in 2016 or to get access to the information for that proceeding. Mr. Rahim continues to be eligible for review by the PRB. He will automatically receive another full review before the PRB in September 2019, three years after his initial full review. In the interim, he receives a file review every six months to determine whether any new information raises a significant question as to whether his continued detention is warranted. If such a significant question is raised during a file review, he will promptly receive a full review.

Treatment in detention

Law and policy

The United States reaffirms and continues to uphold the bedrock principle that torture and cruel, inhuman, and degrading treatment or punishment are categorically and legally prohibited always and everywhere, violate U.S. and international law, and offend human dignity, and the United States has taken steps to strengthen protections against torture and cruel, inhuman, or degrading treatment or punishment. Torture is contrary to the founding principles of our country and to the universal values to which the United States holds itself and the international community.

All U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo, are carried out in accordance with international humanitarian law, including Common Article 3 of the Geneva Conventions, and all other applicable international and domestic laws. The United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo. Executive Order 13491, *Ensuring Lawful Interrogations*, directs that individuals detained in any armed conflict shall in all circumstances be treated humanely, consistent with U.S. domestic law, treaty obligations, and U.S. policy, and shall not be subjected to violence to life and person (including cruel treatment and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the United States. It further orders that such individuals shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized and listed in the Army Field Manual 2-22.3. The Army Field Manual explicitly prohibits threats, coercion, and physical abuse, and is publicly available for the Commission's review. The National Defense Authorization Act for Fiscal Year 2016 ("2016 NDAA") codified many of the key interrogation-related reforms required by the Executive Order. It also imposed new legal requirements, including that the Army Field Manual remain publicly available, and that any revisions be made publicly available 30 days in advance of their taking effect.

In addition to the Army Field Manual, the U.S. Department of Defense has Department-wide policy directives in place to ensure humane treatment during intelligence interrogations and detention operations. For example, Department of Defense Directive 3115.09 requires that Department of Defense personnel and contractors promptly report any credible information regarding suspected or alleged violations of Department policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings, or tactical questioning. Reports must

be promptly and thoroughly investigated by proper authorities, and remedied by disciplinary or administrative action, when appropriate.

Additionally, Department of Defense Directive 2310.01E requires that “[a]ll military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a Department of Defense Component shall report reportable incidents through their chain of command,” including “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information.” All reportable incidents must be investigated and, where appropriate, remedied by corrective action.

U.S. law provides several avenues for the domestic prosecution of U.S. government officials and contractors who commit torture and other serious crimes overseas. ...

The U.S. government has investigated allegations of torture or cruel treatment. Prior to August 2009, career prosecutors at the Department of Justice carefully reviewed several cases involving alleged detainee abuse. These reviews led to charges in several cases and the conviction of a U.S. Central Intelligence Agency (CIA) contractor and a Department of Defense contractor. In 2009, the U.S. Attorney General directed a preliminary review of the treatment of certain individuals alleged to have been mistreated while in U.S. government custody subsequent to the 9/11 attacks. The inquiry was limited to a determination of whether prosecutable offenses were committed. The review considered all potentially applicable substantive criminal statutes as well as the statutes of limitations and jurisdictional provisions that govern prosecutions under those statutes. That review of the alleged mistreatment of 101 individuals, led by a career Federal prosecutor and now known as the Durham Investigation, generated two criminal investigations. The Department of Justice ultimately declined those cases for prosecution because the admissible evidence would not have been sufficient to obtain and sustain convictions beyond a reasonable doubt.

Beyond the Department of Justice, there are many other accountability mechanisms in place throughout the U.S. government aimed at investigating credible allegations of torture and prosecuting or punishing those responsible. ...

* * * *

International Committee of the Red Cross (ICRC) access

The 2016 NDAA requires that any U.S. government department or agency provide the ICRC with notification of, and prompt access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the U.S. government, consistent with existing Department of Defense regulations and policies. The Department of Defense has worked closely with the ICRC to facilitate increased opportunities for Guantanamo detainees to communicate with their families. The addition of near real-time communication is another step in the Department of Defense’s efforts to assess continually and, where practicable and consistent with security requirements, improve conditions of detention for detainees in its custody. Detainees are given the opportunity to send and receive letters, facilitated by the ICRC, and are able to talk to their families periodically via phone or video teleconference.

Medical care at Guantanamo

The Joint Medical Group at Guantanamo (JMG) is committed to providing appropriate and exemplary medical care to all detainees. JMG providers take seriously their duty to protect the physical and mental health of the detainees and approach their interactions with detainees in

a manner that encourages provider-patient trust and rapport and that is aimed at encouraging detainee participation in medical treatment and prevention. Detainees receive timely, compassionate, quality healthcare and have regular access to primary care and specialist physicians. For example, detainees may make a request to guard personnel in the cell blocks or to the medical personnel who make daily rounds on each cell block at any time in order to initiate medical care. In addition to responding to such detainee requests, the medical staff will investigate any medical issues observed by staff. The availability of care through ongoing monitoring and response to detainee-initiated requests has resulted in thousands of outpatient contacts between detainees at Guantanamo and the medical staff, followed by inpatient care as needed. The healthcare provided to the detainees at Guantanamo is comparable to that which U.S. service personnel receive while serving at Joint Task Force-Guantanamo.

* * * *

On August 2, 2017, the Commission notified the United States that it had issued a precautionary measures resolution in MC-184-17 dated July 25, 2017. The United States responded on August 11, 2017, reiterating its previous arguments and informing the Commission that it would construe the resolution as a recommendation.

e. Petition No. P-524-16 (Hernández): Supervening Domestic Settlement Renders Petition Manifestly Groundless and Therefore Inadmissible Before IACHR

On September 12, 2017, the United States responded to a petition filed by family members of an individual who died in U.S. government custody after attempting to enter the United States illegally. The key argument of the U.S. response is that the settlement reached in a lawsuit brought by petitioners in U.S. court precludes the pursuit of any remedy at the IACHR.

* * * *

As noted above, these claims, which were outlined in the Third Amended Complaint, effectively mirror the claims that Petitioners assert before the Commission. The dismissal of the case with prejudice means that Petitioners are legally prohibited from ever again raising the claims asserted in the U.S. federal court case. They are likewise legally prohibited from ever again raising claims they could have asserted, or that they might in the future assert, arising directly or indirectly from the acts or omissions that gave rise to the federal court case. These include “any and all claims” and “rights” “of whatsoever kind and nature,” which by the plain meaning of those terms includes the claims that were pending in the instant Petition at the time Petitioners reached the settlement agreement with the U.S. government.

Accordingly, Petitioners can no longer bring claims before a reviewing forum asserting that the United States violated Mr. Hernández-Rojas’s rights with regard to acts or omissions that gave rise to their district court complaint. These acts or omissions include all the claims that Petitioners make in the Petition before the Commission.

Apart from the fact that Petitioners have now obligated themselves under U.S. law not to further pursue the claims in the Petition against the United States, nothing in the principles established by the American Declaration or in the Rules would suggest that the Commission should intervene in a matter that has been voluntarily settled between a petitioner and the governmental authorities that are accused of violating the petitioner's rights. Moreover, implicit in the requirement of exhaustion in Article 31 of the Rules is the incontrovertible principle that if a petitioner has received an effective remedy in the domestic system, then his or her claim is not admissible before the international forum. And in fact, the Commission itself encourages the settlement of human rights claims, by placing itself at the disposal of petitioners and the government to reach a friendly settlement, as reflected in Article 40 of the Rules. It would also be fundamentally unfair for the Commission to allow the Petition to go forward even though the United States believed, at the time it agreed to the settlement agreement, that any and all other claims arising from this incident would be relinquished, and paid monetary compensation in reliance on that belief.

In considering the instant Petition's admissibility under the Rules, it is important to recall the procedural timeline. Petitioners filed the Petition on March 30, 2016. The Commission forwarded the Petition for a U.S. response on May 12, 2017. Thereafter, a material development occurred: on May 30, 2017, Petitioners and the U.S. government reached a settlement whereby Petitioners relinquished all claims of whatever nature against the United States, in any forum. Therefore, as a result of the settlement agreement Petitioners voluntarily concluded with the U.S. government, the claims in the earlier-in-time Petition have now been rendered manifestly groundless, and thus inadmissible in light of supervening information, as provided for under Articles 34(b) and (c) of the Rules. The Commission should respect the legally binding agreement reached by Petitioners and the U.S. government, dismiss the Petition, and close this matter so that it may focus its resources on the many other matters that demand its attention.

* * * *

f. Petition No. P-627-17 (Mitchell): Competence to Review Collective Rights; Lawfulness of Death Penalty; Fourth Instance Formula; Basis for Precautionary Measures

On September 21, 2017, the United States filed its response to a petition brought by a member of the Navajo Nation who was convicted and sentenced to death in federal court in the United States. The U.S. response asserts, *inter alia*, that while the Commission may review claims of violations of individual human rights, it does not have competence to evaluate claims of violations of the collective rights of indigenous peoples, including pursuant to the UN Declaration on the Rights of Indigenous Persons ("UNDRIP") and the American Declaration on the Rights of Indigenous Peoples; that the application of the death penalty for crimes committed by an Indian in Indian Country would violate neither international law nor U.S. domestic law under the circumstances; and that the IACHR improperly decided to request precautionary measures when there was no risk of immediate harm to the petitioner.

* * * *

Mr. Mitchell raises two primary arguments. First, he argues that the United States violated the sovereignty of the Navajo Nation by seeking the death penalty in Mr. Mitchell's case. Second, he argues that Mr. Mitchell's rights related to due process and a fair trial were violated as a consequence of alleged collusion between the U.S. government and tribal law enforcement, ineffective assistance of counsel, and the decisions of the federal courts in his own *habeas* proceedings. As explained below, the Commission should declare the Petition to be inadmissible because Petitioner has not stated facts that tend to establish a violation of any rights in the American Declaration. Additionally, the arguments presented in the Petition are unreviewable in light of the Commission's "fourth instance formula" as they amount to a mere disagreement with determinations of domestic courts on these same issues, rendered in compliance with the American Declaration.

Should the Commission nevertheless declare the Petition admissible and choose to examine the claims presented by Mr. Mitchell on their merits, or should it defer its examination of the Petition's admissibility until its review of the merits under Article 36(3) of the Rules, it should deny the requested relief because the Petition does not demonstrate a failure by the United States to uphold its commitments under the American Declaration. The reasons the Petition is inadmissible under Article 34(a), the reasons the Commission lacks competence to review it, and the reasons it is meritless in any event are discussed in tandem throughout this brief.

1. Mr. Mitchell's Allegation of Infringement on Navajo Sovereignty Is Beyond the Commission's Competence to Review ...

In 1994, Congress passed the Federal Death Penalty Act ("FDPA"), creating 60 capital offenses under federal law. In a show of respect for tribal self-determination, the law provided that unless a tribe opted in to the federal death penalty, "no person subject to the criminal jurisdiction of an Indian tribal government" could be sentenced to death for crimes where federal jurisdiction derived from the offense having been committed on tribal land. Mr. Mitchell alleges that applying the FDPA in his case violates the tribal sovereignty of the Navajo Nation. He further claims that because the tribe never opted into the federal death penalty and recommended against its use in Mr. Mitchell's case, the government's decision to pursue a death sentence was "contrary to then-existing federal policy and contrary to evolving standards of decency." As explained below, however, in reviewing Mr. Mitchell's claim, the Commission must limit itself to the American Declaration, an instrument setting forth individual rights that makes no mention of the collective rights of indigenous peoples. Moreover, Mr. Mitchell's sentencing was entirely lawful because federal jurisdiction over the crime for which he received the death penalty was not dependent on it having taken place on tribal land and therefore the provision of the FDPA requiring a tribe to opt in did not apply.

a. The American Declaration Does Not Speak to Collective Rights ...

The Commission may not review Mr. Mitchell's claim that the United States infringed on the Navajo Nation's sovereignty by imposing the death penalty with respect to crimes committed by Indians in Indian Country, because this claim goes beyond the scope of the American Declaration. Mr. Mitchell supports this claim by reference to specific articles of the American Declaration and general references to the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") and the American Declaration on the Rights of Indigenous Peoples ("OAS DRIP"), as well as the Commission's merits report in the *Dann* case and a decision of the Inter-American Court of Human Rights.

The American Declaration sets forth human rights, fundamental freedoms, and duties of individuals, not of collectives. This fact is evidenced in the Declaration's plain text. The articles cited in the Petition begin with the words "[e]very human being," "[a]ll persons," "[e]very person," or "[e]very accused person." All of the other rights, and all of the duties, similarly begin with language referring to individual persons. As such, these articles, on their face, do not set forth rights pertaining to the Navajo Nation.

Moreover, the Commission must decline to review the Petition through the rubric of the UNDRIP or the OAS DRIP because it lacks competence to apply any instrument beyond the American Declaration with respect to the United States. *A fortiori*, the Commission lacks competence to apply provisions in such instruments setting forth collective rights, such as the many articles of the UNDRIP and OAS DRIP declaring collective rights of indigenous peoples—*pueblos indígenas*. These collective rights, while important, must be contrasted with the human rights enjoyed and exercised by indigenous *individuals* and all other individuals by virtue of having been "born free and equal, in dignity and in rights, . . . endowed by nature with reason and conscience," and which are the rights recognized and protected by the American Declaration.

Furthermore, both the UNDRIP and the OAS DRIP are aspirational statements of political and moral commitment, and are not binding under international law. Neither instrument was intended to create new international law, nor are they reflections of states' existing obligations under conventional or customary international law.

With respect to the OAS DRIP in particular, the United States has persistently expressed objections to that instrument, and dissociated from consensus upon the Organization of American States ("OAS") General Assembly's adoption of it in June 2016. As the Commission will recall, the United States strongly disagreed with the Commission's assertion in the *Dann* merits report that "aspects of" the OAS DRIP, which was at that time still a draft, "reflect[ed] general international legal principles" and could thus be considered in interpreting and applying the American Declaration in the context of indigenous peoples.

With respect to the UNDRIP, the United States supports that instrument as explained in its December 2010 Announcement of Support, recognizes its significant moral and political force, and looks to the principles of the UNDRIP in its dealings with federally recognized tribes. But U.S. support for the UNDRIP did not change the U.S. domestic legal framework with respect to tribal rights, and there is no domestic law that precludes the United States from imposing the death penalty for federal crimes committed by Indians in Indian Country. Furthermore, Mr. Mitchell points to no provision of the UNDRIP that would provide him the substantive relief he seeks.

b. The U.S. Government's Decision to Seek the Death Penalty for Mr. Mitchell Was Consistent with U.S. Domestic Law

In addition, the decision to seek the death penalty for Mr. Mitchell did not contravene any provision of U.S. domestic law. Under U.S. law, American Indian tribes possess a unique legal status as "domestic dependent nations" by virtue of the fact that they existed as sovereign nations prior to European settlement of North America. A "federally recognized tribe" is one that has a documented government-to-government relationship with the United States. There are currently 567 such tribes, of which the Navajo Nation is one. The U.S. Supreme Court has long acknowledged that federally recognized tribes retain inherent powers of self-government by virtue of their preexisting sovereignty, but these powers may be limited by federal law. For

instance, some federal criminal statutes apply, by operation of federal law, to crimes between Indians in Indian Country (“enclave crimes”). However, others apply throughout the United States, including in Indian Country, to Indians and non-Indians alike. Federal jurisdiction over such “crimes of general applicability” derives from Congress’s plenary power under the U.S. Constitution to regulate interstate commerce.

* * * *

Mr. Mitchell asserts that in at least 20 other instances of murder on tribal land, the U.S. government has ultimately declined to pursue the death penalty, “apparently based on the tribe’s opposition to capital punishment.” Here too, the prosecution requested the Navajo Nation’s input regarding the possibility of the United States seeking the death penalty in Mr. Mitchell’s case. The Navajo Nation held public hearings to gauge tribal members’ position, after which the Attorney General of the Navajo Nation communicated the tribe’s opposition in a letter dated January 22, 2002 to the United States Attorney for the District of Arizona. The tribe had ample opportunity to articulate its cultural opposition to the death penalty before the penalty phase of Mr. Mitchell’s case, and it did so. But there was no requirement under U.S. law for federal prosecutors to defer to the tribe’s preferences. Nor was there any requirement to do so under any binding international instrument to which the United States is a party, and, as discussed above, the provisions of the nonbinding UNDRIP do not apply to these circumstances. Even if they did, the United States does not interpret the UNDRIP to require tribal consent to the death penalty. If the U.S. government did exercise prosecutorial discretion to decline to seek the death penalty in past tribal cases, it was no guarantee that the death sentence would never be lawfully pursued in the future.

* * * *

Multiple layers of careful judicial review, both state and federal, provided Mr. Mitchell extended opportunities to challenge his trial and conviction, and he fully availed himself of these opportunities. Consequently, the claim should be rejected as inadmissible under Article 34(a) of the Rules because it does not state facts that tend to establish a violation of the American Declaration, and is without merit.

* * * *

In this matter, the United States has provided Mr. Mitchell with a comprehensive and expansive system of review. Over many years, his claims have been reviewed through both direct appeals and the *habeas* procedure, at each of three levels of the federal court system: the U.S. District Court for the District of Arizona, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court. This public record demonstrates that the United States has allocated substantial time and resources to thoroughly and impartially considering Mr. Mitchell’s claims and afford him judicial review. Consequently, in presenting his meritless claim that the United States domestic courts provided him insufficient opportunities to pursue *habeas* relief, Mr. Mitchell has failed to set forth facts that tend to establish a violation of the American Declaration under Article 34(a) of the Rules.

3. The ... “Fourth Instance Formula”

In addition, the Commission should dismiss Mr. Mitchell’s claims because the Commission lacks competence to sit as a court of fourth instance. The Commission has repeatedly stated that it may not “serve as an appellate court to examine alleged errors of internal

law or fact that may have been committed by the domestic courts acting within their jurisdiction”—a doctrine the Commission calls the “fourth instance formula.”

* * * *

C. PRECAUTIONARY MEASURES

In its letter dated July 2, 2017, and without first asking for U.S. views, even though the “immediacy of the threatened harm” did not “admit of no delay” as would be required for the Commission to disregard Article 25(5) of the Rules, the Commission requested that the United States “adopt the necessary measures to preserve the life and physical integrity of Mr. Lezmond Mitchell ... so as not to render ineffective the processing of his case before the Inter-American system.” In addition to that request for precautionary measures, Mr. Mitchell has petitioned the Commission to request that the U.S. government: (1) suspend execution of his sentence in order to allow him to challenge the government’s lethal injection protocol and/or file a clemency petition; and (2) make evidence available as needed to file a petition before the Commission regarding the federal government’s lethal injection protocol.

There was no basis for the Commission’s issuance of precautionary measures in this matter. The United States reiterates that Mr. Mitchell is a party to an active lawsuit filed against the United States, in which he alleges that the means by which the government seeks to implement the death penalty in his case violates the U.S. Constitution as well as federal statutory law. Mr. Mitchell’s case is pending and, pursuant to the government’s representations in the course of that suit, it will not seek an execution warrant or carry out an execution until revision of the lethal injection protocol is completed. Thus, Mr. Mitchell is not in danger of immediate execution, and his challenge to the federal government’s lethal injection protocol remains unexhausted.

* * * *

2. Hearings

The IACHR invited the United States to hearings at three Periods of Sessions in 2017: on March 21, 2017 at its Washington, D.C., headquarters; on September 7, 2017 in Mexico City; and on December 7, 2017, again at its headquarters. While the United States attended and actively participated in the latter two sets of hearings, it chose not to participate in the March 2017 hearings. In a press conference on March 21, the Department of State spokesperson explained that participation in the two thematic hearings (respectively on then-recent executive orders, including one barring terrorist entry, and on access to asylum in the United States) would be inappropriate because of sensitivities surrounding ongoing litigation on those matters in U.S. courts. The third hearing concerned *Shibayama et al.* (12.545), involving claims for reparations for the World War II-era detention in the United States of civilians of Japanese descent. While the United States also did not attend that hearing, it filed written observations shortly after the hearing, on April 3, 2017. There, it reiterated jurisdictional arguments made in several prior written filings—including about the IACHR’s lack of jurisdiction over claims arising prior to the adoption of the 1948 American Declaration, as reflected in the

IACHR's dismissal of several such claims in its March 2006 admissibility report—and also stated the following:

Please be assured that the United States acknowledges the suffering experienced by the Shibayama family and those similarly situated, which Isamu and Bekki Shibayama bravely and movingly described in their testimony before the Commission on March 21. Nevertheless, as a purely legal matter, the petition in this case is both inadmissible and the Commission lacks competence to pronounce on its merits.

The United States participated in two hearings on September 7, 2017 in Mexico City: one a thematic hearing about military commissions at the detention facility at Guantanamo Bay Naval Station, and the other a petition-based hearing concerning a person formerly detained at Guantanamo, Djamel Ameziane (12.865). Excerpts follow from the as-prepared remarks at the latter hearing by James Bischoff of the Office of the Legal Adviser at the U.S. Department of State, on behalf of the United States, regarding, *inter alia*, the long history of the case before the IACHR, the IACHR's lack of authority to issue binding orders or to pronounce on the law of war, the nonbinding nature of the American Declaration, the absence of a *non-refoulement* commitment therein, and the United States' humane transfer policies.

* * * *

Part 2 – Procedural History

Matters covering much of the same ground as the petition under discussion today have been before the Commission for over 15 years. As Mr. Stevenson pointed out at the thematic hearing this morning, this hearing is the 17th time we have appeared to discuss issues surrounding Guantanamo. Since 2002, when the Commission initially recommended precautionary measures with regard to the 254 detainees then being held at Guantanamo Bay, we have participated in three other thematic hearings, eight petition-based hearings, and four working meetings on Guantanamo, as well as a roundtable discussion in connection with the rollout of the Commission's 2015 report on Guantanamo. We have also filed over 20 written submissions about Guantanamo, including in this and other individual cases. Despite its limited resources, the Commission has already explored this area in great detail.

This case in particular has a long history before the Commission. . . . All in all, Mr. Ameziane's counsel have filed at least 12 substantive written submissions, and the United States has submitted at least six written submissions, including the latest in December 2016. This hearing is the third in this case alone.

This history shows that the Commission already has before it a large amount of information about this case, which raises questions as to the utility of yet another hearing about Mr. Ameziane, particularly given the Commission's very limited resources. The utility of yet another hearing in this case is also questionable when one recalls the Commission has so many other cases open on its docket, including 98 involving the United States alone and many more

involving our fellow OAS Member States. This docket continues to grow at a pace that far exceeds the Commission's capacity to dispose of these cases.

Part 3 – Precautionary Measures

Before addressing the substance of this petition, I will address a few procedural matters. First, we do not dispute that Mr. Ameziane was repatriated to Algeria in 2013 and released from U.S. custody. We also acknowledge that the Commission had requested precautionary measures in 2008 with respect to his treatment in U.S. custody. These measures also recommended that the United States take steps to ensure Mr. Ameziane was not transferred to a country where there were substantial grounds for believing he would be in danger of being subjected to torture or other mistreatment. The United States respectfully reiterates its longstanding view that although the Commission may make recommendations for precautionary measures, the Commission's governing instruments do not give it the authority to *require* that States adopt precautionary measures, as it has repeatedly claimed with regard to Mr. Ameziane and other petitioners.

The practice of requesting precautionary measures is based on Article 25 of the Rules, drawn up by the Commissioners themselves. Article 25 provides for the Commission to *request* that a State adopt precautionary measures. But the OAS Member States have not given the Commission any mandate to assert that such precautionary measures are mandatory. The Commission's Statute does, in fact, refer to *provisional* measures, but only in the context of States Parties to the American Convention on Human Rights, which the United States is not. Even there, the Statute does not give the Commission the power to request or require such measures directly of a Member State. The Statute instead gives the Commission the power to request that the Inter-American Court of Human Rights take provisional measures in serious and urgent cases with respect to States subject to its jurisdiction. There is no provision in the OAS Charter, the Commission's Statute, or even the American Convention that provides the Commission the authority to itself require any OAS Member State—American Convention party or not—to take precautionary measures. As such, the Commission's request for precautionary measures can at most be a nonbinding recommendation.

Regardless, the United States' actions with respect to Mr. Ameziane were not inconsistent with the precautionary measures request. The United States did not remove Mr. Ameziane to a country where there were substantial grounds for believing he would be in danger of being tortured or mistreated—a point I will discuss in more detail below. And the precautionary measures are moot in any event, as Mr. Ameziane is no longer in U.S. custody.

Part 4 – Recommendatory Powers

With respect to the Commission's authority beyond precautionary measures, the United States reiterates its position that there too, the Commission may only issue recommendations, not decisions that are binding on States. The relevant provisions of the OAS Charter and the Commission's Statute state in general terms that the Commission was created to "promote the observance and defense of human rights." Article 106 of the OAS Charter and Article 1 of the Commission's Statute clearly establish the Commission as a "consultative organ" of the OAS with carefully delimited responsibilities in matters of human rights. Article 18 of the Commission's Statute, which sets forth the general functions and powers of the Commission, and Article 20, which sets forth supplemental powers of the Commission with respect to States that are not parties to the American Convention, like the United States, also set forth powers to make recommendations, not to issue binding decisions.

Specifically, in Articles 18 and 20 the Commission's powers are defined with terms such as the following: "pay particular attention to," "examine ... and make recommendations," and

“develop an awareness of human rights.” These are not functions that carry an implication that the Commission may make decisions that are binding on States.

On a similar note, Mr. Ameziane’s counsel in their letter requesting this hearing and again today take issue with the discussion in our December 2016 submission about the nonbinding normative character of the American Declaration. Counsel assert that the jurisprudence of the inter-American system recognizes the Declaration as a source of legal obligation for OAS Member States.

It is, of course, true that the Commission and the Inter-American Court have long taken the view that the Declaration is a source of legal obligation. Yet while we have great respect for the views of the Commission and the Court, we must reiterate that the United States simply does not accept, and has never accepted, this view, and is not bound by it as a matter of international law. While we recognize the good intentions of those who would wish the Declaration had binding force, it would seriously undermine the process of international lawmaking, by which sovereign States voluntarily undertake specified legal obligations, to impose legal obligations on States where no obligation has been accepted, through some form of *ipse dixit*—which is precisely how this longstanding jurisprudence originated in the Commission’s *Baby Boy* decision back in 1981. Contrary to the Commission’s assertions there and those of the Court in its 1988 advisory opinion, it is simply not the case that the States that negotiated and later ratified the OAS Charter or its amendments—particularly the 1967 Protocol of Buenos Aires—or the States that adopted the Commission’s Statute, intended the Commission to apply the American Declaration as a binding source of international law.

From our perspective, it really does not matter how many times the Commission or Court may restate this view. Indeed, as far as we are aware, neither body has ever seriously reconsidered the flawed legal reasoning underlying it. As a sovereign State, the United States voluntarily undertakes international law obligations, and it takes those obligations seriously. But we have never undertaken an obligation that would render the Declaration binding—not when it was adopted, not when we ratified the OAS Charter or any of its amendments, not when we and other OAS States adopted the Statute, and not at any other time. Indeed, we have persistently objected to any such notion since at least the early 1980s. We also argued against it before the Court in 1988 and have persistently stated our objection in scores of hearings and written submissions over the years.

We realize that the Commission is unlikely to change its view that the American Declaration and its precautionary measures have binding force, no matter how many times we argue to the contrary. These are areas in which we simply will have to continue to disagree, but we always do so in a spirit of respectful dialogue. And our political and moral commitment to the American Declaration remains steadfast.

Part 5 – Lack of Competence

I’ll now say a few words about the Commission’s competence in this case. First, we reiterate our position that the only relevant instrument which the Commission could be competent to evaluate in relation to the conduct of the United States would be the nonbinding American Declaration. Article 27 of the Rules of Procedure directs the Commission to “consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments” Article 23 of the Rules, in turn, identifies the American Declaration as an “applicable instrument” with respect to nonparties to the American Convention. Although Article 23 lists several other instruments, the United States

is not a party to any of those other instruments. Thus, for the United States, the American Declaration is the only “applicable instrument.”

Many of Mr. Ameziane’s claims, however, fall outside the purview of the American Declaration. During situations of armed conflict, the law of war is the *lex specialis*. As such, it is the controlling body of law with regard to the conduct of hostilities and the protection of war victims. The Commission has no competence under its Statute and Rules to consider matters arising under the law of war and may not incorporate the law of war into the principles of the American Declaration. Nor may it apply the Convention Against Torture or other instruments beyond the American Declaration.

One final point on competence: Petitioners argued in their letter [and here again today] that the Commission has already declared its competence in this case and therefore our arguments on competence are “no longer relevant.” This is incorrect. Although the Commission is not a court or judicial body, it is guided by principles of competence that apply generally to such bodies. One such principle is that questions of subject-matter jurisdiction—or jurisdiction *ratione materiae*—are always relevant, and can always be raised and reconsidered by that body.

Part 6 – Adverse Inferences

As a final procedural point, I’d like to turn to one more assertion by counsel for Mr. Ameziane in their letter requesting this hearing, that Article 38 of the Rules of Procedure requires the Commission to presume as true factual allegations made in their merits brief of September 2015—including allegations that Mr. Ameziane is indigent and homeless as a result of U.S. government actions—if the United States did not expressly refute them.

We reject the suggestion that the U.S. government is somehow responsible for Mr. Ameziane’s financial and housing situation in Algeria. In any event, it simply cannot be that Article 38 requires the respondent State to respond to each and every factual allegation made in a petitioner’s written filings, of which there are myriad in this case, as I explained earlier. Moreover, even if the Commission were inclined to look to Article 38 here and accept these facts as true, it should not do so. Article 38 appears to reflect a well-established principle used in many international courts and tribunals that the body may draw an adverse inference if a party that can reasonably be assumed to possess information or documentation to refute a claim against it fails to produce that information or documentation. Here, the information in question is not uniquely in the possession of the Government of the United States—indeed, it is not in our possession at all. The best source for this information is Mr. Ameziane himself. Article 38 is simply inapposite in these circumstances.

Part 7 – Non-refoulement and Transfers

I’ll now discuss Mr. Ameziane’s claim that the United States violated the principle of *non-refoulement*—which Mr. Ameziane claims is guaranteed by the American Declaration—when the United States repatriated him to his home country of Algeria in December 2013.

Before I get into the reasons why these claims are meritless, it’s important to acknowledge that the Commission has already expressed itself publicly on this issue. In its press release of December 2013, the Commission found that Mr. Ameziane’s transfer had been forcible and violated the principle of *non-refoulement*, and it repeated these conclusions in its report on Guantanamo in June 2015. With respect, it was wholly inappropriate for the Commission to make these premature findings while the present proceedings were still ongoing, with the parties were still submitting facts and arguments—effectively prejudging one of the central issues in this case. We would urge the Commission not to take its unfortunate prior findings as settled, as counsel for Mr. Ameziane have urged you to do, and instead examine this

issue *de novo*. And it is important to recall at the outset that Mr. Ameziane is not alleging that he has been subjected to torture or other mistreatment by the Government of Algeria since his transfer.

Turning to the claim itself, the claim is unreviewable because no article of the American Declaration contains an express or implied *non-refoulement* commitment. As we have explained in several prior submissions to the Commission, the United States respectfully disagrees with the Commission's conclusion in the *Mortlock* case in 2008 that, in exceptional circumstances owing to humanitarian concerns, the issuance of a removal order may amount to a violation on the part of the removing State of Article XXVI's ban on cruel, infamous, or unusual punishment. In addition to improperly characterizing removal as punishment, the *Mortlock* case and those following its lead represent an inappropriate attempt to declare impermissible procedures that fall within the State's sovereign prerogative.

As the Commission has acknowledged, international law recognizes the sovereign right of States to regulate the entry, residence, and expulsion of noncitizens, subject to their international obligations. While the United States has undertaken *non-refoulement* obligations as a State Party to the UN Convention Against Torture and the Protocol Relating to the Status of Refugees, these treaties are beyond the scope of the Commission's competence to interpret and directly apply, as mentioned earlier.

It is also worth noting, with respect, that the reasoning in the *Mortlock* case is fundamentally flawed. The standard announced in *Mortlock* was based upon an interpretation of Article 3 of the European Convention on Human Rights, set forth by the European Court of Human Rights in the case of *D v. United Kingdom*. However, the United States is not a party to the European Convention and Article 3 of the European Convention is broader than Article XXVI of the American Declaration, as it prohibits not only certain forms of "punishment" but also inhuman or degrading "treatment." That the Commission chose not to address this distinction in the *Mortlock* case, notwithstanding its recognition of the distinction, is particularly problematic because the opinion in the *D* case did not address the relevant definition of "punishment" and, instead, held that the removal of the petitioner—a noncitizen of the United Kingdom who suffered from HIV/AIDS—to her country of origin would amount to "inhuman treatment." Absent from the *Mortlock* decision is any explanation as to why the Commission was adopting the European Court's test for inhuman *treatment* in order to assess whether the order of removal in *Mortlock*'s case amounted to cruel or unusual *punishment* under Article XXVI or another article of the Declaration.

With that said, the policy of the United States is not to transfer any individual to a foreign country if it is more likely than not that the person would be tortured in that country. This policy includes transfers of Guantanamo detainees, and is reflected in U.S. law: Section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 provides that

[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

To further the goal of ensuring humane transfers in all contexts, a Special Task Force issued a set of recommendations in 2009 aimed at ensuring that U.S. transfer practices, including practices concerning Guantanamo detainees, comply with the domestic laws, international

obligations, and policies of the United States and do not result in the transfer of individuals to face torture. The Special Task Force's report, apart from a classified annex, is publicly available.

All transfers of detainees from Guantanamo are conditioned on the receipt of assurances of humane treatment from the receiving government. The U.S. government transfers a detainee only if it determines that the transfer is consistent with our humane transfer policy. In making any such determination, U.S. officials consider the totality of relevant factors relating to the individual to be transferred and the proposed recipient government. When considering a transfer, the United States may consider, among other factors: the individual's allegations of prior or potential future mistreatment in the receiving State; the receiving State's overall human rights record; the specific factors suggesting that the individual in question is at risk of being tortured in the receiving State; whether similarly situated individuals have been tortured in the receiving State; and any humane treatment assurances provided by the receiving State (including an assessment of their credibility).

The essential question in evaluating foreign government assurances relating to humane treatment is whether, taking into account these assurances and the totality of other relevant factors relating to the individual and the government in question, it is more likely than not that the individual will be tortured in the country to which he is being transferred. Although the content of any specific set of assurances must be determined on a case-by-case basis, assurances should fundamentally reflect a credible and reliable commitment by the receiving State to treat the transferred individual humanely and that such treatment would be consistent with applicable international and domestic law. The U.S. government considers a number of factors in evaluating the adequacy of assurances offered by the receiving State, including, but not limited to, information regarding the judicial practices and penal conditions of the receiving country; U.S. relations with the receiving country; the receiving country's capacity and incentives to fulfill its assurances; political or legal developments in that country; the country's record in complying with similar assurances; the particular person or entity providing the assurances; and the relationship between that person or entity and the entity that will detain and/or monitor the individual transferee's activity.

In a case in which the United States becomes aware of credible allegations that humane treatment assurances were not being honored, the United States would take diplomatic or other steps to ensure that the detainee in question would be appropriately treated, and to make clear the bilateral implications of continued non-observance of commitments the receiving country has made to the U.S. government. A failure to honor humane treatment commitments would be a significant factor in determining whether to make any future detainee transfers from U.S. custody to the custody of a foreign government against which such a finding had been made. In specific cases where the United States had concerns about whether these commitments would be honored by the receiving country, the United States would not proceed with transfers to that country predicated on such assurances until those concerns had been appropriately addressed. The United States has also taken other measures, such as training guard forces in anticipation of transfers, and has suspended transfers, where appropriate.

With respect to Mr. Ameziane specifically, he was repatriated to his home country after a review, which examined a number of factors, including security issues. The transfer was consistent with U.S. practice of repatriating detainees when this can be done consistent with our security and humane treatment policies, and was coordinated with the Government of Algeria to ensure the transfer took place with appropriate security and humane treatment assurances. The

United States only repatriated Mr. Ameziane after satisfying itself that the Algerian government would continue to abide by lawful procedures and uphold its humane treatment obligations under domestic and international law in managing the return of Mr. Ameziane. In the years since his transfer Mr. Ameziane has, as far as we know, been living freely in Algeria. Even if it is true that Mr. Ameziane is indigent and that life conditions are generally difficult for him in Algeria, our available information indicates that Mr. Ameziane has not been subjected to mistreatment that would indicate a violation of the principle of *non-refoulement*.

For these reasons, the United States rejects the argument that Mr. Ameziane's return violated the principle of *non-refoulement*, even if such a principle could be taken as implicit in the American Declaration. The Commission should reverse its prior conclusion on this point and dismiss this claim.

Part 8 – Conclusion

In our December 2016 submission, we gave detailed information demonstrating that Mr. Ameziane's detention at Guantanamo was lawful under international and domestic law, as is the detention of other Guantanamo detainees, and that he and other detainees had availed themselves of judicial avenues, including *habeas* proceedings in federal civilian court. In his case, *habeas* proceedings were ultimately rendered moot through his release from U.S. custody.

More generally, the United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo, and U.S. laws, executive orders, and policy provide detailed rules for their proper treatment. I again refer you to our December 2016 submission and our March 2015 response to the Commission's Guantanamo report, which go into significant detail on these protections.

* * * *

As noted above, the United States also participated in a thematic hearing in Mexico City about the military commissions at the Guantanamo facility. The as-prepared presentation by James Bischoff of the Office of the Legal Adviser, U.S. Department of State, is excerpted below.

* * * *

The military commissions were created in the context of the armed conflict between the United States and al Qaida, the Taliban, and associated forces. During this conflict, the United States has captured and detained enemy belligerents and is generally permitted under the law of war to hold them until the end of hostilities. As a matter of domestic law, this detention is authorized by the Authorization for Use of Military Force (AUMF) of 2001, as informed by the laws of war. The Military Commissions Act (MCA) of 2009, as amended, is the U.S. statutory authority for military commissions to try detained alien unprivileged enemy belligerents in this conflict. I'll refer to the statute as the MCA for the remainder of my remarks.

The purpose of the commissions is to try alien unprivileged enemy belligerents for violations of the law of war and certain other offenses. An "unprivileged enemy belligerent" is defined by the MCA as an individual who is *not* a prisoner of war under Article 4 of the Third Geneva Convention and who has:

- engaged in hostilities against the United States or its coalition partners;
- purposefully and materially supported hostilities against the United States or its coalition partners; or
- was a part of al Qaida at the time of the alleged offense.

The offenses triable by military commission are set forth in the MCA and reflect the very serious nature of the acts that are examined by the commissions. These include the following offenses, among others:

- Murder of persons who are entitled to protection under one or more of the 1949 Geneva Conventions, including civilians not taking an active part in hostilities.
- Intentionally engaging in an attack on a civilian population or a civilian object.
- Subjecting persons in their custody to torture or cruel or inhuman treatment.
- Intentionally causing serious bodily injury to one or more persons, in violation of the law of war.
- Mutilating or maiming one or more protected persons.
- Rape, sexual assault, or abuse.
- Terrorism, or
- Attacking property that is specifically protected by the law of war.

Part 5 – Procedural Safeguards

The MCA incorporates fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 to the 1949 Geneva Conventions and other applicable law, and are also consistent with those in the 1977 Additional Protocol II to the 1949 Geneva Conventions. I'll go through some of these.

Presumption of innocence

First, the MCA provides that every accused individual is presumed innocent until his guilt is established beyond a reasonable doubt. In any given case, "if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted." The burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the United States. This is the same standard of proof applied in criminal cases in U.S. civilian courts.

Right to counsel

Every accused whose case is being heard by a military commission is entitled to defense counsel. Each defense counsel must be an attorney serving in the U.S. armed services and, in addition, he or she must be certified as competent to perform duties as defense counsel before general courts-martial by the armed force of which he or she is a member. No one who has acted as an investigator, military judge, or member of a military commission—that is, a juror—may later act as trial counsel or defense counsel in the same case. In non-capital cases, the accused has the right to be represented by civilian counsel, and by either the defense counsel assigned or the military counsel of the accused's own selection. When any of the charges are capital offenses, the accused has the right to be represented by counsel in the same manner as in a non-capital case, but is also entitled to at least one additional counsel who is learned in applicable law relating to capital cases. The learned counsel may be a civilian. If he so desires, the accused may also represent himself *pro se*.

Composition of commission

The MCA requires military commissions to have at least five members (that is, jurors), except where the alleged offenses may give rise to the death penalty. In those cases, there must be no fewer than 12 members/jurors.

Right to present evidence and be present at proceedings

The MCA also provides that the accused has certain procedural rights. Defendants are entitled to:

- Be present at all sessions of the military commission, other than those for deliberations or voting;
- Present evidence in his or her defense;
- Cross-examine witnesses; and
- Examine and respond to all evidence admitted against him or her on the issue of guilt or innocence and for sentencing.

Evidentiary rules

The MCA sets forth a number of evidentiary rules that also provide procedural safeguards for the accused. These rules include the following:

- The suppression of evidence that is not reliable or probative.
- The suppression of hearsay evidence; and
- The suppression of evidence the probative value of which is substantially outweighed by, inter alia, considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
- In addition, no statement obtained by the use of torture or by cruel, inhuman, or degrading treatment, whether or not under color of law, is admissible in a military commission, except as evidence against a person accused of torture or cruel, inhuman or degrading treatment.
- No person is required to testify against himself or herself in a proceeding.

The MCA also provides that a statement of the accused may be admitted in evidence only if the military judge finds—(1) that the totality of the circumstances renders the statement reliable and probative; and (2) that—

(A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or

(B) the statement was voluntarily given.

In order to determine the voluntariness of a statement by the accused, the military judge must consider the totality of the circumstances. Defense counsel must be given a reasonable opportunity to obtain witnesses and other evidence. In addition, trial counsel—that is, the attorney in the role of the prosecutor in the military commission—must disclose to the defense the existence of any evidence that reasonably tends to negate the guilt of the accused of an offense charged, or reduce his degree of guilt.

Specific rules govern the handling of classified information. Where the record contains classified information, the accused receives a redacted version of the record in order to safeguard that information. However, defense counsel has access to the unredacted record. If the United States seeks to delete or withhold classified information from the accused, the MCA requires trial counsel to submit a declaration invoking the government's classified information privilege and setting forth the damage to national security that would result from access to that information. A military judge may authorize the United States to delete or withhold specified items of classified information; substitute a summary; or substitute a statement admitting relevant facts that the classified information would tend to prove.

Undue influence

Furthermore, the MCA provides for additional safeguards against efforts to unlawfully influence the action of a military commission. No authority convening a military commission may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence handed down by the military commission, or with respect to any other exercise of their functions. In addition, no person may attempt to coerce or influence by any unauthorized means —(A) the action of a military commission or any member thereof in reaching the findings or sentence; (B) the action of any convening or reviewing authority with respect to their judicial acts; or (C) the exercise of professional judgment by trial counsel or defense counsel. The MCA also includes rules preventing military personnel who participate in commissions, including as defense counsel, from suffering adverse professional consequences by reason of having participated.

Sentencing

As soon as practicable upon a finding of guilt, trial counsel must disclose to the defense the existence of evidence that reasonably may be viewed as mitigation evidence at sentencing. The only available sentences are incarceration or execution. Cruel or unusual punishment is prohibited. Generally, an accused may not be found guilty of an offense unless two-thirds of the commission members agree. The MCA allows for capital sentences only when certain conditions are met, including:

- the panel members (that is, jury) unanimously find beyond a reasonable doubt that the accused is guilty of the offense and that at least one of the aggravating factors existed;
- the panel members unanimously agree on a sentence of death after a hearing in which the defense has the full opportunity to submit testimony and matters in mitigation and extenuation; and
- the Convening Authority approves of the sentence after affording the accused an opportunity to provide further mitigating and extenuating information.

No person may be sentenced to life imprisonment, or to confinement for more than 10 years unless three-fourths of the commission members agree.

Challenges and appeal

The MCA also provides for the right to appeal final judgments to the U.S. Court of Military Commission Review and to federal civilian courts of appeal. The Court of Military Commission Review reviews the record and may only affirm a guilty finding or sentence insofar as it finds it to be correct in law and fact based on the entire record. The Court may weigh the evidence and judge the credibility of witnesses. If the Court sets aside the findings or sentence, the Court may order a rehearing or dismiss the charges. A case may then be appealed to the United States Court of Appeals for the District of Columbia Circuit, which is a federal civilian court consisting of life-tenured judges; and ultimately to the Supreme Court of the United States on a writ of certiorari.

Part 6 – Transparency

Further, the United States is committed to ensuring the transparency of military commission proceedings. To that end, proceedings are transmitted via live video feed. Court transcripts, filings, and other materials are also available to the public online.

Finally, the United States participated in four thematic hearings on December 7, 2017 at the IACHR's headquarters in Washington, D.C. The themes of these hearings were: economic, social, cultural, and environmental rights in Puerto Rico; labor rights in the U.S. automotive industry; freedom of association, peaceful assembly, and expression in the United States; and impunity for extrajudicial killings in the United States. The U.S. delegation, led by Interim Permanent Representative to the OAS Kevin K. Sullivan, delivered remarks at the four hearings and answered questions posed by the Commissioners.

After remarks by civil society at the hearing on freedom of association, assembly, and expression, Lynn Sicade of the Bureau of Democracy, Human Rights, and Labor delivered remarks on behalf of the United States. Those remarks are excerpted below.

* * * *

In my remarks today, I will endeavor to provide the Commission and those attending and watching this hearing with some general information about freedom of expression, association, and peaceful assembly in the United States. These freedoms are core values of the United States, embedded in our foundational document: the Constitution of the United States of America. Protecting these rights from government infringement was central to shaping the design of the U.S. government. Our government's framers sought to do this by limiting the power of the national government vis-à-vis the constituent States and by breaking up the power of the national government between three separate, co-equal branches. At the same time, many strongly believed that individual freedoms could not be sufficiently safeguarded unless they were spelled out in our Constitution itself. This was done very early on through the first ten amendments to the Constitution—known as the Bill of Rights. From the beginning, our government's framers foresaw that a delicate and constant balancing would be required to ensure that the exercise of government power did not threaten the rights it was meant to protect.

The federal executive branch has played a role by enforcing laws and judicial decisions and also through its own actions. By 1946, the unwillingness or inability of state officials to uphold the civil rights of racial minorities and the weakness of existing federal statutes had led to increasing demands for new legislation to strengthen the powers of the national government. ...

Check and Balances Have Safeguarded Civic Space during Difficult Periods

While noting civil society's stated concerns about the current status of civic space in the United States, we believe it is helpful to consider the present situation in historical context. In the twentieth century, U.S. society experienced periods of intense divisiveness—particularly, in the 1960s and 1970s. ...

The U.S. Supreme Court Has Broadly Defined These Rights

During this time the U.S. Supreme Court recognized that the First Amendment protected a right to freedom of association, though not explicitly spelled out in the text. It further held that such right is fundamental, protected from infringement by both the federal government and the governments of the U.S. states. ...

The Supreme Court has defined the rights to freedom of speech and peaceful assembly broadly. There are relatively few limits on what individuals in the United States can say or on when, where, and how they can say it, for example. Unless speech is determined—through the applicable legal tests—to be obscene, child pornography, incitement to imminent violence, or a true threat of violence, it is protected by the First Amendment. ...

In a similar way, the Supreme Court has broadly defined the right to peaceful assembly to include political meetings, marches, sit-in protests, rallies before government buildings, gatherings in a public park, group boycotts, labor pickets, filing lawsuits, and lobbying the government. ...

Civic Space Is Working

There are numerous rationales for guaranteeing respect for and protection of open civic space. One is to ensure citizens are informed and able to meaningfully participate in political decision-making and to hold their governments accountable. Another is to foster resilient, stable societies by ensuring outlets for the airing of grievances and allowing people to have their voices heard. Yet another is to promote tolerance by ensuring there is space for the broadest possible diversity of voices, viewpoints, values, interests, and ideas. There is also the view that open civic space facilitates debate and competition among those with divergent views and ideas regarding facts, opinions, and lies, with the hope and expectation that truth will ultimately prevail. If we consider the current situation of civic space in the United States in this light, we see that all these things are indeed happening. ...

Global and Regional Engagement

The United States has long viewed the freedoms of expression, association, and peaceful assembly as belonging to every individual, which is why we prioritize opening of civic space in our foreign policy. In the United Nations, the U.S. leads on freedom of expression. We were the main sponsor behind the creation of the mandate for the rapporteur on freedom of peaceful assembly and association at the Human Rights Council. At the United Nations General Assembly Third Committee in November, we were pleased once again to co-sponsor the resolution on human rights defenders and the resolution on the safety of journalists and the issue of impunity.

Here at the OAS, we strongly support General Assembly resolutions which address freedom of expression and association issues. In addition to our historic support for the IACHR's work on human rights defenders and freedom of expression, we also actively promote and support the registration of credible civil society organizations to participate in OAS events, ministerials, and in the Summits of the Americas processes. Let me now talk a little about recent and ongoing efforts by the United States to promote active civil society engagement in the Summits process, which is a very timely issue for our region.

The United States has a long history of supporting the efforts of the Summits Secretariat at the OAS, the Inter-American Development Bank, and other institutions to expand and formalize the role of stakeholders in the Summit process, including civil society from the region and the United States. At the last Summit in Panama, civil society representatives were clear in their recommendations to leaders that they wish to formalize and magnify their role in the Summit process.

* * * *

3. Commission Decisions in 2017

a. Case No. 12.254: Texas Death Row

On March 18, 2017, the Commission published Report No. 24/17, the merits report in *Saldaño* and its only merits report in a case involving the United States in 2017. As noted above, the United States filed a response to a preliminary version of the report on January 12, 2017, in which the United States acknowledged the report, took it under advisement, and notified the Commission that it had forwarded the report to the appropriate Texas authorities for their consideration. One day prior to the report's publication, on March 17, the United States participated in a working meeting regarding Mr. Saldaño.

b. Case No. 13.154 (Petition No. 766-06): Presidential Vote in Puerto Rico

On June 13, 2017, the Commission transmitted its May 25, 2017 report on admissibility on the petition brought on behalf of *Four Million American Citizens of Puerto Rico (Igartúa)*. The petition was brought on behalf of all U.S. citizens residing in Puerto Rico claiming human rights violations based on the lack of electors from Puerto Rico in U.S. presidential elections. The Commission found the petition admissible and directed that the case continue to consideration of the merits. Reports on admissibility are available by year and country at <http://www.oas.org/en/iachr/decisions/admissibilities.asp>.

c. Case No. 13.326 (Petition No. 1105-06): Presidential Vote and Congressional Representation of Puerto Rico

On March 3, 2017, the Commission transmitted its January 27, 2017 report on admissibility on the *Roselló* petition, also brought on behalf of U.S. citizens residing in Puerto Rico, but raising claims with regard to both presidential as well as congressional elections. The Commission found the claims admissible except as to Article XXXII (duty to vote) and Article XXXIV (duty to serve the community and the nation) because those articles have been referred to "for the purpose of interpretation of the balance between the rights set out in the first part of the instrument and the duties individuals may have as citizens." The report on admissibility on the *Roselló* petition is also available at <http://www.oas.org/en/iachr/decisions/admissibilities.asp>.

The United States filed a response on July 31, 2017 declining the Commission's invitation to enter into settlement discussions in *Rosello*. The U.S. letter states, in part:

We also acknowledge your correspondence dated July 6, 2017, in which you forward a letter from Petitioners dated May 30, 2017. In that letter, Petitioners state that they intend to file a merits brief and ask for an extension until October 3, 2017. Petitioners also state that they are prepared to attempt to reach a

friendly settlement with the United States in this case. While we likewise acknowledge the Puerto Rico Senate's April 4, 2017 resolution calling on the United States to desist from defending against Petitioners' claims of human rights violations and enter into a friendly settlement with Petitioners, we are not in a position to discuss friendly settlement at this time. We continue to doubt that the Commission's individual petition process is an appropriate or effective avenue for the U.S. citizen residents of Puerto Rico to assert claims about representation in the U.S. Congress.

Cross References

International Criminal Tribunals, **Ch. 3.B.**

ILC's work on the effect of armed conflict on treaties, **4.A.2.**

International Organizations Immunities, **Ch. 10.E.**

G7 and UN actions on cultural heritage, **Ch. 14.C.**

UNCITRAL, **Ch. 14.A.1.**

UN sanctions, **Ch. 16**

Middle East peace process, **C. 17.A.**

UN peacekeeping, **Ch. 17.B.**

Accountability of UN officials and experts on missions, **Ch. 17.B.7.**

Montenegro joins NATO, **Ch. 18.A.2.a.**

CHAPTER 8

International Claims and State Responsibility

A. CUBA CLAIMS TALKS

On January 12, 2017, the United States and Cuba continued discussions regarding bilateral claims. See January 12, 2017 State Department media note, available at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266891.htm>; see also *Digest 2016* at 331-33; and *Digest 2015* at 305 regarding previous claims discussions. State Department Legal Adviser Brian Egan led the U.S. delegation to the discussions held in Cuba. As summarized in the media note:

Outstanding U.S. claims include claims of U.S. nationals that were certified by the Foreign Claims Settlement Commission, claims related to unsatisfied U.S. court judgments against Cuba, and claims held by the United States Government. The United States continues to view the resolution of these claims as a top priority.

B. IRAN CLAIMS

In June 2017, the Iran-U.S. Claims Tribunal announced the schedule for hearings in Case B/1 (Claims 2 & 3), pertaining to Iran's former Foreign Military Sales program. The hearings are scheduled to begin in February 2018 and continue through April 2019.

Also in June, the President of the Tribunal, Hans van Houtte, informed the Tribunal of his intention to resign from the Tribunal, effective December 31, 2017, or on such a later date as his successor should become available. Pursuant to the Tribunal Rules of Procedure, the Tribunal's Appointing Authority was charged with appointing a replacement, after the party-appointed arbitrators failed to agree on a replacement within 30 days. In December, the Tribunal's Appointing Authority announced the appointment of Professor Nicolas Michel of the University of Fribourg as a Member of the Tribunal to succeed President van Houtte, effective January 1, 2018. Pursuant to the

Tribunal Rules, President van Houtte will continue to deliberate Case A/15(IIA) until an award is issued in that case.

In August, the United States filed its Response to Iran’s Brief and Evidence in Case A/11, pertaining to the United States’ obligations pursuant to Paragraphs 12-15 of the General Declaration of the Algiers Accords in connection with the return of the assets of the family of the former Shah.

C. IRAQ CLAIMS UNDER THE 2014 REFERRAL TO THE FCSC

The Foreign Claims Settlement Commission (“FCSC”) began issuing decisions in 2016 in the Second Iraq Claims program, which was established by a referral dated October 7, 2014, from the State Department’s Legal Adviser under a 2010 claims settlement agreement between the United States and Iraq. As of May 29, 2018, the total value of awards issued was \$94,975,000. See <http://www.justice.gov/fcsc/current-programs>. For background on the 2014 referral, see *Digest 2014* at 315-16. The following discussion focuses on some of the more noteworthy decisions in 2017.

1. Claim No. IRQ-II-069, Decision No. IRQ-II-045 (Proposed Decision)

Claim No. IRQ-II-069 was denied on January 26, 2017 because the claimant failed to establish that she was a U.S. national at the time of the alleged hostage-taking. The decision’s discussion of the continuous nationality rule and the evidence required to establish such nationality is excerpted below.

* * * *

This claim fails to satisfy the first requirement—that it be brought by a “U.S. national.” The term “U.S. national” has a specific legal meaning in this context. When the Commission interprets terms such as “U.S. national,” Congress has directed us to look first to “the provisions of the applicable claims agreement.” Here, that means we must turn first to the Claims Settlement Agreement. That Agreement expressly provides a definition of “U.S. nationals.” Article I of the Agreement states that “[r]eference to ‘U.S. nationals’ shall mean natural and juridical persons who were U.S. nationals *at the time their claim arose* and through the date of entry into force of this agreement.” As the Commission has recognized in its previous decisions, the U.S. nationality requirement thus means that a claimant must have been a national of the United States when the claim arose and continuously thereafter until May 22, 2011, the date the Agreement entered into force.

Claimant has failed to show that she was a U.S. national in 1990, when her claim arose. Indeed, the documents Claimant has submitted seem to establish conclusively that she was *not* a U.S. national when her claim arose. Claimant has submitted a Travel Document for Palestinian Refugees, issued by Lebanon (the date of issuance is unclear), which indicates that her nationality was Palestinian. Similarly, in her sworn statement, Claimant states that, at the time of the invasion of Kuwait, she was a “stateless Palestinian.” Thus, the evidence establishes that

Claimant was not a U.S. citizen when the claim arose and is thus not a “U.S. national” within the meaning of the Claims Settlement Agreement and 2014 Referral.

In support of her claim to U.S. nationality, Claimant argues that she was “considered [to be] an American Citizen” by the U.S. Department of State on two occasions: first, when the State Department submitted a claim on her behalf against Iraq before the United Nations Compensation Commission (UNCC); and, second, when she received a “Hostage Relief Payment” pursuant to Public Law 101-513.

Even assuming both facts are true, neither establishes that Claimant was a U.S. national. First, the claims the State Department submitted to the UNCC were not just on behalf of United States nationals. The State Department also submitted claims on behalf of non-nationals, including those who were merely “residents of the United States.” Thus, just because the State Department submitted a claim to the UNCC on Claimant’s behalf does not mean that she was a United States national. Second, the hostage benefits afforded by Public Law No. 101-513 were also not limited to those who were U.S. nationals. The law provided benefits not only to U.S. nationals but also “family members” of U.S. nationals, including “any individuals who are members of the households of United States hostages.” Thus, nothing the State Department has done establishes that Claimant was a U.S. national.

Just as importantly, it would not have mattered even if, as Claimant puts it, she was “considered [to be] an American national” by the State Department. As the Commission has previously recognized, U.S. nationality can be acquired “only by birth or by naturalization under the process set by Congress.” Claimant was not a U.S. national at birth, and there is no evidence that she ever acquired U.S. nationality under the naturalization process established by Congress. Thus, even if, by 1990, Claimant had received certain assistance from the State Department (such as the receipt of statutory benefits under Public Law 101-513 or the submission of her claim before the UNCC), this would still not have made her a U.S. national at the time.

Finally, we find no merit in Claimant’s assertion that she obtained U.S. nationality by demonstrating “permanent allegiance” to the United States. Although she does not say so explicitly, Claimant appears to base this argument on the Commission’s authorizing statute, which defines the term “nationals of the United States” as “(1) persons who are citizens of the United States, and (2) persons who, though not citizens of the United States, owe permanent allegiance to the United States. It does not include aliens.” However, the phrase “persons who, though not citizens of the United States, owe permanent allegiance to the United States” applies only to an extremely small class of individuals who were born in certain outlying possessions of the United States—at this point, only American Samoa and Swains Island—or born of such parentage. Claimant has not demonstrated, or even alleged, that she falls within that classification.

Therefore, the Commission is constrained to conclude that it has no jurisdiction to decide the present claim under the 2014 Referral. In other words, the Commission has no authority or power to decide the merits of this claim. Accordingly, this claim must be and is hereby denied for lack of jurisdiction. The Commission makes no determinations about any other aspect of this claim.

* * * *

2. Claim No. IRQ-II-352, Decision No. IRQ-II-178 (Proposed Decision)

Claim No. IRQ-II-352 was also denied because the claimant was not a U.S. national at the time of her hostage experience. Specifically, she did not become a U.S. citizen until 1993—some three years after she claims she was held hostage by Iraq. Claimant argued, however, that she only began to suffer emotional injuries resulting from her hostage experience in 1994, after she had been naturalized as a U.S. citizen, and that her nationality should be measured from that date, not from when she was originally held hostage. The Commission rejected this argument, citing decisions from several of its earlier programs, and held that, “[t]o ascertain when a claim arose for the purpose of determining whether the claim satisfies the continuous nationality requirement, the relevant date is the date of the commission of the act that gave rise to the claimant’s injuries.”

D. LIBYA CLAIMS

1. Foreign Claims Settlement Commission

As discussed in *Digest 2013* at 242-43, the U.S. Department of State made a third referral of Libya claims to the FCSC on November 27, 2013. As of January 19, 2018, the FCSC had issued final decisions on all claims received. The total value of awards as of January 19, 2018 was \$37.7 million. See <http://www.justice.gov/fcsc/current-programs>. The following discussion focuses on some of the more noteworthy decisions under the Third Libya Referral. All decisions are available in full at <https://www.justice.gov/fcsc/final-opinions-and-orders-5>.

a. Claim No. LIB-III-020, Decision No. LIB-III-028

This Commission decided this case under the “special circumstances” category (Category D) of the Third Libya Referral. The decision explains that the Commission’s standard for additional compensation does not encompass a right to a chosen career where claimant can work in other fields. In the Proposed Decision, the Commission denied the claim on the basis that the severity of claimant’s injuries was not a special circumstance warranting more than the \$3 million she had already been awarded. Nevertheless, claimant argued on objection that she was entitled to additional compensation. In the Final Decision, the Commission affirmed its denial of the claim. At one point, the claimant argued that her injuries impacted her “major life functions” (one of the factors in the Commission’s standard for additional compensation) because she was unable to pursue a modeling career. However, the Commission concluded, citing a decision from its Second Libya Program, that “[t]he reference to “major life functions” in [our standard for additional compensation] does not include a specific chosen career where, as here, the claimant has the capability to work in a variety of other fields.”

b. Claim No. LIB-III-018, Decision No. LIB-III-039

The Final Decision in this case made an important point in dicta, namely, that the Commission may revisit any issue on objection, including reducing or eliminating an award made in the Proposed Decision. The claimant was awarded additional compensation under Category D of the Third Libya Referral due to the severity of his injuries. However, on objection, he asserted that he was entitled to greater compensation. The Commission agreed and withdrew its award in the Proposed Decision to award him greater compensation. Most of the decision consists of the factual analysis of the severity of the injury, but in footnote 14, the Final Decision makes the important point that, on objection, the Commission is empowered to revisit any issue that arises from the claim, which may include reducing or even eliminating an award made in the Proposed Decision. The claimant had argued that, “since the Commission made this inference on behalf of the Claimant in the Proposed Decision, it is precluded from revisiting this issue on objection.”

2. Litigation**a. Aviation v. United States**

As discussed in *Digest 2016* at 347-50, the United States prevailed on summary judgment in the U.S. Court of Federal Claims in *Aviation v. United States*. Plaintiffs appealed to the U.S. Court of Appeals for the Federal Circuit. Plaintiff-appellants are foreign insurance companies that insured planes destroyed in terrorist attacks, including the hijacking of Egypt Air Flight 648 and the bombing of Pan Am Flight 103. They sued in federal court, but legislative and executive actions regarding Libya’s sovereign immunity and a claims settlement with Libya occurred during the pendency of their suits. The U.S. brief on appeal, filed on January 5, 2017, argues that Aviation does not possess a cognizable property interest; that no taking occurred; and that the case is not justiciable. Excerpts follow from the section of the brief on the takings analysis. The brief in its entirety is available at <https://www.state.gov/s/l/c8183.htm>.

* * * *

A. The Penn Central Analysis Applies

Even if the Court were to find that Aviation possesses a cognizable property interest, that interest was not “taken” by the United States. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Penn Central identified three factors to be considered: (1) the extent to which the Government’s action interferes with investment-backed expectations; (2) the character of the Government’s action; and (3) the economic impact of that action on the claimants. *Id.*; *Abraham-Youri*, 139 F.3d at 1465.

* * * *

B. The Lack Of Any Reasonable Investment-Backed Expectation Alone Defeats Aviation's Takings Claim

1. Aviation Lacked Any Reasonable Investment-Backed Expectation

First and foremost, the United States' restoration of Libya's sovereign immunity for certain terrorism-related claims did not interfere with Aviation's investment-backed expectations. By providing that the State Sponsor of Terrorism exception no longer applies with respect to Libya, the United States simply restored the default rules of sovereign immunity that typically apply under the FSIA in lawsuits against foreign states for actions taken outside of the United States, like those at issue in Aviation's district court cases. Aviation could not have had an expectation to be able to sue Libya in the United States at the time its claims against Libya accrued because the State Sponsor of Terrorism exception did not exist in the FSIA then. *Beaty*, 556 U.S. at 864-65.

Nor, as the trial court correctly held, ...can Aviation have had an investment-backed expectation in a jurisdictional rule stripping state sponsors of terrorism of sovereign immunity; these rules are inherently subject to "current political realities and relationships," and are generally not rules upon which parties can rely in shaping their conduct. *Id.* (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)). *Cf. Chang v. United States*, 859 F.2d 893, 897 (Fed. Cir. 1988) (possibility of changing world circumstances and a corresponding response by the United States Government "can never be completely discounted" in foreign affairs); *Branch ex. rel. Maine Nat'l. Bank v. United States*, 69 F.3d 1571, 1581 (Fed. Cir. 1995) (investment-backed expectations are greatly reduced in a highly regulated field). That is particularly so in the case of the State Sponsor of Terrorism exception, which requires that the Executive Branch have designated the state as a state sponsor of terrorism and presumes a non-friendly relationship between the United States and a foreign state at a given time.

Not surprisingly, the Supreme Court has recognized that the availability of foreign sovereign immunity or an exception to sovereign immunity generally is not something upon which parties can rely in shaping their conduct. *Beaty*, 556 U.S. at 864-65 ("Foreign sovereign immunity 'reflects current political realities and relationships,' and its availability (or lack thereof) generally is not something on which parties can rely 'in shaping their primary conduct.'" (quoting *Altmann*, 541 U.S. at 696)). The Supreme Court's reasoning is especially apt here: (1) both the jurisdictional rules abrogating and restoring Libya's sovereign immunity were enacted after the conduct giving rise to Aviation's legal claims; and (2) the rule in question (the State Sponsor of Terrorism exception) was aimed specifically at rogue nations whose orientation toward the United States might change.

As the Supreme Court explained, "[t]he President's elimination of Iraq's *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts." *Beaty*, 556 U.S. at 865 (emphasis in original); see also *Belk v. United States*, 12 Cl. Ct. 732, 734 (1987) (holding that no taking occurred when the United States entered into the Algiers Accords with Iran, which extinguished plaintiffs' claims, because "[t]he actions of the President should have been no surprise. The possibility that the President will intervene in this matter is properly recognized as both a shared benefit and a shared risk of those who trade and travel abroad. The compromise of plaintiffs' claims cannot constitute a drastic or novel interference with any investment-backed

expectation.” (internal quotation and citations omitted)); *Alimanestianu v. United States*, No. 14-704C, 2016 WL 7488355, at *7 (Fed. Cl. Dec. 29, 2016) (“Because the jurisdictional rules abrogating Libya’s sovereign immunity were enacted after Libya’s terrorist act, Plaintiffs could not have sued Libya at the time of the injury or have had any expectation of monetary relief from Libya at that time.”). Aviation thus could not have reasonably relied upon the rules of foreign sovereign immunity remaining static with respect to Libya. *Beatty*, 556 U.S. at 857 (observing that it was “entirely unremarkable” that Congress would give the President some flexibility in unique circumstances such as those pertaining to post-war Iraq); cf. *Dames & Moore*, 453 U.S. 654, 674 n.6 (1981) (petitioner’s attachment of foreign state’s assets was not property under Takings Clause because it was subordinate to presidential power over the assets).

In addition, Aviation cannot have had reasonable investment-backed expectations in still-pending causes of action. See *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 181 (D.C. 2008), *cert. denied*, 556 U.S. 1104 (2009) (“Since even ‘settled expectations’ may be disturbed by Congress without effecting a taking . . . the expectancy the plaintiffs have of a successful outcome to their suit is not an interest the government is obliged to pay for as the price of eliminating it.” (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986))); cf. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215-16 (Fed. Cir. 2005) (frustration of business expectations does not constitute a compensable taking).

Moreover, Aviation’s claims against Libya could be brought in United States courts for only approximately six months. In 2007, one of Aviation’s district court cases was dismissed for lack of subject matter jurisdiction. Congress then amended the FSIA, allowing insurance companies, like Aviation, to bring suit under certain circumstances. 28 U.S.C. § 1605A. Aviation then filed amended complaints in both its district court lawsuits asserting claims pursuant to section 1605A. Appx243, Appx253-273, Appx347-369. That statutory section (1605A), however, applied to Libya for only approximately six months—from the end of January 2008, when it was enacted, until later in 2008, when Libya’s sovereign immunity was restored with respect to claims of this nature. Thus, Aviation’s taking claim now seeks to hold the United States liable for Libya’s acts of terrorism simply because, by enacting 1605A, the Government, for a brief period of time, allowed Aviation to sue Libya, and then reinstated Libya’s sovereign immunity some six months later.

That plaintiffs-appellants (with one apparent exception) are foreign companies further supports that they cannot have any expectation that the United States would include them in any settlement, or that they would be entitled to bring claims before the Foreign Claims Settlement Commission. For one, the Supreme Court has made clear that “the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such [foreign] creditors.... There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts.” *United States v. Pink*, 315 U.S. 203, 228 (1942). Moreover, Aviation could not have any expectation of obtaining a portion of the settlement proceeds through the Foreign Claims Settlement Commission. “The Foreign Claims Settlement Commission . . . has the duty of distributing a governmentally created fund among a class. No claimant, including the appellant, has a right to participate in any amount until the Commission has made an award.” *American & European Agencies v. Gilliland*, 247 F.2d 95, 97-98 (D.C. Cir. 1957). Indeed, the Commission lacks jurisdiction to consider claims brought by foreign entities such as Aviation. See 22 U.S.C. § 1623(a) (“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....*” (emphasis added)).

The speculative nature of Aviation’s claims is illustrated by a Foreign Claims Settlement Commission decision concerning claims brought by one of plaintiffs-appellants. Appx506-71. In that decision, the Commission explained that, with respect to the claimant’s district court case, “the claimants were never able to convince the court that there was a viable legal theory under which they would in fact prevail. In short, at no point did any court rule that claimants had a valid cause of action or that claimants were entitled to damages, and there is no evidence that a court ever would have.” Appx515. Thus, Aviation’s taking claim is based upon three unfounded assumptions: (1) that they possessed a valid cause of action against Libya; (2) that they would have succeeded on that cause of action; and (3) that they would have been able to collect on a final judgment against Libya. As one district court explained in the context of claims brought against Iran, “[a] number of practical, legal and political obstacles have made it all but impossible for plaintiffs in these FSIA terrorism cases to enforce their default judgments....” *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 49 (D.D.C. 2009).

Aviation’s claims against Libya were particularly speculative given that they were claims brought by insurance companies seeking to recover for payments made to third parties. Insurance contracts are designed to protect against a situation when the damaged party may not be able to recover for the loss incurred—thus, the damaged party seeks to insure against that loss because, otherwise, recovery may be unlikely. Indeed, insurance companies themselves use reinsurance—that is, multiple layers of insurance—to protect themselves against loss or liability. ... Thus, the very nature of insurance is that insurance companies recognize the possibility that they may never recover for the loss incurred—if recovery were likely, there would be no need for insurance. In this case, the nature of the loss is even more uncertain and unpredictable because it results from unanticipated acts of state-sponsored terrorism.

Accordingly, Aviation lacked any investment-backed expectation in being able to pursue claims against Libya. The Supreme Court has held that the lack of any such expectation, by itself, is cause for rejecting a takings claim. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (“It is to the last of these three factors that we now direct our attention, for we find that the force of this [reasonable expectations factor] is so overwhelming . . . that it disposes of the taking question,” when the plaintiff “could not have had a reasonable investment-backed expectation.”); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994) (quoting *Monsanto*).

* * * *

C. The Character Of The Government’s Actions Supports That No Taking Occurred

With respect to the character of the Government’s actions, courts have repeatedly recognized that the President has indisputable power to settle or to extinguish claims against foreign states and nationals without effecting a taking. *See, e.g., Chang*, 859 F.2d at 896-98. *Cf. Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) (“That the President’s control of foreign relations includes the settlement of claims is indisputable.”); *Dames & Moore*, 453 U.S. at 679-80 (same).

Indeed, it is difficult to imagine an area in which the political branches of the United States have broader authority and discretion to act in the public’s interest than the realm of foreign relations. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *United States v.*

Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (“[T]he federal power over external affairs [is] in origin and essential character different from that over internal affairs.”); *Alimanestianu v. United States*, No. 14-0704, 2016 WL 7488355, at *7 (Fed. Cl. Dec. 29, 2016) ... Within that realm, the Government’s power to define the scope of foreign sovereign immunity, taking into account principles of international law, and to establish and to promote amiable relations between two countries (here, the United States and Libya) constitute core functions. Given that, in this case, Congress and the President exercised those core functions in connection with the United States’ efforts to normalize relations with Libya, it is self-evident that the Government acted in furtherance of a legitimate governmental interest. *See Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009) ...

The foreign relations context of this case further illustrates why the character of the Government’s actions supports that no taking occurred. Courts recognize that the Constitution soundly commits foreign relations matters, including rules governing sovereign immunity, to the Government’s political branches. *See Oetjen*, 246 U.S. at 302; *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (presidential power is at its maximum when exerted pursuant to authorization of Congress). The FSIA itself is widely regarded as a statute that “directly addresses sensitive matters of foreign relations, which . . . are inherently subject to ‘current political realities and relationships.’” *In re Islamic Republic of Iran Terrorism Litig.*, 659 F.Supp.2d at 80-81 (quoting *Altmann*, 541 U.S. at 696). *See also Dames & Moore*, 453 U.S. at 679 (“[N]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are ‘sources of friction’ between the two sovereigns.” (quoting *Pink*, 315 U.S. at 225)); *cf. Abraham-Youri*, 139 F.3d at 1468 (recognizing that those who “engage in international commerce” do so pursuant to a type of implied license and that certain “sticks in the bundle of rights” are subject to “constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights.”). The calculation of whether, and under what terms, to resolve claims and to normalize relations with Libya cannot be disentangled from the President’s settlement authority. Thus, the foreign-relations context supports that the Government’s actions did not result in a taking.

Further, the Government’s actions affected Aviation’s claims against Libya through alteration of a rule of sovereign immunity. *See Lingle*, 544 U.S. at 539 (contrasting a “physical invasion” of property with a program “adjusting the benefits and burdens of economic life to promote the common good”). Similar to *Belk*, “[h]ere there was no physical invasion of property, but only the prohibition on the assertion by the appellants of their alleged damage claims against Iran.” *Belk*, 858 F.2d at 709. Indeed, nothing the United States did affects Aviation’s ability to pursue relief against Libya through its home country. . . . It thus would be odd if the President were able to extinguish claims altogether but unable to exercise the lesser power of restoring sovereign immunity with respect to a foreign state without engaging in a taking.

The Supreme Court specifically recognized in *Beatty* that the type of governmental actions about which Aviation complains only altered a jurisdictional rule of sovereign immunity, rather than any substantive rights. 556 U.S. at 864-65. Aviation can have no property right in such rules because they “speak to the power of the court rather than to the rights or obligations of the parties,” *Landgraf*, 511 U.S. at 274 (citation and quotation marks omitted), and because recognizing such a right would violate the settled principle that no person has a vested interest in any rule of law. *Branch ex. rel. Maine Nat’l. Bank v. United States*, 69 F.3d 1571, 1578 (Fed. Cir. 1995) (“[n]o person has a vested interest in any rule of law entitling him to insist that it shall

remain unchanged for his benefit.” (quoting *New York Central R. R. Co. v. White*, 243 U.S. 188, 198 (1917)).

* * * *

D. The Economic Impact Of the Government’s Actions Is Speculative

With respect to the economic impact of the Government’s actions, the claims themselves do not have any definite value. Thus, any economic value Aviation allegedly lost in its legal claims is speculative. *In re Jones Truck Lines, Inc.*, 57 F.3d 642, 651 (8th Cir. 1995) (“[A]ny economic impact based on the loss of causes of action is somewhat speculative . . . [and thus] the projected economic impact on [the plaintiff] is not sufficiently concrete to establish a taking.”).

The trial court rightly emphasized that “the value of Plaintiffs’ loss of its causes of action does not have a definite value and thus is speculative.” . . . The court also explained that it was “skeptical” that Aviation could have collected on any judgment. *Id.*

The trial court is right. Whether Aviation could have pursued a claim against Libya to final judgment and actually collected on the judgment is purely speculative. . . . Moreover, as explained above, nothing the United States did affects Aviation’s ability to pursue its claims in foreign countries or seek resolution of its claims through foreign governments.

In response to the trial court’s holding, Aviation argues that Congress passed certain legislation that would have increased the likelihood of it recovering on any judgment. App. Br. at 44-49. But Aviation focuses on recent developments—it even acknowledges that “obstacles” to recovery of judgments against foreign states existed as late as 2008, when the LCRA was enacted and its claims were dismissed, and that, in response, Congress passed legislation to assist with recovery. *Id.* at 45-46. And Aviation’s argument is premised on the fact that it obtained a default judgment against Libya’s co-defendant, Syria—who did not actively participate in the district court litigation. . . .

Aviation also contends that the central inquiry is the reduction in the value of its property—that is, it asserts that the Government reduced the value of its claims to zero so it does not matter what the actual value of its claims is. As an initial matter, Aviation is incorrect that the Government has eliminated the entire value of its claims against Libya. Because the Government did not espouse its claims and because Aviation may still seek relief through its home country, it still may obtain compensation from Libya.

Moreover, inherent in an analysis of the economic impact of the Government’s actions is the nature of the property at issue. As explained above, Aviation’s purported property—its legal claims—is inherently speculative. Evaluating the impact of the Government’s actions on that property must account for that fact. Put another way, the economic effect of the Government’s actions must consider the underlying value of the property interest.

* * * *

Finally, policy considerations and equity and justice weigh heavily in favor of the conclusion that no taking occurred. A contrary ruling would effectively mean that, to settle claims against a foreign country, the United States would be required to pay for any claim brought in United States courts against that country—even claims of foreign nationals or corporations. “The American government should not be held as a surrogate for [another country’s] unjustifiable actions.” *Belk v. United States*, 12 Cl. Ct. 732 (1987); *see also Abraham-Youri v. United States*, 36 Fed. Cl. 482 (1996) (“The property losses that plaintiffs suffered were

occasioned by Iran, not the United States.”). And holding that a taking occurred might significantly alter the judgment of the President in reinstituting relations with a foreign country.

* * * *

b. Alimanestianu v. United States

As discussed in *Digest 2016* at 350-56, the United States also prevailed on summary judgment in another case related to claims against Libya before the U.S. Court of Federal Claims, *Alimanestianu v. United States*. The Alimanestianu plaintiffs brought a federal suit against Libya, but their lawsuit was dismissed after the United States reached a claims settlement agreement with Libya. Although the Alimanestianu estate and family received nearly \$11 million from the settlement fund, they claimed the lost opportunity to pursue their suit in federal court constituted a taking. Excerpts follow from the U.S. brief filed in the Court of Appeals for the Federal Circuit on August 10, 2017. Portions of the brief, such as discussion of application of the *Penn Central* factors, that are similar to the discussion in *Aviation, supra*, are not included below.

* * * *

II. The Alimanestianu Plaintiffs Lack A Cognizable Property Interest

In determining whether governmental action constitutes a taking for Fifth Amendment purposes, the Court applies a two-part test. “First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was ‘taken.’” *Acceptance Insurance Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009) (collecting Federal Circuit cases). When the claimant fails to establish the existence of a protected property interest, “the court’s task is at an end” and the action must be dismissed. *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

As demonstrated below, the Alimanestianu plaintiffs have failed to establish the existence of a cognizable property interest under settled law.

A. The Alimanestianu Plaintiffs Lack Any Cognizable Property Interest In The FSIA’s Jurisdictional Rule

The Alimanestianu plaintiffs’ alleged property interests—their non-final tort claims against Libya—were dismissed because the district court no longer possessed jurisdiction to hear them under the provision of United States law permitting courts to hear terrorism claims against certain designated state sponsors of terrorism. In other words, all that was “taken” was the power of United States courts to adjudicate their pending claims. The Alimanestianu plaintiffs had no vested property right in the jurisdiction of United States courts over their claims in the face of Congress’s modification of that jurisdiction through legislation. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (“Application of a new jurisdictional rule usually takes away no substantive right....”). To hold otherwise would run contrary to the well-settled proposition that no person has a vested right in any rule of law. *Branch v. United States*, 69 F.3d 1571, 1577-879 (Fed. Cir. 1995) (“As a general matter, a legislature is free to make statutory changes in the

common law rules of liability without running afoul of the Fifth or Fourteenth Amendment protections of property.”).

B. The Alimanestianu Plaintiffs’ Non-Final Tort Claims Are Not Vested Property Interests

In any event, to the extent that the Alimanestianu plaintiffs assert that their tort claims were taken through some action other than the reinstatement of Libya’s sovereign immunity, the Supreme Court has explained that property rights must be “vested” to be protected by the Takings Clause. *See Landgraf*, 511 U.S. at 266 (“The Fifth Amendment’s Takings Clause prevents the Legislature...from depriving private persons of *vested* property rights [without just compensation].” (emphasis added)); *see also Hodges v. Snyder*, 261 U.S. 600, 603 (1923). As this Court has held, a “plaintiff has no vested rights in a lawsuit...” *Stauffer v. Brooks Bros. Group, Inc.*, 758 F.3d 1314, 1321 (Fed. Cir. 2014) (citation omitted).

In *Rogers v. Tristar Prods., Inc.*, 559 Fed. App’x. 1042 (Fed. Cir. 2012) (non-precedential), this Court rejected the argument that, “by initiating a lawsuit it has become property” for purposes of the Takings Clause, and explained that because “no ‘vested’ right attaches” to legal claims, “it is of no moment that [the plaintiff] expended effort and resources in filing and pursuing the complaint.” *Id.* at 1045. The *Rogers* Court recognized that, “under most circumstances, Congress can change the rules in the middle of the suit..., or even eliminate the cause of action entirely after the case has been filed.” *Id.* (citations omitted).

Numerous other circuits have likewise recognized that causes of action or non-final judgments do not constitute cognizable or “vested” property for constitutional purposes. *See, e.g., Iletto v. Glock, Inc.*, 565 F.3d 1126, 1141 (9th Cir. 2009) (holding no property interest in a cause of action); *Hines v. Anderson*, 547 F.3d 915, 919 (8th Cir. 2008) (finding no property right in a consent decree); *Plyler v. Moore*, 100 F.3d 365, 374 (4th Cir. 1996) (same); *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir. 1993) (“[N]ot all judgments... are final for Fifth Amendment...purposes. Rather, a case remains ‘pending’ and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse.” (citations omitted)); *Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1345-47 (7th Cir. 1992) (same); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986) (“Congress abridged no vested rights...by...retroactively abolishing [plaintiff’s] cause of action in tort;” *dicta* that valid taking claim therefore “very unlikely”); *Memorial Hospital v. Heckler*, 706 F.2d 1130, 1137-38 (11th Cir. 1983) (no enforceable property right in non-final judgment); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 176 (D.C. 2008) (no vested property interest in cause of action), *cert. denied*, 556 U.S. 1104 (2009). Because the Alimanestianu plaintiffs had only non-final legal claims against Libya, they did not have any “vested” property, and thus cannot prevail on their takings claim.

The trial court found that the “lack of finality” of the Alimanestianu plaintiffs’ claims was not dispositive of whether a taking had occurred, because the Government’s “conduct prevented Plaintiffs’ judgment from becoming final” and because “what was taken was Plaintiffs’ right to complete the appellate process to attain a final judgment.” Appx141. This reasoning is flawed in two respects. First, it incorrectly conflates the threshold question of whether a property interest exists with whether it has been taken. *Acceptance*, 583 F.3d at 854. That the Alimanestianu plaintiffs’ tort claims against Libya were terminated upon the United States’ restoration of Libya’s sovereign immunity has no bearing on whether those claims constituted cognizable property protected by the Takings Clause.

Second, the purported “right to complete the appellate process,” Appx141, is not among the vested property rights protected by the Takings Clause. *Landgraf*, 511 U.S. at 266. Also, procedural rights protected under the Due Process Clause are not the same as the property protected by the Takings Clause. *See Adams v. United States*, 391 F.3d 1212, 1220 n.4 (Fed. Cir. 2004) (noting that “entitlements are often referred to as ‘property interests’ within the meaning of the Due Process Clause...but such references have no relevance to whether they are ‘property’ under the Takings Clause.”). Thus, it “is of no moment that [the Alimanestianu plaintiffs] expended effort and resources in filing and pursuing” their claims against Libya before a vested right attached. *Rogers*, 559 Fed. App’x at 1045.

By the trial court’s logic, a prospective homebuyer could sue under the Takings Clause if the Government seized the property before the time of closing, and thus before the buyer acquired any rights in the property. That cannot be the rule. *See CRV Enterprises, Inc. v. United States*, 626 F.3d 1241, 1249 (Fed. Cir. 2010) (holding that “plaintiffs did not own the property at the time of the alleged regulatory taking and therefore lacked standing”); *see also Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) (“It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation.”).

This conclusion is reinforced by case law in other jurisdictions rejecting claims similar to the Alimanestianu plaintiffs’. *See Ileto*, 565 F.3d at 1141; *Beretta*, 940 A.2d at 180-82; *Hammond*, 786 F.2d at 12-13, 15; *see also, e.g., Adams v. Hinchman*, 154 F.3d 420, 424 (D.C. Cir. 1998) (a cause of action “affords no definite or enforceable property right until reduced to a final judgment.” (citations and internal quotation marks omitted)); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) (“a pending tort claim does not constitute a vested right”); *Salmon v. Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991) (a tort claim affords no definite or enforceable property right until reduced to final judgment).

III. No Taking Occurred

A. There Is No Categorical Duty To Pay Just Compensation Here

1. This Court’s Precedent Holds That Additional Considerations Are Relevant With Respect To Takings Claims Based On Espousal

Even if the Court were to find that the Alimanestianu plaintiffs possess a cognizable property interest, that interest was not “taken” by the United States. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The Alimanestianu plaintiffs contend that the Government has engaged in a *per se* taking of their property. As a result, they assert, the Court must find that a taking occurred without any further analysis.

The Alimanestianu plaintiffs are incorrect. Their extreme position is based upon a misunderstanding of Supreme Court case law and fails to recognize this Court’s binding precedent.

As an initial matter, this Court has, on two occasions, addressed takings claims in the context of the Government’s espousal of legal claims. *See Belk*, 858 F. 2d at 709; *Abraham-Youri*, 139 F.3d at 1465; *cf. Chang v. United States*, 859 F. 2d 893, 894-98 (Fed. Cir. 1988) (applying *Penn Central* factors to claim that United States engaged in taking of plaintiffs’ contracts when it imposed sanctions on Libya). In *Abraham-Youri*, this Court expressly rejected the argument that a *per se* takings claim is automatically compensable and that the Court may not consider other factors in its analysis. *Abraham-Youri*, 139 F. 3d at 1465-66. In other words, *per se* takings do not automatically require compensation, even when the property at issue is allegedly seized, destroyed, or entirely extinguished. *See, e.g., id.* (no *per se* taking even when

property rights were “not simply regulated in some manner, but were terminated”); *Paradissiotis v. United States*, 304 F.3d 1271, 1274-75 (Fed. Cir. 2002) (no taking when value of stock options was completely “destroyed”).

Thus, this Court has made clear that, when claims are espoused, that does not mean that a taking has occurred. In *Belk*, the Court concluded that, even though plaintiffs’ claims were “extinguished,” pursuant to the *Penn Central* factors, no taking occurred. *Id.* at 708. And in *Abraham-Youri*, this Court concluded that an espousal of claims meant that the parties’ “chooses in action were not simply regulated in some manner, but were terminated.” 139 F.3d at 1465. The Court nonetheless emphasized that “[t]o say that, however does not say . . . that the considerations identified by the trial court [under *Penn Central*] are not relevant to the proper outcome of the case.” *Id.* at 1466. The Court proceeded to focus on the unique circumstances present when the Government espouses claims of its citizens: “Certain sticks in the bundle of rights that are property are subject to constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights. As the trial court correctly observed, those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity.” *Id.* at 1468; *see also id.* at 1468 (Clevenger, J. concurring) (“This case is significant in that it affords us the opportunity to recognize that the familiar per se taking and regulatory taking categories are not rigid and that certain “per se” takings . . . do not automatically result under the Fifth Amendment in compensation to the ousted property owner.”).

Indeed, the Supreme Court has recognized the particular circumstances that surround the espousal of claims: “[a]t least since the case of the ‘Wilmington Packet’ in 1799, Presidents have exercised the power to settle claims of United States nationals by executive agreement. In fact, during the period of 1817-1917, ‘no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens.’” *Dames & Moore v. Regan*, 453 U.S. 654, 679 n.8 (1981) (citations omitted). And more recently, the Supreme Court found that, “[t]he President’s elimination of Iraq’s *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts.” *Republic of Iraq v. Beaty*, 556 U.S. 848, 865 (2009) (emphasis in original); *see also Abraham-Youri*, 139 F. 3d at 1469 (Clevenger, J. concurring) (“One who obtains, in the pursuit of international commerce, a claim against a foreign government knows that our government may deem it necessary to espouse that claim.”); *Belk v. United States*, 12 Cl. Ct. 732, 734 (1987) (holding that no taking occurred when the United States entered into the Algiers Accords with Iran, which extinguished plaintiffs’ claims, because “[t]he actions of the President should have been no surprise. The possibility that the President will intervene in this matter is properly recognized as both a shared benefit and a shared risk of those who trade and travel abroad. The compromise of plaintiffs’ claims cannot constitute a drastic or novel interference with any investment-backed expectation.” (internal quotation and citations omitted)).

2. *Horne* Is Inapposite

In response to this precedent, the Alimanestianu plaintiffs rely on the Supreme Court’s decision in *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), which they assert stands for the proposition that whenever private property is transferred to the Government, a *per se* taking has occurred and the Government must pay just compensation. App. Br. at 34-48.

In *Horne*, the Supreme Court held that a Government requirement that raisin growers set aside a certain percentage of their crop for the Government, free of charge, was a *per se* taking. The Court explained that in that context, personal property is subject to the same rules that apply to real property. *Id.* at 2426. The Court concluded that, as a result, the Government must compensate the raisin growers for the market value of the raisins.

Horne is easily distinguishable and the Alimanestianu plaintiffs' reliance on this case is based on a misunderstanding of property (assuming that the claims and non-final judgment here are vested property). In particular, as explained, the Alimanestianu plaintiffs fail to understand that their claims (and subsequent non-final judgment) were claims against a foreign government which, by their very nature, come with limitations that preclude a takings claim.

As explained above, the Supreme Court held in *Beatty*, 556 U.S. at 865, that the subsequent elimination of a country's subjection to suit cannot be said to have deprived a party of any expectation that they held at the time of their injury that they would be able to sue in United States courts. *Beatty* makes clear that the statement in *Horne* that, "[w]hatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away," 135 S. Ct. 2427, has no application in the context of claims against a foreign country, especially when the foreign country enjoyed immunity from suit at the time of the injury at issue. *Beatty*, 556 U.S. at 865.

Put another way, regardless of the type of property or the type of government action, "[e]xisting rules and understandings and background principles derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Acceptance*, 583 F.3d at 857; *see also California Hous. Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992) (no conceivable expectation by the plaintiffs that their property would not be occupied in the event circumstances compelled the regulators to close the facility because the license to engage in domestic banking was subject to the condition of potential occupation of the private property by the Government.). As this Court has held, in this context, those background rules include the fact that international relations may become strained and that the United States Government at times espouses the claims of its nationals against a foreign government. *Abraham-Youri*, 139 F.3d at 1468. And, pursuant to the Supreme Court's decision in *Beatty*, they also include the fact that no party could have any reasonable expectation in pursuing their terrorism-related claims against Libya when, at the time the injury arose, Libya enjoyed sovereign immunity with respect to those claims. 556 U.S. at 865.

Thus, the holding in *Horne* that "[r]aisin growers subject to the reserve requirement lose the entire 'bundle' of property rights in the appropriated raisins," 135 S. Ct. at 2428, is not applicable to international claims. Instead, as this Court held in *Abraham-Youri*, the sticks in the bundle of rights that make up a claim against a foreign nation come with an important and inherent limitation: that the claim may be espoused by the United States. *Abraham-Youri*, 139 F.3d at 1468.

Moreover, a hypothetical demonstrates that even when a *per se* taking has occurred, property may nonetheless be subject to certain constraints: The Government gives a citizen an item of property while reserving the right to take back the property at any time without payment. Under the Alimanestianu plaintiffs' view, when the Government does take back the property, it has engaged in a *per se* taking—the entire property has been taken by the Government. In other words, under their view of *Horne*, notwithstanding that the property came with certain

conditions, a *per se* taking occurred and the Government would need to compensate the owner for the property. That view is plainly incorrect. The bundle of rights that came with the property was “subject to constraint by government as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights.” *Abraham-Youri*, 135 F. 3d at 1468. Thus, under this hypothetical, no taking occurred because, even though the entire property was taken, the use of that property was always subject to certain constraints—the right of the Government to take it back at some future date. Put differently, the property-holder’s interest was contingent, not absolute. As this Court held in *Abraham-Youri*, the same is true with respect to claims against foreign governments. 139 F. 3d at 1468.

Indeed, the Supreme Court has made clear that property rights “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). And again, this Court has held that these rules apply in this very context—espousal. *Abraham-Youri*, 135 F. 3d at 1468. Put another way, property subject to pervasive regulation and Government control, such as claims against foreign states, is not protected by the Takings Clause under these circumstances. *See, e.g., Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012) (“Where a citizen voluntarily enters into an area which from the start is subject to pervasive Government control, a property interest is likely lacking.”); *cf. Dames & Moore*, 453 U.S. 654, 674 n.6 (1981) (petitioner’s attachment of foreign state’s assets was not property under Takings Clause because it was subordinate to presidential power over the assets). Thus, even assuming that the Alimanestianu plaintiffs’ legal claims could constitute cognizable property interests, inherent within those claims is the limitation that they could be espoused and that statutory rules of sovereign immunity might change.

Finally, the Alimanestianu plaintiffs make two additional arguments in support of their assertion that compensation must be paid because a *per se* taking has occurred. First, they contend that the fact that many of them received compensation from the settlement fund may not be considered. App. Br. at 45. As explained above, however, this Court has rejected the argument that a *per se* taking automatically entitles one to compensation. And in so holding, the Court in *Abraham-Youri* emphasized that “the fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States.” 139 F.3d at 1468. In any event, this Court has held that one proper consideration is the economic impact of the Government’s action on the claimants. *Id.* at 1465, 1468. The Government’s action in this case resulted in the Alimanestianu plaintiffs collectively receiving nearly \$11 million.

Second, the Alimanestianu plaintiffs cite to a case from 1886—*Gray v. United States*, 21 Ct. Cl. 340 (1888)—which, they assert, supports their theory that a taking occurred. But this Court was faced with the same argument in *Abraham-Youri*. The Court concluded that *Gray* was an “advisory opinion to Congress,” that the language cited is *dicta*, and that even if *Gray* correctly stated propositions of law applicable to the circumstances of that case at that time, “the evolution of takings law in the last 100 years brings additional considerations to light.” *Abraham-Youri*, 139 F.3d at 1467; *see also Aris Gloves, Inc. v. United States*, 420 F.2d 1386 (Ct. Cl. 1970) (“All that really needs to be said about the *Gray* case is that the opinion... was strictly an advisory opinion which was not binding upon either of the parties and cannot be binding upon subsequent courts. However, it is worth mentioning that, in referring to the ‘French Spoliation’ claims which were later granted by Congress following the *Gray* opinion, the Supreme Court

remarked: ‘We think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace and not of right.’” (*quoting Blagge v. Balch*, 162 U.S. 439, 457 (1896)).

Accordingly, *Horne* has no application to this case. The Court must follow *Belk* and consider the constraints on any identifiable property interest, as in *Abraham-Youri*.

* * * *

E. The Alimanestianu Plaintiffs’ Arguments Are Unavailing

The Alimanestianu plaintiffs do not dispute most of the foregoing. Rather, they contend that the Commission did not provide them with sufficient compensation and that it was “not a true alternative forum.” Pet. Br. at 49-55. They also contend that the trial court erred in valuing their claims. *Id.* at 55-56.

The Alimanestianu plaintiffs are incorrect. With respect to their challenge to the amount that they received under the settlement, “the fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States.” *Abraham-Youri*, 139 F.3d at 1468.

Moreover, parties may not challenge in court the award provided by the Commission because decisions of the Commission are not subject to judicial review. 22 U.S.C. § 1623(h).

Even though the Government was not required to provide an alternative forum, the Commission is an alternative forum. Section 1623(a)(1)(C) of Title 22, United States Code, provides, “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.” The International Claims Settlement Act of 1949 (ICSA), 22 U.S.C. § 1621 *et seq.*, established the International Claims Commission, which in 1954 merged with the War Claims Commission to become the Foreign Claims Settlement Commission, and provided the Commission with jurisdiction to “make final and binding decisions with respect to claims by United States nationals against settlement funds.” *Dames & Moore* 453 U.S. at 680 (citing 22 U.S.C. § 1623(a)). And in rendering decisions upon claims, the Commission does not, as the Alimanestianu plaintiffs contend, mechanically implement the will of third parties (such as the State Department) but, rather, is required to make independent decisions. *See* 22 U.S.C. § 1622g (“Nothing in this Act shall be construed to diminish the independence of the Commission in making its determinations on claims in programs that it is authorized to administer pursuant to [the ICSA and the War Claims Act]. The decisions of the Commission with respect to claims shall be final and conclusive on all questions of law and fact, and shall not be subject to review by the Attorney General or any other official of the United States or by any court by mandamus or otherwise.”).

With respect to the Alimanestianu plaintiffs’ claims against Libya, by letter dated January 15, 2009, the State Department’s Legal Adviser referred certain categories of claims for “adjudication and certification” by the Commission. Appx127-133. The referral letter did not predetermine award amounts, and instead simply declared that the State Department “believe[d] and recommend[ed]” certain amounts for different categories of claimants. *Id.* On July 7, 2009, the Commission published a notice announcing the commencement of adjudication of claims under this portion of the Libya Claims Program. *See* Notice of Commencement of Claims Adjudication Program, 74 Fed. Reg. 32,193 (July 7, 2009). The Commission adjudicated and issued a number of decisions on these claims. *See* Index of Claims under the January 2009

Referral from the Department of State Ordered by Decision Number, available at <http://www.justice.gov/sites/default/files/pages/attachments/2014/07/11/claims-january-referral-by-decision.pdf>. These decisions make clear that, in fact, the Commission fulfilled its obligations and adjudicated these claims independently. *See* Appx156-211 (proposed and final decisions from the Commission).

Thus, the Government did provide an alternative forum for many of the Alimanestianu plaintiffs' claims—and, in fact, the majority of the Alimanestianu plaintiffs received considerable compensation from the settlement proceeds. In any event, even if the Government had not provided an alternative forum, "that fact is not sufficient to establish a taking." *Belk*, 858 F.2d at 709.

* * * *

The President's authority to enter into the claims settlement agreement with Libya is beyond question and is a quintessential example of the exercise of the President's broad constitutional powers in foreign affairs. *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) ("That the President's control of foreign relations includes the settlement of claims is indisputable."); *Dames & Moore*, 453 U.S. at 679-80 (same). Indeed, the Supreme Court has long acknowledged the President's authority specifically with respect to espousal of the claims of United States' nationals against foreign states. *Dames & Moore*, 453 U.S. at 679-80 ("the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries.... [T]here has also been a longstanding practice of settling such claims by executive agreement..."); *see also Shanghai Power*, 4 Cl. Ct. at 244 ("Our Presidents have exercised the power to settle international claims of U.S. nationals at least since 1799.").

This Court's decision in *Belk*—that cases like this are not justiciable—parallels this case. In *Belk*, former hostages held by Iran sued the United States for a taking of their claims against Iran. Plaintiffs' complaint in that case involved the "implement[ation] of the Algiers Accords"—that is, the implementation of the settlement of plaintiffs' claims with Iran. *Belk*, 858 F.2d at 710. This Court concluded that the case was not justiciable because "[t]he determination whether and upon what terms to settle the dispute with [another country]...necessarily was for the President to make in his foreign relations role." *Belk*, 858 F.2d at 710.

The same is true in this case—the Alimanestianu plaintiffs challenge the Executive Branch's espousal of their claims pursuant to Congress's enactment of the LCRA, which premised the restoration of Libya's sovereign immunity on the settlement of terrorism-related claims of United States nationals against Libya. Shortly after the enactment of the LCRA, the Executive Branch espoused the claims of the Alimanestianu plaintiffs in accordance with that legislation and entered into the claims settlement agreement with Libya. The settlement agreement required the Secretary of State to certify that the funds received were sufficient to compensate the victims of Libya's state-sponsored terror. *See* Appx78-82. The funds were then distributed to claimants by the State Department and the Commission, in amounts that the Alimanestianu plaintiffs now challenge. By challenging the amounts they received under the settlement agreement, they are challenging the merits of that agreement. This situation parallels the *Belk* plaintiff's challenge to the implementation of the Algiers Accords and, like that challenge, is nonjusticiable.

The trial court disagreed with us with respect to justiciability. In denying our motion to dismiss, it held that the Alimanestianu plaintiffs are not challenging the merits of the settlement agreement or the President's settlement authority. Appx144.

We continue to respectfully disagree. The Alimanestianu plaintiffs allege that the Government compromised their claims “for pennies on the dollar,” and that they received either “nothing in exchange for the espoused Judgment or a fraction of the value of the Judgment.” Appx21. In describing “the taking” that they allege occurred, they assert that the settlement agreement resulted in the establishment of a fund of 1.5 billion dollars but that “[t]he amount of the Fund was a small fraction of the value of the claims that U.S. citizens held against Libya.” Appx25. They assert that “the Executive branch espoused the valuable claims and judgments of its citizens against Libya and used them as a bargaining chip in its efforts to restore diplomatic relations with the state of Libya.” Appx25. And they again emphasize that, because the fund was not sufficient to cover the amount of their non-final judgment, they believe that a taking occurred. Appx27. Indeed, in their brief to this Court, they repeatedly challenge the amount they received from the settlement. App. Br. at 50-56 (“The Commission did not provide reasonable compensation for the plaintiffs”). Moreover, before the trial court, they even asserted that the property interest that they allege was taken is “the proceeds from the settlement of the claims.” Appx220. These statements reveal that the core of the Alimanestianu plaintiffs’ argument relates to the President’s exercise of his authority to espouse and to settle claims, in the context of conducting the United States’ foreign relations with Libya.

The reasons that the President’s exercise of claims settlement authority is insulated from judicial review become evident if one imagines what would happen if this Court were to adopt the Alimanestianu plaintiffs’ theory. A determination that the United States engaged in a taking in this case could have the effect of requiring the United States, in any future claims settlement agreement with a foreign sovereign, to pay compensation to persons who were engaged in litigation against that sovereign in an amount determined by a trial court or simply by the plaintiff’s claimed damages. Those damages amounts can be significant and are not always tested in the courts through adversarial proceedings; indeed, in many terrorism cases, plaintiffs have obtained substantial default judgments against foreign states who do not appear. *See, e.g., Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1121 (9th Cir. 2010) (resolving issues related to enforcement of plaintiffs’ \$2.6 billion default judgment against Iran arising out of the 1983 bombing of United States Marine barracks in Lebanon); *Volloldo v. Ruz*, 2016 WL 84192, at *1 (N.D.N.Y. Jan. 1, 2016) (citing state-court \$2.79 billion default judgment against Cuba arising out of alleged acts of torture).

This prospect might inhibit the United States from making future settlements, even when they are in its foreign policy interests, or may effectively require the United States to negotiate larger settlements, which could prove impossible or politically costly. Such a determination would also, as courts have suggested, have the effect of making the United States indirectly responsible for Libya’s conduct. “The American government should not be held as a surrogate for [another country’s] unjustifiable actions.” *Belk*, 12 Cl. Ct. at 735; *see also Abraham-Youri*, 36 Fed. Cl. at 487 (“The property losses that plaintiffs suffered were occasioned by Iran, not the United States.”). In other words, the rule that the Alimanestianu plaintiffs seek could have serious unintended consequences in matters of foreign policy that are committed to the political branches.

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Cross References

International Criminal Tribunals, **Ch. 3.B.**

TEPCO case regarding compensation for Fukushima nuclear accident, **Ch. 5.C.4.**

IACHR cases, **Ch. 7.E.**

Relations with Cuba, **Ch. 9.A.2.**

Expropriation Exception to Immunity, **Ch. 10.A.3.**

ICAO Dispute with Brazil (Chicago Convention), **Ch. 11.A.4.**

Investment Disputes, **Ch. 11.B.**

WTO Dispute Settlement, **Ch. 11.C.**

Litigation regarding arbitration, **Ch. 15.C.2**

CHAPTER 9

Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

A. DIPLOMATIC RELATIONS

1. Somalia

As discussed in *Digest 2013* at 251-55, the United States recognized the government of Somalia in 2013. As discussed in *Digest 2015* at 338-40, the U.S. Mission to Somalia, based within the United States Embassy in Nairobi, Kenya, commenced operations in 2015. In 2016, the new U.S. ambassador to Somalia was sworn in. *Digest 2016* at 361-63. On February 8, 2017, the United States congratulated Somalia on the conclusion of its electoral process in a State Department press statement, which follows, and is available at <https://www.state.gov/r/pa/prs/ps/2017/02/267498.htm>.

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The United States congratulates the people of Somalia on the successful conclusion of their national electoral process. We congratulate Mr. Mohamed Abdullahi Mohamed on his selection as the next President of the Federal Government of Somalia and look forward to working closely with him and a new government. We commend the Somali Security Forces and the African Union Mission in Somalia for their efforts over the past six months to allow the electoral process to unfold in a relatively safe and secure environment.

This transition represents an important step forward for the country. We commend the thousands of Somalis from across the country, including youth and women, who were able to vote in greater numbers than in the 2012 elections, but regret the numerous credible reports of irregularities in the electoral process. We encourage Somalia's new administration to take credible steps to stamp out corruption and to establish strong electoral institutions to enable a free and fair one person one vote poll in 2020.

The United States looks forward to the timely formation of a new government, and to working in partnership with the President and new government to advance reconciliation, drought relief, security, and build the strong institutions to deliver good governance and development for the Somali people.

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2. Cuba

As discussed in *Digest 2014* at 336, and *Digest 2015* at 340-47, the United States and Cuba restored diplomatic relations after extensive discussions and an exchange of letters by the countries' presidents.

On September 19, 2017, the United States and Cuba held the sixth meeting of their Bilateral Commission, which had last met in December 2016. The State Department issued a media note regarding the meeting on September 20, 2017, which is available at <https://www.state.gov/r/pa/prs/ps/2017/09/274281.htm>. The media note summarizes the meeting as follows:

The meeting provided an opportunity to discuss the incidents affecting diplomatic personnel at the U.S. Embassy in Havana. The United States reiterated its deep concern for the safety and security of the U.S. Embassy community in Havana and the urgent need to identify the cause of these incidents and to ensure they cease. The delegations also reviewed the Administration's priorities and areas for engagement in the interests of the United States and the Cuban people, including human rights; implementation of the Migration Accords; and protecting the national security and public health and safety of the United States.

On September 29, 2017, the State Department announced that it had ordered the departure of non-emergency personnel assigned to the U.S. Embassy in Havana, Cuba, due to attacks on embassy employees. See Secretary Tillerson's September 29, 2017 statement, available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/09/274514.htm>. Secretary Tillerson explained that over the course of several months, 21 embassy employees had "exhibited a range of physical symptoms, including ear complaints, hearing loss, dizziness, headache, fatigue, cognitive issues, and difficulty sleeping," as a result of injuries from attacks. He indicated that the U.S. government was unable to determine the cause or source of these attacks. The transcript of a September 29, 2017 special briefing on the departure of U.S. personnel from Cuba, which is available at <https://www.state.gov/r/pa/prs/ps/2017/09/274518.htm>, is excerpted below.

* * * *

SENIOR STATE DEPARTMENT OFFICIAL ONE: ... On September 29th, the Department ordered the departure of nonemergency personnel assigned to the U.S. embassy in Havana, as well as all family members. Over the past several months, at least 21 U.S. embassy employees have been targeted in specific attacks. The health, safety, and well-being of our embassy community are our greatest concerns. Investigations into the attacks are ongoing, as investigators have been unable to determine who or what is causing these attacks.

Until the Government of Cuba can assure the safety of U.S. Government personnel in Cuba, our embassy will be reduced to emergency personnel so as to minimize the number of U.S. Government personnel at risk of exposure. The remaining personnel will carry out core diplomatic and consular functions, including providing emergency assistance to U.S. citizens in Cuba. Routine visa operations are suspended indefinitely. Short-term travel by U.S. Government officials to Cuba will also be limited to those involved with the ongoing investigation or who have a need to travel related to the U.S. national security or crucial embassy operations. The United States will not send official delegations to Cuba or conduct bilateral meetings in Cuba for the time being. Meetings may continue in the United States.

The Department will issue a Travel Warning for U.S. citizens not to travel to Cuba, and informing them of our decision to draw down our diplomatic staff. The Travel Warning will note that over the past several months, numerous U.S. embassy employees have been targeted in specific attacks. These employees have suffered significant injuries as a consequence of these attacks. Affected individuals have exhibited a range of physical symptoms, including ear complaints, hearing loss, dizziness, tinnitus, balance problems, visual complaints, headache, fatigue, cognitive issues, and difficulty sleeping.

The governments of the United States and Cuba have not yet identified the responsible party, but the Government of Cuba is responsible for taking all appropriate steps to prevent attacks on our diplomatic personnel in Cuba. Because our personnel's safety is at risk and we are unable to identify the source of the attacks, we believe that U.S. citizens may also be at risk and warn them not to travel to Cuba. The Travel Warning will advise U.S. travelers the reduction of staffing at the embassy would impact its ability to offer many routine services to U.S. citizens. Emergency services will still be provided.

I want to stress that the decision to reduce our diplomatic presence in Havana was made to ensure the safety of our personnel. We maintain diplomatic relations with Cuba and our work in Cuba continues to be guided by the national security and foreign policy interests of the United States. We are continuing our investigation into the attacks and the ... Cuban Government has told us they will continue their efforts as well. We acknowledge the efforts the Cuban Government has made to investigate and its cooperation in facilitating the U.S. investigation, but we have members of our embassy community who have suffered physical harm due to these ongoing attacks in Havana, most recently in late August. The Cuban Government is obligated under the Vienna Convention to take all appropriate steps to protect our diplomats in Cuba.

* * * *

SENIOR STATE DEPARTMENT OFFICIAL ONE: We have not ruled out the possibility of a third country as a part of the investigation, but that investigation continues and will continue irrespective of the ordered departure. We will continue to investigate ...these attacks and to get to the bottom of them.

With regard to the threat to American citizens, ... there's no more important mission for the State Department or a U.S. embassy overseas than to protect and advise Americans on potential threats to their safety, health, and well-being. The fact that some of these attacks have occurred in hotels where American citizens could be at and that we have no way of advising American citizens on how they could mitigate such attacks, we felt we must warn them on not to travel to Cuba until we understand and know more about the source and means and ways to mitigate these attacks that are occurring.

* * * *

SENIOR STATE DEPARTMENT OFFICIAL ONE: The ordered departure will result in more than half of the embassy footprint being reduced. ...

* * * *

SENIOR STATE DEPARTMENT OFFICIAL ONE: The staff who were affected at hotels were temporary duty staff at the embassy. I will let my colleague answer as to whether we have any staff resident at the hotel. I do think there are times when people are arriving and leaving that they may be out of living quarters, that they might be in the hotel, so I don't want to say definitively people don't live there, because there's transition periods. But there have been attacks at the hotel. They have ... involved our U.S. personnel, and that's what I know.

SENIOR STATE DEPARTMENT OFFICIAL TWO: I would just add we're not aware of any hotel staff or other individuals who have been attacked or suffered these systems beyond the U.S. Government personnel at the hotel. And in terms of our Cuban staff at the embassy, we're not aware of any incidents involving them or attacks involving them. The victims that we're aware of are the 21 U.S. Government personnel.

* * * *

SENIOR STATE DEPARTMENT OFFICIAL TWO: There was a careful analysis of both the risk and the estimate of what would be needed to reduce that risk, and one of the measures that was considered prudent was to considerably ... reduce the number of people present, thereby reducing the ... individuals who could be subject to these attacks. And so this was seen as a major step towards addressing some of our vulnerabilities and reducing our exposure.

* * * *

SENIOR STATE DEPARTMENT OFFICIAL TWO: As I mentioned, we continue to investigate the attacks in Havana. At this stage, we still do not have definitive answers on source or cause of the attacks. I don't want to get into speculating about types of technology or research or get into the details of our investigation at this point, so can't go into that details.

* * * *

On October 3, 2017, the Department of State informed the Government of Cuba that it was requiring the departure of 15 Cuban officials from the Cuban embassy in Washington, D.C. due to Cuba's failure to protect U.S. diplomats in accordance with its obligations under the Vienna Convention. October 3, 2017 Press Statement by Secretary Tillerson, available at

<https://www.state.gov/secretary/20172018tillerson/remarks/2017/10/274570.htm>.

Secretary Tillerson's statement also includes the following:

...This order will ensure equity in our respective diplomatic operations.

On September 29, the Department ordered the departure of non-emergency personnel assigned to the U.S. Embassy in Havana, as well as all family members. Until the Government of Cuba can ensure the safety of our diplomats in Cuba, our embassy will be reduced to emergency personnel to minimize the number of diplomats at risk of exposure to harm.

We continue to maintain diplomatic relations with Cuba, and will continue to cooperate with Cuba as we pursue the investigation into these attacks.

The State Department also provided a special briefing on October 3, 2017 on the required departure of the personnel from the Cuban embassy in the United States, available at <https://www.state.gov/r/pa/prs/ps/2017/10/274572.htm>.

The President issued the National Security Presidential Memorandum entitled "Strengthening the Policy of the United States Toward Cuba" on 82 Fed. Reg. 48,875 (Oct. 20, 2017). Excerpts follow from the memorandum.

* * * *

Section 1. Purpose.

The United States recognizes the need for more freedom and democracy, improved respect for human rights, and increased free enterprise in Cuba. The Cuban people have long suffered under a Communist regime that suppresses their legitimate aspirations for freedom and prosperity and fails to respect their essential human dignity.

My Administration's policy will be guided by the national security and foreign policy interests of the United States, as well as solidarity with the Cuban people. I will seek to promote a stable, prosperous, and free country for the Cuban people. To that end, we must channel funds toward the Cuban people and away from a regime that has failed to meet the most basic requirements of a free and just society.

...

The initial actions set forth in this memorandum, including restricting certain financial transactions and travel, encourage the Cuban government to address these abuses. My Administration will continue to evaluate its policies so as to improve human rights, encourage the rule of law, foster free markets and free enterprise, and promote democracy in Cuba.

Sec. 2. Policy.

It shall be the policy of the executive branch to:

(a) End economic practices that disproportionately benefit the Cuban government or its military, intelligence, or security agencies or personnel at the expense of the Cuban people.

(b) Ensure adherence to the statutory ban on tourism to Cuba.

(c) Support the economic embargo of Cuba described in section 4(7) of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (the embargo), including by opposing measures that call for an end to the embargo at the United Nations and other international forums and through regular reporting on whether the conditions of a transition government exist in Cuba.

(d) Amplify efforts to support the Cuban people through the expansion of internet services, free press, free enterprise, free association, and lawful travel.

(e) Not reinstate the “Wet Foot, Dry Foot” policy, which encouraged untold thousands of Cuban nationals to risk their lives to travel unlawfully to the United States.

(f) Ensure that engagement between the United States and Cuba advances the interests of the United States and the Cuban people. These interests include: advancing Cuban human rights; encouraging the growth of a Cuban private sector independent of government control; enforcing final orders of removal against Cuban nationals in the United States; protecting the national security and public health and safety of the United States, including through proper engagement on criminal cases and working to ensure the return of fugitives from American justice living in Cuba or being harbored by the Cuban government; supporting United States agriculture and protecting plant and animal health; advancing the understanding of the United States regarding scientific and environmental challenges; and facilitating safe civil aviation.

Sec. 3. Implementation.

The heads of departments and agencies shall begin to implement the policy set forth in section 2 of this memorandum as follows:

(a) Within 30 days of the date of this memorandum, the Secretary of the Treasury and the Secretary of Commerce, as appropriate and in coordination with the Secretary of State and the Secretary of Transportation, shall initiate a process to adjust current regulations regarding transactions with Cuba.

(i) As part of the regulatory changes described in this subsection, the Secretary of State shall identify the entities or subentities, as appropriate, that are under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services or personnel (such as Grupo de Administracion Empresarial S.A. (GAESA), its affiliates, subsidiaries, and successors), and publish a list of those identified entities and subentities with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba.

(ii) Except as provided in subsection (a)(iii) of this section, the regulatory changes described in this subsection shall prohibit direct financial transactions with those entities or subentities on the list published pursuant to subsection (a)(i) of this section.

(iii) The regulatory changes shall not prohibit transactions that the Secretary of the Treasury or the Secretary of Commerce, in coordination with the Secretary of State, determines are consistent with the policy set forth in section 2 of this memorandum and:

(A) concern Federal Government operations, including Naval Station Guantanamo Bay and the United States mission in Havana;

- (B) support programs to build democracy in Cuba;
- (C) concern air and sea operations that support permissible travel, cargo, or trade;
- (D) support the acquisition of visas for permissible travel;
- (E) support the expansion of direct telecommunications and internet access for the Cuban people;
- (F) support the sale of agricultural commodities, medicines, and medical devices sold to Cuba consistent with the Trade Sanctions Reform and Export Enhancement Act of 2000 (22 U.S.C. 7201 et seq.) and the Cuban Democracy Act of 2002 (22 U.S.C. 6001 et seq.);
- (G) relate to sending, processing, or receiving authorized remittances;
- (H) otherwise further the national security or foreign policy interests of the United States;

or

- (I) are required by law.

(b) Within 30 days of the date of this memorandum, the Secretary of the Treasury, in coordination with the Secretary of State, shall initiate a process to adjust current regulations to ensure adherence to the statutory ban on tourism to Cuba.

(i) The amended regulations shall require that educational travel be for legitimate educational purposes. Except for educational travel that was permitted by regulation in effect on January 27, 2011, all educational travel shall be under the auspices of an organization subject to the jurisdiction of the United States, and all such travelers must be accompanied by a representative of the sponsoring organization.

(ii) The regulations shall further require that those traveling for the permissible purposes of non academic education or to provide support for the Cuban people:

(A) engage in a full-time schedule of activities that enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people's independence from Cuban authorities; and

(B) meaningfully interact with individuals in Cuba.

(iii) The regulations shall continue to provide that every person engaging in travel to Cuba shall keep full and accurate records of all transactions related to authorized travel, regardless of whether they were effected pursuant to license or otherwise, and such records shall be available for examination by the Department of the Treasury for at least 5 years after the date they occur.

(iv) The Secretary of State, the Secretary of the Treasury, the Secretary of Commerce, and the Secretary of Transportation shall review their agency's enforcement of all categories of permissible travel within 90 days of the date the regulations described in this subsection are finalized to ensure such enforcement accords with the policies outlined in section 2 of this memorandum.

(c) The Secretary of the Treasury shall regularly audit travel to Cuba to ensure that travelers are complying with relevant statutes and regulations. The Secretary of the Treasury shall request that the Inspector General of the Department of the Treasury inspect the activities taken by the Department of the Treasury to implement this audit requirement. The Inspector General of the Department of the Treasury shall provide a report to the President, through the Secretary of the Treasury, summarizing the results of that inspection within 180 days of the adjustment of current regulations described in subsection (b) of this section and annually thereafter.

(d) The Secretary of the Treasury shall adjust the Department of the Treasury's current regulation defining the term "prohibited officials of the Government of Cuba" so that, for purposes of title 31, part 515 of the Code of Federal Regulations, it includes Ministers and Vice-Ministers, members of the Council of State and the Council of Ministers; members and employees of the National Assembly of People's Power; members of any provincial assembly; local sector chiefs of the Committees for the Defense of the Revolution; Director Generals and sub-Director Generals and higher of all Cuban ministries and state agencies; employees of the Ministry of the Interior (MININT); employees of the Ministry of Defense (MINFAR); secretaries and first secretaries of the Confederation of Labor of Cuba (CTC) and its component unions; chief editors, editors, and deputy editors of Cuban state-run media organizations and programs, including newspapers, television, and radio; and members and employees of the Supreme Court (Tribuno Supremo Nacional).

(e) The Secretary of State and the Representative of the United States to the United Nations shall oppose efforts at the United Nations or (with respect to the Secretary of State) any other international forum to lift the embargo until a transition government in Cuba, as described in section 205 of the LIBERTAD Act, exists.

(f) The Secretary of State, in coordination with the Attorney General, shall provide a report to the President assessing whether and to what degree the Cuban government has satisfied the requirements of a transition government as described in section 205(a) of the LIBERTAD Act, taking into account the additional factors listed in section 205(b) of that Act. This report shall include a review of human rights abuses committed against the Cuban people, such as unlawful detentions, arbitrary arrests, and inhumane treatment.

(g) The Attorney General shall, within 90 days of the date of this memorandum, issue a report to the President on issues related to fugitives from American justice living in Cuba or being harbored by the Cuban government.

(h) The Secretary of State and the Administrator of the United States Agency for International Development shall review all democracy development programs of the Federal Government in Cuba to ensure that they align with the criteria set forth in section 109(a) of the LIBERTAD Act.

(i) The Secretary of State shall convene a task force, composed of relevant departments and agencies, including the Office of Cuba Broadcasting, and appropriate non-governmental organizations and private-sector entities, to examine the technological challenges and opportunities for expanding internet access in Cuba, including through Federal Government support of programs and activities that encourage freedom of expression through independent media and internet freedom so that the Cuban people can enjoy the free and unregulated flow of information.

(j) The Secretary of State and the Secretary of Homeland Security shall continue to discourage dangerous, unlawful migration that puts Cuban and American lives at risk. The Secretary of Defense shall continue to provide support, as necessary, to the Department of State and the Department of Homeland Security in carrying out the duties regarding interdiction of migrants.

(k) The Secretary of State, in coordination with the Secretary of the Treasury, the Secretary of Defense, the Attorney General, the Secretary of Commerce, and the Secretary of Homeland Security, shall annually report to the President regarding the engagement of the United States with Cuba to ensure that engagement is advancing the interests of the United States.

(l) All activities conducted pursuant to subsections (a) through (k) of this section shall be carried out in a manner that furthers the interests of the United States, including by appropriately protecting sensitive sources, methods, and operations of the Federal Government.

Sec. 4. Earlier Presidential Actions.

(a) This memorandum supersedes and replaces both National Security Presidential Directive-52 of June 28, 2007, U.S. Policy toward Cuba, and Presidential Policy Directive-43 of October 14, 2016, United States-Cuba Normalization.

(b) This memorandum does not affect either Executive Order 12807 of May 24, 1992, Interdiction of Illegal Aliens, or Executive Order 13276 of November 15, 2002, Delegation of Responsibilities Concerning Undocumented Aliens Interdicted or Intercepted in the Caribbean Region.

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3. Russia

See Chapter 10 for discussion of the U.S. determination in 2017 to restrict access to multiple facilities leased or owned by the Government of the Russian Federation.

4. Libya

For background on the political transition in Libya, see *Digest 2016* at 374-78. On July 28, 2017, the State Department issued a press statement regarding the Libyan Dialogue and Joint Declaration. The statement is available at <https://www.state.gov/r/pa/prs/ps/2017/07/272916.htm>, and includes the following:

The United States remains committed to working with Libya and our international partners to help resolve the political conflict and advance peace and long-term stability in Libya.

While the Libyan people must lead the process of achieving political reconciliation in their country, the international community plays an important role in supporting those efforts.

In this regard, we welcome the Joint Declaration from the July 25, meeting between Libyan Prime Minister Fayez al-Sarraj and General Khalifa Haftar, hosted outside of Paris by French President Emmanuel Macron. We call on all Libyans to support political dialogue and adhere to a cease-fire, as stated in the Joint Declaration.

The United States also welcomes new UN Special Representative of the Secretary-General for Libya Ghassan Salamé as the head of the UN Support Mission in Libya, UNSMIL, which plays a critical role in advancing lasting peace and stability. We look forward to working with him to help Libyans reach a political solution.

On September 22, 2017, the State Department issued a press statement expressing U.S. support for the UN Action Plan for Libya. The statement is available at <https://www.state.gov/r/pa/prs/ps/2017/09/274402.htm>, and appears below.

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The United States welcomes the September 20 United Nations (UN) announcement of an action plan to advance political reconciliation in Libya and help the Libyan people achieve lasting peace and security.

We applaud the vigorous outreach by UN Special Representative of the Secretary-General (SRSG) for Libya Ghassan Salamé to Libyan leaders and call on all Libyans to support and engage in his mediation efforts. The Libyan Political Agreement (LPA) remains the framework for a political solution to the conflict throughout the transition period. In this regard, we strongly support UN facilitation as the Libyan people carry out this critical transition, specifically by seeking to negotiate mutually-agreed limited amendments to the LPA, adopt a new constitution, and prepare for national elections.

The United States will not support individuals who seek to circumvent the UN-led political process.

The United States remains committed to working with Libya, the UN, and our international partners to help advance political reconciliation, defeat terrorism, and promote a more stable future for the Libyan people.

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5. Kenya

Kenya held a presidential election on August 8, 2017 but Kenya's supreme court nullified the election in September based on a challenge brought by the opposition candidate. In October, several ambassadors to Kenya, including U.S. Ambassador Robert F. Godec, issued two joint statements in advance of the second election. The October 2, 2017 joint statement is available at <https://ke.usembassy.gov/statement-ambassadors-high-commissioners-kenya-advance-new-presidential-election/> and the October 23, 2017 joint statement is available at <https://ke.usembassy.gov/statement-ambassadors-high-commissioners-advance-kenyas-new-presidential-election/>. On November 28, 2017, the State Department issued a press statement regarding the presidential election in Kenya, which is excerpted below and available at <https://www.state.gov/r/pa/prs/ps/2017/11/276007.htm>.

* * * *

The United States congratulates the people of Kenya on the conclusion of the presidential election process, as well as President Uhuru Kenyatta and Deputy President William Ruto on their inauguration for a second term. The United States and Kenya have been steadfast partners for decades, working together to strengthen security, build mutual prosperity, address regional challenges, and to advance development and good governance.

Even as we look forward to strengthening and renewing the bilateral partnership in the years ahead, we are deeply concerned by the ongoing political tensions in Kenya. We urge security forces to refrain from the use of unnecessary force against citizens exercising their democratic rights.

As part of the process of addressing these tensions and strengthening institutions, we urge Kenyans to join together to hold an immediate, sustained, and open national conversation to heal divisions between communities. We encourage all Kenyans to come together at this critical moment and to work together peacefully and uphold the constitution.

As friends, we will continue to work with all Kenyans committed to building democracy, advancing prosperity, and strengthening security.

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B. STATUS ISSUES

1. Hong Kong

On June 7, 2017, the State Department issued a fact sheet reviewing key developments in Hong Kong. The fact sheet is excerpted below and available at <https://www.state.gov/p/eap/rls/2017/271611.htm>.

* * * *

In light of ongoing public interest in matters related to Hong Kong, the State Department prepared this review of key current developments and progress made in U.S.-Hong Kong relations.

This assessment is current as of March 2017.

Key Findings

- The United States has longstanding economic and cultural interests in Hong Kong. Cooperation between the U.S. Government and the Hong Kong Government (HKG) remains broad, effective, and mutually beneficial.
- Certain actions by the Chinese Central Government this year appeared inconsistent with China's commitment in the Basic Law to allow Hong Kong to exercise a high degree of autonomy.
- However, Hong Kong generally maintains a high degree of autonomy under the "one country, two systems" framework, more than sufficient to justify continued special treatment by the United States for bilateral agreements and programs.

Progress in U.S.-Hong Kong Relations

U.S.-Hong Kong relations are fundamentally based upon the continued maintenance of the “one country, two systems” framework, as established in the Basic Law of the Hong Kong Special Administrative Region (SAR) of the People’s Republic of China (PRC), as enacted by the National People’s Congress of the PRC. The United States-Hong Kong Policy Act of 1992, as amended, establishes the authority of the U.S. government to treat Hong Kong as a non-sovereign entity distinct from China for the purposes of U.S. domestic law based on the principles of the 1984 Sino-British Joint Declaration.

Hong Kong’s strong traditions of rule of law, as displayed by its highly independent judiciary, low levels of corruption, and high standards for public health and safety, have continued to make Hong Kong a preferred platform for U.S. businesses, as well as an important base for U.S. investments and business activity in the Asia-Pacific region writ large. Hong Kong was ranked the world’s freest economy for the twenty-third consecutive year according to the 2017 Heritage Foundation Index of Economic Freedom.

More than 1,400 U.S. firms operate in Hong Kong, drawn in part by Hong Kong’s openness, transparency, and strong rule of law. Hong Kong also continues to be a valuable trading partner, with U.S.-Hong Kong two-way trade totaling \$42 billion in 2016. Last year, the United States’ single largest bilateral trade surplus was with Hong Kong, at \$28 billion. Hong Kong in turn counted the United States as its second-largest trading partner after Mainland China. In 2016, Hong Kong was the United States’ fifth-largest export market for beef, seventh-largest export market for agricultural goods more generally, and ninth-largest export market for manufactured goods and services.

An estimated 85,000 U.S. citizens live in Hong Kong. Nearly 1.3 million U.S. citizens visited or transited Hong Kong in 2016. On average approximately 127,000 Hong Kong residents visit the United States each year.

Law enforcement cooperation: The United States and Hong Kong continue to have valuable and successful law enforcement cooperation, and U.S. law enforcement agencies maintain particularly strong relations with Hong Kong Customs authorities. However, there are opportunities for improvement in bilateral cooperation. For example, Hong Kong has not yet enacted certain laws that would improve identification of high-risk travelers or enable full implementation of recommendations and standards in United Nations Security Council resolutions on counterterrorism.

The United States continues to provide proactive information regarding drug couriers and drug shipments (predominantly cocaine) entering Hong Kong, which generated multiple arrests and seizures of significant quantities of illegal narcotics by Hong Kong Customs authorities. The United States also has recently assisted in the identification of several drug trafficking organization cells operating in Hong Kong and East Asia that could impact the United States. Hong Kong remains a good partner for fugitive surrender and sharing of evidence in criminal cases.

U.S. Navy activities: With approval from the Central Government, Hong Kong received six port calls from nine total U.S. Navy ships between March 2016 and March 2017, and engagement between U.S. military forces and the Hong Kong Disciplined Services continues unfettered. The Central Government denied one port visit request for a group of ships comprising one aircraft carrier and four escort ships in the first half of 2016, which was the first port visit denial since 2007. However, it did not impact the approval of other port visits. The Central Government gave no official reason for the denial beyond the visit being “inconvenient.”

Trade and finance: Hong Kong participates separately from Mainland China in a range of multilateral organizations and agreements, including the Asia-Pacific Economic Cooperation (APEC) forum, the World Trade Organization (WTO), the Financial Action Task Force, and the Financial Stability Board, with trade and economic policy objectives that generally align with our own. Hong Kong also joined the Asia Infrastructure Investment Bank in March 2017.

The United States recognizes Hong Kong as a separate customs territory. There are more than a dozen U.S.-Hong Kong bilateral agreements currently in force. Hong Kong's legal requirement for Central Government "sovereign assent" for certain forms of international liaison has at times hindered timely cooperation, but the issue has not arisen recently.

The United States and Hong Kong concluded one arrangement related to cooperation on financial regulations in the past year. In January 2017, the U.S. Securities and Exchange Commission and the Hong Kong Securities and Futures Commission signed a Memorandum of Understanding (MOU) regarding mutual assistance in the supervision and oversight of regulated entities that operate on a cross-border basis in the United States and Hong Kong.

Export controls: The United States cooperates closely with Hong Kong on strategic trade control and counter-proliferation initiatives. The Hong Kong government is obligated to implement United Nations sanctions measures adopted by the Central Government, and it acts to detain and investigate suspect controlled shipments. The U.S. Department of Commerce has raised concerns about diversion, and the U.S. and Hong Kong governments have taken steps together to tighten licensing requirements. As part of a longstanding annual dialogue on strategic trade controls, the United States and Hong Kong continue to hold joint seminars for industry groups, publish due diligence guidance to raise industry awareness about the risks inherent in transshipments, and cooperate on ongoing enforcement investigations. Additionally, the U.S. and Hong Kong governments hold annual counterproliferation meetings, most recently in December 2016, which focus on counterproliferation efforts and cooperation, proliferation finance, best practices in licensing and enforcement, and discussions of regional proliferation threats.

Cultural, Scientific and Academic Exchanges: The United States enjoys excellent academic, cultural, educational, and scientific exchanges with the people and government of Hong Kong. U.S. and Hong Kong educational institutions hold extensive regular exchanges, including short-term visits by U.S. faculty, summer programs for students, and multi-year exchanges of faculty and staff. Hong Kong ranks 21st (and 4th on a per capita basis) as a source of foreign students in the United States. Hong Kong also hosts more than 1,500 American students each year, including 48 American undergraduate students in the most recent year under the Department of State's Gilman Scholarship program.

Eighteen Hong Kong residents were selected as Fulbright students and scholars in fiscal years 2016 and 2017 combined, and Hong Kong hosted 24 U.S. Fulbright students and scholars and three Fulbright specialists over the same period. In fiscal years 2016 and 2017 combined, some 22 Hong Kong residents were selected to participate in the State Department's International Visitor Leadership Program. One Hong Kong scholar was selected to participate in the Study of U.S. Institutes (SUSI) for Scholars in 2016.

Other Matters Affecting U.S. Interests in Hong Kong

Hong Kong's highly developed rule of law, independent judiciary, and respect for individual rights are fundamental to its way of life, as well as its economic prosperity, and are made possible by Hong Kong's high degree of autonomy. Several high profile court cases over the past year, including the conviction of a former Chief Executive on corruption-related charges, demonstrated that Hong Kong's judiciary remains highly independent and professional.

The Central Government publicly and frequently reiterated its commitment to the “one country, two systems” framework over the past year, and it has continued to adopt positive measures to support Hong Kong’s economic growth in ways that are consistent with that framework, such as the December 2016 opening of the Hong Kong-Shenzhen Stock Connect trading link.

However, certain other actions by the Central Government appear to be inconsistent with its stated commitments to Hong Kong’s high degree of autonomy. On November 7, 2016, the Standing Committee of the National People’s Congress (NPCSC) issued an interpretation of Basic Law Article 104, which requires all Hong Kong government officials, when assuming office, to swear to uphold the Basic Law and swear allegiance to the “Hong Kong Special Administrative Region of the People’s Republic of China.” The NPCSC had full legal authority to issue its interpretation, but it did so while the Court of First Instance was still considering HKG judicial review petitions filed against two legislators-elect, on the grounds that the pair had incorrectly taken their oaths of office. On November 9, 2016, a judge ruled in favor of the HKG to disqualify the legislators-elect, noting that he would have reached the same decision even if the NPCSC had not issued its interpretation two days prior. In Hong Kong, prominent legal scholars, the Bar Association, and the Law Society all characterized the interpretation as unnecessary and voiced concern that the preemptive issuance of the interpretation might cause reputational harm to Hong Kong’s court system. The NPCSC interpretation was only the fifth such action since the Hong Kong SAR’s inception in 1997, but the first such interpretation issued while a relevant case was pending before the Hong Kong courts.

The two legislators-elect in question, Yau Wai-ching and Sixtus Leung of the Youngspiration political party, unsuccessfully appealed their disqualification in the High Court; the Court of Final Appeals is scheduled to hear their second appeal in August 2017. In December 2016, the HKG filed judicial review petitions against four additional pro-democracy legislators, alleging that the ways in which they took their respective oaths of office were illegal under the NPCSC Basic Law interpretation and demanding that the four be disqualified from serving the remainder of their four-year legislative terms. The Court of First Instance heard the cases in March 2017, but a verdict has not yet been released.

From October-December 2015, five men working in Hong Kong’s publishing industry disappeared from Hong Kong, Thailand, and Mainland China in what appears to be the most serious breach of the “one country, two systems” policy since 1997. The British Foreign Secretary noted that the disappearances constituted a “serious breach” of the 1984 Sino-British Joint Declaration. In July 2016, Causeway Bay Books manager Lam Wing-kee alleged that he was detained by Mainland authorities in Mainland China for delivering books illegally to the Mainland. Lam also discussed the alleged abduction from Hong Kong of his colleague Lee Bo, a dual citizen of Hong Kong and the United Kingdom. Although Lee later denied he was abducted from Hong Kong, Lam’s statements confirmed for many observers that the Central Government had bypassed Hong Kong law enforcement agencies to pursue an individual inside Hong Kong for political reasons in contravention of the Basic Law. The Hong Kong government said it would engage Central Government authorities to improve the notification mechanism governing cross-border cases.

In January 2017, Mainland billionaire Xiao Jianhua departed Hong Kong for Mainland China under mysterious circumstances. Hong Kong authorities confirmed that they received a request for assistance from Xiao's family to locate Xiao, and then later reported that the family withdrew the request. Some facts of Xiao's case are still unknown, but the case has raised concerns among observers due to some possible parallels to the booksellers' cases.

The Hong Kong judiciary also continues to adjudicate cases related to the 2014 "Occupy Central" protests. Recent sentences fell within the judiciary's sentencing guidelines:

- In May 2016, the District Court found pro-democracy activist Ken Tsang guilty of resisting arrest and assaulting a police officer, and sentenced him to five weeks imprisonment, which he began serving in March 2017.
- In July 2016, a Hong Kong court convicted three "Occupy Central" student leaders of illegal assembly, with the sentences ranging from 80 hours of community service to three weeks in prison.
- In February 2017, the District Court convicted seven police officers of assaulting Ken Tsang during his arrest, with each receiving two-year jail sentences.

In late March 2017, the police arrested and formally charged nine other "Occupy Central" activists with offenses that include creating a public nuisance, inciting a public nuisance, and inciting others to incite a public nuisance. Two currently seated Legislative Council members are among the accused. On the same day, the police also forcibly retired and arrested a former police superintendent for violent actions taken during Occupy-related protests in 2014.

Hong Kong courts also continue to review cases related to the February 2016 Lunar New Year riots in the Mong Kok neighborhood, during which more than 120 people, including 90 police officers, suffered injuries. Police arrested more than 60 people and charged over 30 people with rioting. In December 2016, two men were found guilty of assaulting police and received three-month prison sentences. Other cases related to the riots await hearings, including the cases against activists Ray Wong and Edward Leung, co-conveners of the localist group Hong Kong Indigenous.

Development of Hong Kong democratic institutions: In September 2016, Hong Kong residents elected representatives to the 70-member Legislative Council, whose members serve a four-year term. A record 2.2 million Hong Kong residents voted, or over 58 percent of eligible voters, and the election was conducted in a manner consistent with the Basic Law. Pro-establishment candidates won 40 of 70 Legislative Council seats, while pan-democratic candidates won 30, a three-seat increase over the 27 seats the opposition camp held from 2012 to 2016. The structure of Hong Kong's Legislative Council elections favors the maintenance of an establishment majority through a complex mix of "functional" constituencies representing certain sectors by trade or by profession, along with more standard "geographic" constituencies elected by popular vote.

The government's Electoral Affairs Committee received approximately 1,200 petitions about election misconduct following the conclusion of the Legislative Council elections. The highest profile petitions sought judicial review of the disqualification, prior to the election, of two pro-independence candidates. The disqualified candidates contend that a new, hastily inserted requirement in the registration process, which required prospective candidates to sign a Confirmation Form that included a pledge that Hong Kong is an inalienable part of the People's Republic of China, was not instituted in accordance with Hong Kong law. The petitioners also argued that they were illegally disqualified from standing for election despite signing the form and fulfilling all other candidate requirements. These cases are still pending in the courts.

In December 2017, roughly 106,000 Hong Kong residents across a variety of sectors elected the approximately 1,200 members of the Chief Executive Election Committee. These committee members represented industrial, commercial, financial, professional, labor, social service, religious, grassroots, and political sectors. Many sub-sectors chose their committee members through elections within their respective professional memberships, although some other members were elected unopposed, especially from the industrial, commercial, and financial sectors.

In March 2017, the Chief Executive Election Committee members, via secret ballot, chose former Chief Secretary for Administration Carrie Lam to serve as Hong Kong's next leader, starting July 1. Lam earned 777 votes, former Financial Secretary John Tsang earned 365 votes, and retired judge Woo Kwok-hing earned 21 votes. Tsang had topped public popularity polls in the lead-up to the election, but the Central Government tapped Lam as its favored candidate. The disparity between public popularity and popularity within the Election Committee elicited public dissatisfaction about the Chief Executive election system, prescribed by the Basic Law and Annex I thereto, under which few Hong Kong residents are able to directly participate in choosing their top leader. The outcome also focused public attention on the Central Government's various efforts to influence the voting outcome, and led to increased public concern about the Central Government's degree of commitment to Hong Kong's autonomy.

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2. Ukraine

The United States continued its support in 2017 for Ukraine's sovereignty, political independence, unity, and territorial integrity within its internationally recognized borders. The United States maintained the position affirmed in UN General Assembly Resolution 68/262 (2014) that Crimea and all of eastern Ukraine remain part of Ukraine. See *Digest 2014* at 345-46 for discussion of Resolution 68/262.

On March 16, 2017, the third anniversary of the illegitimate referendum on Crimea orchestrated by Russia, the State Department issued a press statement reaffirming the commitment of the United States to Ukrainian sovereignty and territorial integrity. The press statement follows and is available at <https://www.state.gov/r/pa/prs/ps/2017/03/268482.htm>.

Three years ago, Russia seized and occupied Crimea. Russia then staged an illegitimate referendum in which residents of Crimea were compelled to vote while heavily armed foreign forces occupied their land. The United States does not recognize Russia's "referendum" of March 16, 2014, nor its attempted annexation of Crimea and continued violation of international law. We once again reaffirm our commitment to Ukraine's sovereignty and territorial integrity.

Over the past three years, Russian occupation "authorities" in Crimea have engaged in a campaign to suppress dissent. In Russian-occupied Crimea, human rights monitors have documented enforced disappearances, extrajudicial killings, torture and punitive psychiatric hospitalizations. Crimean Tatars, ethnic Ukrainians, pro-Ukrainian activists, and independent journalists have been subjected to politically motivated prosecution and face ongoing repression.

Russian occupation “authorities” have silenced and forced the closure of nongovernmental organizations and independent media and have consistently denied international observers access to the peninsula. We call on Russia to cease its attempts to suppress freedom of expression, peaceful assembly, association, and religion.

Crimea is a part of Ukraine. The United States again condemns the Russian occupation of Crimea and calls for its immediate end. Our Crimea-related sanctions will remain in place until Russia returns control of the peninsula to Ukraine.

On April 23, 2017, the State Department issued a readout of a call on that day by Secretary of State Rex Tillerson with Ukrainian President Petro Poroshenko to discuss relations with Russia. The readout is available at <https://www.state.gov/r/pa/prs/ps/2017/04/270398.htm> and includes the following:

Secretary Tillerson phoned Ukrainian President Petro Poroshenko today to discuss his recent trip to Moscow and his message to the Russian leadership that, although the United States is interested in improving relations with Russia, Russia’s actions in eastern Ukraine remain an obstacle. The Secretary emphasized the importance of Ukraine’s continued progress on reform and combating corruption.

The Secretary accepted condolences from President Poroshenko on the death today of a U.S. member of the Organization for Security and Cooperation in Europe (OSCE) Special Monitoring Mission (SMM). The leaders agreed that the OSCE SMM has played a vital role in its role of monitoring the Minsk agreements designed to bring peace to eastern Ukraine, and that this tragic incident makes clear the need for all sides—and particularly the Russian-led separatist forces—to implement their commitments under the Minsk Agreements immediately.

Secretary Tillerson reiterated the United States’ firm commitment to Ukraine’s sovereignty and territorial integrity and confirmed that sanctions will remain in place until Russia returns control of the Crimean peninsula to Ukraine and fully implements its commitments in the Minsk agreements.

On December 7, 2017, Secretary Tillerson delivered remarks at an OSCE ministerial plenary session in which he emphasized the importance of the Minsk commitments. Secretary Tillerson’s remarks are excerpted below and available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/12/276319.htm>.

* * * *

Thank you for the opportunity to address this body. The OSCE is an indispensable pillar of our common security architecture that bolsters peace and stability in Europe and Eurasia. Of all the challenges confronting the OSCE today, none is more important or vexing than the situation in Ukraine. The United States is committed to Ukraine's sovereignty, independence, and territorial integrity within its internationally recognized borders. We call for full implementation of the Minsk agreements. We will never accept Russia's occupation and attempted annexation of Crimea. Crimea-related sanctions will remain in place until Russia returns full control of the peninsula to Ukraine.

In eastern Ukraine, we join our European partners in maintaining sanctions until Russia withdraws its forces from the Donbass and meets its Minsk commitments. While Ukraine is taking steps to abide by these agreements—and it must continue to do so—Russia is not. More civilians were killed in 2017 than in 2016. In November, ceasefire violations in Donetsk and Luhansk were up 60 percent. We should be clear about the source of this violence: Russia is arming, leading, training, and fighting alongside anti-government forces. We call on Russia and its proxies to end its harassment, intimidation, and its attacks on the OSCE Special Monitoring Mission. We honor the sacrifice of Joseph Stone, an American paramedic killed in April while on patrol, and commend the bravery and commitment of the SMM monitors serving in the field today. We call on all the OSCE to implement and abide by the organization's principles. We must respect the right of every state to choose its own political future. Where protection for human rights is weak, stability becomes even more difficult to maintain and democratic and economic progress is stalled, if not put under threat.

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3. Georgia

On April 7, 2017, the State Department issued a statement condemning as illegitimate the elections and referendum held in the territories of South Ossetia and Abkhazia in Georgia. The statement, available at <https://www.state.gov/r/pa/prs/ps/2017/04/269629.htm>, follows:

The United States condemns the decision to hold a referendum on April 9 regarding the amendment of South Ossetia's constitutional name to the Republic of South Ossetia-Alania. We also condemn and do not recognize the results of the illegitimate elections conducted in Abkhazia on March 12 and March 26 or the election planned for April 9 in South Ossetia.

These illegitimate elections and referenda are being conducted in Georgian territory without the consent of the government of Georgia. The United States fully supports the territorial integrity of Georgia and its sovereignty within its internationally recognized borders. Our position on Abkhazia and South Ossetia is clear and consistent. These regions are integral parts of Georgia.

On August 9, 2017, the State Department issued a further statement urging Russia to respect Georgia's sovereignty and territorial integrity. The statement is available at <https://www.state.gov/r/pa/prs/ps/2017/08/273312.htm>, and includes the following:

The United States views the visit of President Putin to the Russian occupied Georgian territory of Abkhazia as inappropriate and inconsistent with the principles underlying the Geneva International Discussions, to which Russia is a party. The United States fully supports Georgia's sovereignty and territorial integrity within its internationally recognized borders and rejects Russia's recognition of Abkhazia and South Ossetia. The United States urges Russia to withdraw its forces to pre-war positions per the 2008 ceasefire agreement and reverse its recognition of the Georgian regions of Abkhazia and South Ossetia.

4. Spain

On October 27, 2017, the State Department issued a press statement in support of Spain's territorial integrity in response to the movement for Catalanian independence. The statement is available at <https://www.state.gov/r/pa/prs/ps/2017/10/275136.htm> and includes the following:

The United States enjoys a great friendship and an enduring partnership with our NATO Ally Spain. Our two countries cooperate closely to advance our shared security and economic priorities. Catalonia is an integral part of Spain, and the United States supports the Spanish government's constitutional measures to keep Spain strong and united.

5. Iraq

On September 29, 2017, Secretary Tillerson issued a statement on the Kurdistan Regional Government's unilateral referendum on the status of Kurdistan, held on September 25. The statement is available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/09/274522.htm>, and appears below.

* * * *

The United States does not recognize the Kurdistan Regional Government's unilateral referendum held on Monday.

The vote and the results lack legitimacy and we continue to support a united, federal, democratic and prosperous Iraq.

We remain concerned about the potential negative consequences of this unilateral step. Prior to the vote, we worked with both the KRG and the central government in Baghdad to pursue a more productive framework and to promote stability and prosperity for the people of the Kurdistan region. These aspirations, ultimately, cannot be advanced through unilateral measures such as this referendum.

We urge calm and an end to vocal recriminations and threats of reciprocal actions. We urge Iraqi Kurdish authorities to respect the constitutionally-mandated role of the central government and we call upon the central government to reject threats or even allusion to possible use of force. The United States asks all parties, including Iraq's neighbors, to reject unilateral actions and the use of force.

The fight against ISIS/ Daesh is not over, and extremist groups are seeking to exploit instability and discord. We urge our Iraqi partners to remain focused on defeating ISIS/Daesh.

We encourage all sides to engage constructively in a dialogue to improve the future of all Iraqis.

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6. Zimbabwe

On November 21, 2017, the State Department issued a press statement by Secretary Tillerson marking the historic transition in Zimbabwe. Secretary Tillerson's statement is excerpted below and available at

<https://www.state.gov/secretary/20172018tillerson/remarks/2017/11/275839.htm>.

* * * *

With the resignation of Robert Mugabe, today marks an historic moment for Zimbabwe. We congratulate all Zimbabweans who raised their voices and stated peacefully and clearly that the time for change was overdue. Zimbabwe has an extraordinary opportunity to set itself on a new path.

The United States strongly supports a peaceful, democratic, and prosperous Zimbabwe. As events unfold, we continue to call on all parties to exercise restraint and respect constitutional and civilian order.

We urge Zimbabwe's leaders to implement much-needed political and economic reforms for a more stable and promising future for the Zimbabwean people. We will continue to support the people of Zimbabwe as these reforms move forward.

Whatever short-term arrangements the government may establish, the path forward must lead to free and fair elections. The people of Zimbabwe must choose their own leaders.

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7. Jerusalem

On December 6, 2017, the President issued Proclamation 9683, “Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United State Embassy to Israel to Jerusalem.” 82 Fed. Reg. 58,331 (Dec. 11, 2017). The Proclamation recognizes Jerusalem as the capital of the State of Israel, acknowledging both Jerusalem’s role as the seat of Israel’s government and the will of the U.S. Congress expressed in the Jerusalem Embassy Act, but does not take a position on final status issues. The specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties. The Proclamation states that recognition of Jerusalem as Israel’s capital and moving the U.S. Embassy from Tel Aviv to Jerusalem do not reflect a departure from the U.S. commitment to Mid-East peace. For discussion of the Mid-East Peace Process, see Chapter 17. Excerpts follow from the proclamation.

* * * *

The foreign policy of the United States is grounded in principled realism, which begins with an honest acknowledgment of plain facts. With respect to the State of Israel, that requires officially recognizing Jerusalem as its capital and relocating the United States Embassy to Israel to Jerusalem as soon as practicable.

The Congress, since the Jerusalem Embassy Act of 1995 (Public Law 104– 45) (the “Act”), has urged the United States to recognize Jerusalem as Israel’s capital and to relocate our Embassy to Israel to that city. The United States Senate reaffirmed the Act in a unanimous vote on June 5, 2017.

Now, 22 years after the Act’s passage, I have determined that it is time for the United States to officially recognize Jerusalem as the capital of Israel. This long overdue recognition of reality is in the best interests of both the United States and the pursuit of peace between Israel and the Palestinians.

Seventy years ago, the United States, under President Truman, recognized the State of Israel. Since then, the State of Israel has made its capital in Jerusalem—the capital the Jewish people established in ancient times. Today, Jerusalem is the seat of Israel’s government—the home of Israel’s parliament, the Knesset; its Supreme Court; the residences of its Prime Minister and President; and the headquarters of many of its government ministries. Jerusalem is where officials of the United States, including the President, meet their Israeli counterparts. It is therefore appropriate for the United States to recognize Jerusalem as Israel’s capital.

I have also determined that the United States will relocate our Embassy to Israel from Tel Aviv to Jerusalem. This action is consistent with the will of the Congress, as expressed in the Act.

Today’s actions—recognizing Jerusalem as Israel’s capital and announcing the relocation of our embassy—do not reflect a departure from the strong commitment of the United States to facilitating a lasting peace agreement. The United States continues to take no position on any final status issues. The specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties. The United States is not taking a position on boundaries or borders.

Above all, our greatest hope is for peace, including through a two-state solution, if agreed to by both sides. Peace is never beyond the grasp of those who are willing to reach for it. In the meantime, the United States continues to support the status quo at Jerusalem's holy sites, including at the Temple Mount, also known as Haram al Sharif. Jerusalem is today—and must remain—a place where Jews pray at the Western Wall, where Christians walk the Stations of the Cross, and where Muslims worship at Al-Aqsa Mosque.

With today's decision, my Administration reaffirms its longstanding commitment to building a future of peace and security in the Middle East. It is time for all civilized nations and people to respond to disagreement with reasoned debate—not senseless violence—and for young and moderate voices across the Middle East to claim for themselves a bright and beautiful future. Today, let us rededicate ourselves to a path of mutual understanding and respect, rethinking old assumptions and opening our hearts and minds to new possibilities. I ask the leaders of the Middle East—political and religious; Israeli and Palestinian; and Jewish, Christian, and Muslim—to join us in this noble quest for lasting peace.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim that the United States recognizes Jerusalem as the capital of the State of Israel and that the United States Embassy to Israel will be relocated to Jerusalem as soon as practicable.

* * * *

Secretary Tillerson issued a press statement on December 6, 2017 regarding the U.S. decision to recognize Jerusalem as Israel's capital and to relocate the U.S. embassy. The press statement, available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/12/276304.htm>, includes the following:

...[The] decision to recognize Jerusalem as Israel's capital aligns U.S. presence with the reality that Jerusalem is home to Israel's legislature, Supreme Court, President's office, and Prime Minister's office.

...The President decided today, as Congress first urged in the Jerusalem Embassy Act in 1995, and has reaffirmed regularly since, to recognize Jerusalem as the capital of Israel.

The State Department will immediately begin the process to implement this decision by starting the preparations to move the U.S. Embassy from Tel Aviv to Jerusalem.

On December 7, 2017, Acting Assistant Secretary of State for Near East Affairs David Satterfield held a briefing on the U.S. decision to recognize Jerusalem as the capital of Israel. The transcript of the briefing is excerpted below and available at <https://www.state.gov/r/pa/prs/ps/2017/12/276349.htm>.

* * * *

QUESTION: What country is Jerusalem in?

AMBASSADOR SATTERFIELD: The President recognized Jerusalem as the capital of the state of Israel.

QUESTION: Does that mean then that the U.S. Government officially recognizes that Jerusalem municipality lies within the state of Israel?

AMBASSADOR SATTERFIELD: There has been no change in our policy with respect to consular practice or passport issuance at this time, which is what I think you are raising.

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QUESTION: Hi, Assistant Secretary. Could I just put a finer point on it? The President said and you just said that Jerusalem is the capital of Israel. But he also said that the borders are yet ...

AMBASSADOR SATTERFIELD: The boundaries of sovereignty.

QUESTION: The boundaries of sovereignty.

AMBASSADOR SATTERFIELD: Border questions have not been addressed.

QUESTION: So what he's—so you're essentially saying that Jerusalem is the capital of Israel, but you're not saying that the entire municipality of Jerusalem falls into that capital?

AMBASSADOR SATTERFIELD: I will restate what the President said, which is we recognize Jerusalem as the capital of the state of Israel. We are not changing or taking a position on the boundaries of sovereignty in Jerusalem ... including geographic boundaries. And I will not elaborate beyond that ... except to note a further comment which the President made. Which is that we regard those issues—the specifics, the boundaries of sovereignty, borders—as a matter for permanent status or final status negotiations between the part[ies]. And I think that addresses just about everything that could fall in the basket you're raising.

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AMBASSADOR SATTERFIELD: I think the way the President presented it yesterday in his remarks and in the proclamation does a pretty good job of that, which is to say we're acknowledging a reality, something practical; Jerusalem is currently, historically, capital of Israel. That's the decision he announced.

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QUESTION: ... So what happens to the Palestinian population of East Jerusalem? Do they now become automatically Israeli citizens, would have full rights, and so on? What happens to 300,000 Palestinians?

AMBASSADOR SATTERFIELD: ...[T]he President's proclamation yesterday, his decision, have no impact on those issues. He is recognizing a practical reality. Jerusalem is the capital of Israel. And all of the other aspects—boundaries of sovereignty—we're not taking a position. It's for the sides to resolve.

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QUESTION: And can you just explain why now? Why did he make this decision now?

AMBASSADOR SATTERFIELD: Because December 4th was the trigger date for the next waiver required under the Jerusalem Act of '95. That was the proximate timing issue. Full stop.

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AMBASSADOR SATTERFIELD: The President believes taking this issue—that is the fact of U.S. recognition, acknowledgement of Jerusalem as the capital of Israel—an issue that's been pending out there since '95, since the act was initially passed—was appropriate to make and that it helps in the process to no longer have that issue, which is the U.S. acknowledgement of the simple fact that Jerusalem is the location of the supreme court, the Knesset, the president and the prime minister's residences, that that is a useful clearing of an issue that has been part of, grown as part of, this process for many decades.

QUESTION: So it's setting us up for what? To—if you're saying that that gets that out of the way and it's been a reality, how does that set the stage?

AMBASSADOR SATTERFIELD: The President and his peace team have been engaged, as you all know, for many months now in discussions with the two parties, with regional states, with other key actors, to try to advance a peace. This is not an easy process; it's a difficult one. But he believes this step assists in that process. I am not going to elaborate on that further.

* * * *

QUESTION: And one other question. Do you regard those portions of East Jerusalem that were occupied by Israel in 1967 as occupied territory?

AMBASSADOR SATTERFIELD: The decision of the President is to recognize Jerusalem as the capital of the state of Israel. The President has stated that that decision does not touch upon issues of boundaries, of sovereignty, or geographic borders. Full stop.

QUESTION: So it is still occupied territory, in your view?

AMBASSADOR SATTERFIELD: I have stated what the President's decision does and does not do.

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AMBASSADOR SATTERFIELD: ...[T]his decision had no impact on any issue other than the recognition or acknowledgment of Jerusalem as the capital of Israel.

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AMBASSADOR SATTERFIELD: ...[F]inal status negotiations are going to deal with those boundaries of sovereignty, border questions that the President spoke to as not addressed by his recognition. The President thought it was the right thing to do for the United States, after all these years, to acknowledge the fact, the reality, that Jerusalem is the seat of government of the state of Israel, the capital of the state of Israel. That's it.

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On December 8, 2017, Ambassador Nikki Haley, U.S. Permanent Representative to the United Nations, delivered a statement at the UN on the decision to recognize Jerusalem and relocate the U.S. Embassy. Excerpts of the statement follow, and the statement is available at <https://usun.state.gov/remarks/8206>.

* * * *

It's important to be clear about exactly what the President's decision does. The President has announced that the United States recognizes the obvious—that Jerusalem is the capital of Israel. He has also instructed the State Department to begin the process of relocating the U.S. Embassy from Tel Aviv to Jerusalem. That is what the President has done.

And this is what he has not done: The United States has not taken a position on boundaries or borders. The specific dimensions of sovereignty over Jerusalem are still to be decided by the Israelis and the Palestinians in negotiations. The United States has not advocated changing any of the arrangements at the Temple Mount/Haram al-Sharif. The President specifically called for maintaining the status quo at the holy sites.

Finally, and critically, the United States is not predetermining final status issues. We remain committed to achieving a lasting peace agreement. We support a two-state solution if agreed to by the parties.

Those are the facts of what was said and done this week. Now, there are a few more points that are central to the discussion of this issue.

Israel, like all nations, has the right to determine its capital city. Jerusalem is the home of Israel's parliament, president, prime minister, Supreme Court, and many of its ministries. It is simple common sense that foreign embassies be located there. In virtually every country in the world, U.S. embassies are located in the host country's capital city. Israel should be no different.

The United States took this step in full knowledge that it will raise questions and concerns. Our actions are intended to help advance the cause of peace. We must recognize that peace is advanced, not set back, when all parties are honest with each other. Our actions reflected an honest assessment of reality.

I understand the concern members have in calling this session. Change is hard. But we should never doubt what the truth can do. We should never doubt that when we face the truth, believe in the human spirit, and encourage each other, that peace can happen.

To those who have good faith concerns about the future of peace between the Israelis and the Palestinians, let me again assure you that the President and this administration remain committed to the peace process.

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On December 18, 2017, Ambassador Haley provided the U.S. explanation of vote after the U.S. veto of a draft Security Council resolution on Jerusalem. The explanation of vote follows and is available at <https://usun.state.gov/remarks/8222>.

* * * *

I have been the proud Representative of the United States at the United Nations for nearly a year now. This is the first time I have exercised the American right to veto a resolution in the Security Council. The exercise of the veto is not something the United States does often. We have not done it in more than six years. We do it with no joy, but we do it with no reluctance.

The fact that this veto is being done in defense of American sovereignty and in defense of America's role in the Middle East peace process is not a source of embarrassment for us; it should be an embarrassment to the remainder of the Security Council.

As I pointed out when we discussed this topic 10 days ago, I will once again note the features of the President's announcement on Jerusalem that are most relevant here. The President took great care not to prejudge final status negotiations in any way, including the specific boundaries of Israeli sovereignty in Jerusalem. That remains a subject to be negotiated only by the parties. That position is fully in line with the previous Security Council resolutions.

The President was also careful to state that we support the status quo regarding Jerusalem's holy sites, and we support a two-state solution if that's what the parties agree to. Again, these positions are fully consistent with the previous Security Council resolutions.

It is highly regrettable that some are trying to distort the President's position to serve their own agendas.

What is troublesome to some people is not that the United States has harmed the peace process—we have, in fact, done no such thing. Rather, what is troublesome to some people is that the United States had the courage and honesty to recognize a fundamental reality. Jerusalem has been the political, cultural, and spiritual homeland of the Jewish people for thousands of years. They have had no other capital city. But the United States' recognition of the obvious—that Jerusalem is the capital and seat of the modern Israeli government—is too much for some.

* * * *

Now today, buried in diplomatic jargon, some presume to tell America where to put our embassy. The United States' has a sovereign right to determine where and whether we establish an embassy. I suspect very few Member States would welcome Security Council pronouncements about their sovereign decisions. And I think of some who should fear it.

It's worth noting that this is not a new American position. Back in 1980, when Jimmy Carter was the American President, the Security Council voted on Resolution 478, which called upon diplomatic missions to relocate from Jerusalem. The United States did not support Resolution 478.

In his remarks, then-Secretary of State Ed Muskie said the following: "The draft resolution before us today is illustrative of a preoccupation which has produced this series of unbalanced and unrealistic texts on Middle East issues."

Specifically, regarding the provision on diplomatic missions in Jerusalem, Secretary Muskie said this: "In our judgment, this provision is not binding. It is without force. And we reject it as a disruptive attempt to dictate to other nations. It does nothing to promote a resolution of the difficult problems facing Israel and its neighbors. It does nothing to advance the cause of peace."

That was in 1980. It is equally true today. The United States will not be told by any country where we can put our embassy.

* * * *

Today, for the simple act of deciding where to put our embassy, the United States was forced to defend its sovereignty. The record will reflect that we did so proudly. Today, for acknowledging a basic truth about the capital city of Israel, we are accused of harming peace. The record will reflect that we reject that outrageous claim.

For these reasons, and with the best interests of both the Israeli and the Palestinian people firmly in mind, the United States votes no on this resolution.

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Ambassador Haley delivered a further statement before a UN General Assembly vote on Jerusalem on December 21, 2017, which is excerpted below and available at <https://usun.state.gov/remarks/8232>.

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The arguments about the President's decision to move the American embassy to Jerusalem have already been made. They are by now well known. The decision was in accordance [with] U.S. law dating back to 1995, and its position has been repeatedly endorsed by the American people ever since. The decision does not prejudice any final status issues, including Jerusalem's boundaries. The decision does not preclude a two-state solution, if the parties agree to that. The decision does nothing to harm peace efforts. Rather, the President's decision reflects the will of the American people and our right as a nation to choose the location of our embassy. There is no need to describe it further.

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Cross References

Cuba Migration Policy, **Ch. 1.B.3.**

Law Enforcement MOU with Cuba, **Ch. 3.A.3.**

Kosovo Extradition Treaty, **4.A.1.**

Taiwan (Lin v. U.S.), **Ch. 5.C.3.**

Work of the ILC on succession of states in respect of state responsibility, **Ch. 7.C.1.**

Cuba claims talks, **Ch. 8.A.**

Libya Claims, **Ch 8.D.**

Relations with Russia, **Ch. 10.D.1.**

Cuba maritime boundary agreements, **Ch. 12.A.4.a.**

Cuba Search and Rescue (SAR) agreement, **Ch. 12.A.5.a.**

Cuba oil spills and marine pollution agreement, **Ch. 13.B.4.**

Entry into force of the Apostille Convention for the Republic of Kosovo, **Ch. 15.A.4.**

Cuba, **Ch. 16.A.3.**

Russia sanctions, **Ch. 16.A.7.**

Middle East peace process, **Ch. 17.A.**

South Sudan, **Ch. 17.B.5.**

Montenegro joins NATO, **Ch. 18.A.2.a.**

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 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, 1605B, and 1607, have been the subject of significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of the 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 2017 in which the United States filed a statement of interest or participated as *amicus curiae*.

1. Application of the FSIA in Enforcement of ICSID Arbitration Awards

As discussed in *Digest 2016* at 390-96, the United States submitted an *amicus* brief in *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707 (2d. Cir.). The U.S. Court of Appeals for the Second Circuit issued its decision on July 11, 2017, holding that the FSIA provides the sole basis for subject matter jurisdiction over actions to enforce ICSID awards against a foreign sovereign and that, therefore, the procedures for service of process contained in the FSIA govern such actions. The decision refers extensively to the U.S. *amicus* brief. Excerpts follow from the decision.

* * * *

This appeal requires us to reconcile the ICSID Convention and Section 1650a with the FSIA, so that we may determine the appropriate procedures for converting an ICSID award into a federal judgment. The parties in this appeal each advocate for one of the two approaches adopted by the

district courts. Mobil supports the approach adopted by district courts in the Southern District and applied by the District Court here. Mobil argues that federal courts may enter judgment on ICSID awards summarily, according to the procedures used in the state courts of the forum state—here, on an *ex parte* petition by the award-creditor. Mobil contends, and the District Court ruled, that this approach best accords with the provisions of the ICSID Convention precluding award debtors from raising substantive challenges to the award in domestic courts.

Venezuela and the United States as *amicus curiae*, in contrast, endorse the approach adopted by district courts in the District of Columbia and in the Eastern District of Virginia. Venezuela and the United States would require that award creditors file a complaint seeking entry of judgment on the award; serve the complaint on the foreign sovereign award debtor; and comply with the venue requirements of the FSIA, with these three steps conferring jurisdiction over the foreign sovereign in the federal district court and permitting that court to enter a valid judgment. This procedure would not necessarily permit a substantive challenge to a duly authenticated award, but it would allow the defendant sovereign to appear and be heard before entry of judgment.

Resolution of this dispute requires us to answer whether Section 1650a provides an independent source of jurisdiction over a foreign sovereign award debtor or whether the later enacted FSIA offers the sole basis for federal courts' jurisdiction over foreign sovereigns. It also requires us to consider whether, even if the FSIA provides the sole source of jurisdiction over foreign sovereigns, Section 1650a empowers courts asked to enforce ICSID awards to modify the FSIA's procedural requirements and adopt state court summary procedures for enforcing judgments in each state in which enforcement is sought.

For the reasons set forth below, we agree with Venezuela and the United States as *amicus curiae* that the FSIA controls actions to enforce ICSID awards. We conclude that the FSIA provides the sole source of jurisdiction—subject matter and personal—for federal courts over actions brought to enforce ICSID awards against foreign sovereigns; that the FSIA's service and venue requirements must be satisfied before federal district courts may enter judgment on such awards; and that Section 1650a does not contemplate "recognition" of an ICSID award as a proceeding separate from "enforcement." Although the FSIA provides subject matter jurisdiction over this proceeding, the FSIA's service and venue requirements have not been satisfied here. Accordingly, the District Court lacked personal jurisdiction over Venezuela. The District Court's Rule 60(b) order must therefore be reversed and its judgment must be vacated.

I. Subject matter jurisdiction

Mobil argues that Section 1650a provides its own independent grant of subject matter jurisdiction when it states that an ICSID award "shall create a right arising under a treaty of the United States" and provides federal district courts with "exclusive jurisdiction" over such action. Appellees' Br. at 40 (quoting 22 U.S.C. § 1650a(a)(b))(emphasis omitted). Mobil further argues that ICSID enforcement actions are exempted from the requirements of the later enacted FSIA by the reservation in FSIA Section 1604 that its provisions were adopted "[s]ubject to existing international agreements to which the United States is a party." *Id.* at 41–42 (quoting 28 U.S.C. § 1604) (emphasis omitted).

Venezuela does not contest that Section 1650a could serve as a grant of subject matter jurisdiction over some actions to enforce ICSID awards; rather, it argues that Section 1650a cannot confer subject matter jurisdiction on federal courts when the ICSID award debtor is a foreign sovereign. In such a case, it urges us to conclude, the FSIA takes precedence. The ICSID

Convention is not, it argues, one of the “existing international agreements” exempted from the FSIA’s operation. 28 U.S.C. § 1604.

The District Court found that, if the FSIA applied to this case, subject matter jurisdiction could arise from two exceptions to sovereign immunity found in the FSIA: the implied waiver exception and the arbitration exception.... See 28 U.S.C. §§ 1605(a)(1), (6). On this point, we are in accord with the District Court. Indeed, our Court recently held as much in *Blue Ridge Investments*, 735 F.3d 72. We disagree, however, with Mobil’s assertion that Section 1650a also provides a grant of subject matter jurisdiction to the federal courts over award enforcement actions against foreign sovereign award debtors, and that the FSIA did not abrogate that grant (if ever Section 1650a embodied such a grant). We reject this argument primarily for two reasons.

First, the Supreme Court’s decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), suggests that, even if Section 1650a once granted subject matter jurisdiction, after passage of the FSIA, Section 1650a cannot fairly be read to serve as an independent source of subject matter jurisdiction over a foreign sovereign. The Supreme Court’s emphatic and oft repeated declaration in *Amerada Hess* that the FSIA is the “sole basis for obtaining jurisdiction over a foreign state in our courts,” *id.* at 434; see also *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (quoting *Amerada Hess*, 488 U.S. at 434 35); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (same), is difficult to reconcile with an approach that preserves the potential of Section 1650a to serve as an alternative. Recently, the Supreme Court emphasized that the FSIA is “comprehensive”—a term the Court has used “often and advisedly to describe the Act’s sweep”—meaning that “after 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.” *NML Capital, Ltd.*, 134 S. Ct. at 2255 56 (alterations and citation omitted). We have similarly reiterated our understanding of the categorical nature of this declaration in *Kirschenbaum v. 650 Fifth Avenue and Related Properties*, 830 F.3d 107, 122 (2d Cir. 2016) (“The FSIA provides the exclusive basis for obtaining subject matter jurisdiction over a foreign state.”), and *Blue Ridge Investments*, 735 F.3d at 83 (“The only source of subject matter jurisdiction over a foreign sovereign or its instrumentalities in the courts of the United States is the FSIA . . .”). The comprehensiveness of the FSIA’s framework suggests that Section 1650a should not be read as providing an independent basis for courts to exercise subject matter jurisdiction over foreign sovereigns, or, at the very least, should no longer be read as providing such a basis, even if it once did.

Second, although the question is not free from doubt, we are not persuaded by Mobil’s argument that FSIA Section 1604’s carve out for “existing international agreements” includes the Convention. In *Amerada Hess*, the Supreme Court explained that international agreements that predate the FSIA are excluded from the Act’s reach only when they expressly conflict with the Act’s immunity provisions. See 488 U.S. at 442 (explaining that Section 1604’s carve out “applies when international agreements *expressly conflict* with the *immunity* provisions of the FSIA” (emphasis added)(alterations and citation omitted)); see also H.R. Rep. No. 94 1487, at 6616 (“In the event an international agreement *expressly conflicts* with [the FSIA], the international agreement would control. . . . [But] the international agreement would control *only where a conflict was manifest*.” (emphases added)). Because actions to enforce ICSID awards rendered against foreign sovereigns fall neatly into the FSIA’s specific exemptions from immunity under Sections 1605(a)(1) (waiver) and (6) (arbitration), see *Blue Ridge Invs.*, 735 F.3d at 83 86, we see no conflict between the FSIA’s immunity provisions and the ICSID

Convention or Section 1650a that would trigger Section 1604's carve out as construed by the Supreme Court.

Section 1650a's legislative history also undermines the argument that FSIA Section 1604 exempts the ICSID Convention and Section 1650a from the FSIA's jurisdictional provisions. The legislative record strongly suggests that, when Congress enacted Section 1650a in 1966, a decade before it passed the FSIA, it contemplated that actions against foreign sovereigns under Section 1650a would remain subject to sovereign immunity. Thus, during his appearance before the House Committee on Foreign Affairs, Deputy Legal Adviser at the Department of State Andreas Lowenfeld testified tellingly: "Basically what this convention says is that the district court shall have jurisdiction over the subject matter. As to whether it has jurisdiction over a party, there is nothing in the convention that will change the defense of sovereign immunity." H.R. 15785 Hearing, at 18 (statement of Andreas F. Lowenfeld, Deputy Legal Advisor, Dep't of State). He elaborated that if, for example, "someone wants to sue Jersey Standard in the United States, on an award, no problem. If somebody wants to sue Peru or the Peruvian Oil Institute, why it would depend on whether in the particular case that entity would or would not be entitled to sovereign immunity." *Id.* (paragraph break omitted).

His testimony is consonant with the venerable canon of construction that Congress is presumed to legislate with familiarity of the legal backdrop for its legislation. *See Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."). We are aware of no contrary textual or record indication that Congress intended to exclude proceedings brought under Section 1650a from the ordinary operation of sovereign immunity, either as the principle of immunity stood before or after the enactment of the FSIA.

The Supreme Court's consideration of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, in *Amerada Hess* is also instructive. There, the Court rejected the argument that the ATS—which, like Section 1650a, predates the FSIA—continued to confer subject matter jurisdiction over a foreign sovereign after the FSIA's enactment. *Amerada Hess*, 488 U.S. at 436–38. To the extent the ATS ever provided a source of subject matter jurisdiction over foreign sovereigns, the *Amerada Hess* Court found it could no longer confer that authority after the passage of the FSIA, nor did Congress's failure to repeal the ATS when it enacted the FSIA counsel otherwise. *Id.* at 437. The Court viewed as particularly significant in this regard the fact that the ATS "does not distinguish among classes of defendants," and could therefore continue to have "the same effect after the passage of the FSIA as before with respect to defendants *other than foreign states*." *Id.* at 438 (emphasis added). In other words, any conferral of subject matter jurisdiction stemming from the ATS would be unaffected as to non-sovereign defendants, but the ATS could not confer subject matter jurisdiction over foreign sovereigns after passage of the FSIA.

The same is true here. Section 1650a does not "distinguish" among classes of private defendants: it states broadly that "[t]he district courts of the United States . . . shall have exclusive jurisdiction over actions and proceedings" to enforce ICSID awards. 22 U.S.C. § 1650a(b). Section 1650a's grant of subject matter jurisdiction over private defendants may remain intact; but, after passage of the FSIA, Section 1650a no longer confers subject matter jurisdiction over foreign sovereigns. The ATS and Section 1650a, of course, enacted two centuries apart and addressing very different concerns, have scant overlap in most respects. Nonetheless, the Supreme Court's reasoning about the interrelationship of the FSIA and the ATS as set forth in

Amerada Hess provides a useful template for interpreting the FSIA's comprehensive framework for sovereign immunity in the ICSID award context.

Combined with the legislative history that suggests that Congress expected actions under Section 1650a to be governed by sovereign immunity, *Amerada Hess* in its holding as well as in its language confirms our decision that Section 1650a does not constitute an independent grant of subject matter jurisdiction over a foreign sovereign. The FSIA provides the sole basis for subject matter jurisdiction over actions in federal court to enter judgment against foreign sovereigns on ICSID awards.

II. Personal jurisdiction

A. Scope of the FSIA

Having concluded that the FSIA provides the sole basis for subject matter jurisdiction in cases brought to enforce ICSID awards, we must now determine whether the FSIA also controls the procedures by which such actions must be brought against a foreign sovereign award debtor. We conclude that it does.

At Mobil's urging, the District Court concluded that the FSIA's service and venue requirements had no bearing on Mobil's application for enforcement. The court first observed that the FSIA "leaves congressional intent unclear" regarding whether its service of process and venue requirements apply in the ICSID award context. *Mobil Cerro Negro*, 87 F. Supp. 3d at 593. Having identified this ambiguity, the court then turned to its own interpretation of the "objectives of the ICSID Convention and of Congress" in passing Section 1650a to determine whether the summary procedures invoked by Mobil would be appropriate. *Id.* at 599.

We find no such ambiguity in the FSIA's text. As the Supreme Court has advised, "[a]lthough a major function of the [FSIA] . . . is to regulate jurisdiction of federal courts over cases involving foreign states, the Act's purpose is to set forth comprehensive rules governing sovereign immunity," including "procedures for commencing lawsuits against foreign states." *Verlinden*, 461 U.S. at 495 n.22 (internal quotation marks and citation omitted); *see also* H.R. Rep. No. 94 1487, at 6606 ("[T]his bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining *in personam* jurisdiction over, a foreign state . . ."). The Act was intended to "provide when and how parties can maintain a lawsuit against a foreign state." H.R. Rep. No. 94 1487, at 6604. The FSIA prescribes comprehensive procedures for bringing suit against foreign sovereigns, including suit for "recognition and enforcement of arbitral awards," 28 U.S.C. § 1605(a)(6), as to which the foreign state may be found to have waived the immunity otherwise conferred. Thus it is not Section 1650a's silence on enforcement of ICSID awards that guides our reasoning. Rather, we accord conclusive weight to the affirmative and sweeping provisions in the FSIA's comprehensive statutory scheme and the observation that the FSIA makes no provision for summary procedures in any instance.

In fact, the FSIA explicitly contemplates the exercise of federal court jurisdiction over actions to enforce international arbitral awards against foreign sovereigns under the exemption from immunity provided by Section 1605(a)(6). And nowhere in the FSIA did Congress expressly exempt actions against foreign sovereigns under Section 1605(a)(6) from the statute's service or venue requirements. *See* 28 U.S.C. §§ 1391(f), 1608. Indeed, nowhere in the FSIA did Congress provide an expedited procedure to enter a federal judgment against a foreign sovereign in *any* circumstance. *Cf.* H.R. Rep. No. 94 1487, at 6612 (noting "sections 1330(b) [personal jurisdiction provision], 1608 [service of process provision], and 1605 1607 [foreign sovereign immunity provisions] are all carefully interconnected"). We simply see no reason to conclude

that an action to enforce an ICSID award, which is comfortably encompassed within Section 1605(a)(6), would be exempt from the FSIA's procedural requirements.

B. Conflict with the ICSID Convention or Section 1650a

The District Court rejected this straightforward application of the FSIA's service and venue provisions, in part, based on its concern that requiring compliance with these provisions of the FSIA "would bring the FSIA into grave tension with the objectives of the ICSID Convention and of Congress." *Mobil Cerro Negro*, 87 F. Supp. 3d at 599. It thus endorsed instead the adoption of New York state procedures, which it viewed as more consistent with "Congress's expectation" that ICSID award recognition "would be automatic and not subject to contest." *Id.* at 600.

At the outset, we note that, in interpreting the ICSID Convention and its enabling act, we owe particular deference to the interpretation favored by the United States. *Medellín v. Texas*, 552 U.S. 491, 513 (2008) ("It is . . . well settled that the United States' interpretation of a treaty is entitled to great weight." (internal quotation marks and citation omitted)). In its brief *amicus curiae*, the United States articulates its view that "the mechanics of enforcing ICSID awards are not and never were governed by treaty," U.S. Br. at 13, and that neither the Convention nor Section 1650a "requires or forbids any particular set of procedures," *id.* at 16. Instead, the ICSID Convention "reserves the means of enforcement to member states, which enforce awards in the same way that they enforce domestic judgments." *Id.* at 13.

We agree with the United States that the FSIA's requirements and the United States' obligations under the ICSID Convention do not stand in significant tension. As we have noted, the ICSID Convention contemplates treatment of an award "as if it were a final judgment of the courts of a constituent state." ICSID Convention art. 54. Article 54 affords ICSID arbitral awards the status of final state court judgments, and was included in the Convention at the insistence of the United States. *See Schreuer, Commentary*, at 1143. It does not, however, dictate the nature of the proceedings through which ICSID awards will be enforced in the United States.

The United States was faithful to this provision when it enacted Section 1650a, requiring the federal courts to accord ICSID awards "full faith and credit as if the award were a final judgment of . . . one of the several States." 22 U.S.C. § 1650a(a). The legislative history suggests that this provision was intended to immunize ICSID awards from substantive assault outside the ICSID tribunal. *See, e.g.,* Smith House Statement at 4 ("[A]n action would have to be brought on the award in a U.S. district court In such an enforcement action, the district court would be required to give full faith and credit to the arbitral award. Essentially, this means that district courts would be precluded from inquiring into the merits of the underlying controversy."). Requiring an enforcement action to comply with the FSIA does not contravene this mandate.

To require that a civil action be prosecuted to conclusion before entering judgment on an ICSID award will not relieve federal courts of the responsibility under the Convention and Section 1650a to enforce ICSID awards as final. *See* ICSID Convention art. 53(1) (providing that ICSID awards "shall not be subject to any appeal or to any other remedy except those provided for in [the] Convention"); 22 U.S.C. § 1650a(a) (providing that "pecuniary obligations imposed by [] an award . . . shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States"); *see also* Schreuer, *Commentary*, at 1139 41.

Litigation on actions to enforce awards need not be protracted. That the action might be referred to as “plenary” as opposed to “summary” does not portend a proceeding in which the court must entertain all manner of substantive defenses, or even defenses cognizable under the Federal Arbitration Act. Used in this context, the word “plenary” signals merely the need for commencing an action under Federal Rule of Civil Procedure 3, service of the complaint in compliance with Rule 4 (as modified by the FSIA), and the opportunity for the defendant sovereign to appear and file responsive pleadings. To initiate such an action, an ICSID award creditor may file a complaint in district court, detailing the terms of the award, establishing proper venue, and furnishing a certified copy of the award. After the complaint is filed and service effected, the award creditor may file a motion for judgment on the pleadings, for instance, or a motion for summary judgment. The ICSID award- debtor would be a party to the action and would be able to challenge the United States court’s jurisdiction to enforce the award—for instance, on venue grounds—but would not be permitted to make substantive challenges to the award.

Moreover, requiring compliance with the FSIA facilitates an enforcement regime for ICSID awards that has a greater prospect of consistency across the nation. The District Court discounted any need for uniformity of enforcement in the ICSID context, observing that each member state to the Convention will enforce awards according to different procedures. But in so reasoning, the District Court overlooked the Congressional intent, manifest in the enabling legislation’s history and text, to provide for uniform enforcement *within* the United States. Congress vested exclusive jurisdiction over enforcement of ICSID awards in the federal courts. *See* 28 U.S.C. § 1650a(b). Testimony given by the General Counsel of the Treasury before the Senate Committee on Foreign Relations reflects that in enacting Section 1650a, Congress was guided by a desire to provide a uniform enforcement procedure throughout the United States:

[T]he proposed legislation states that district courts of the United States shall have exclusive jurisdiction over actions to enforce arbitral awards. This provision is also based on article 54(1) of the convention, which states that ...arbitral awards may be enforced in or through the Federal courts. The United States suggested this provision in order to be able to provide in the United States for a *uniform procedure* for enforcement of awards rendered pursuant to the convention.

S. Rep. No. 89 1374, at 17 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2617, 2619 (emphasis added). Calling upon different state procedures in each of the states in which district courts sit at the entry of judgment phase would actively undermine the goal of establishing a nationally uniform procedure for enforcement of ICSID awards. Indeed, such a regime could be expected to achieve the opposite result, in which each state could potentially require a distinct procedure. Applying the FSIA will facilitate national uniformity in procedure. Consistency as to enforcement seems to us importantly aligned with the values of predictability and federal control that foreign affairs demands and that the FSIA was designed to promote.

We are confident that our decision that actions to enforce ICSID awards against foreign sovereigns must comply with the FSIA’s service and venue provisions is consistent with the United States’ obligations under the ICSID Convention. We recognize, of course, that executions on the judgment will proceed according to state law. *See* Fed. R. Civ. P. 69(a)(1). But this does not compel us to abandon the goal of consistency when the award is first converted to a federal judgment.

C. “Recognition” under Section 1650a

The District Court’s contrary reasoning also derived from the notion that “recognition,” and not just “enforcement,” was part of the District Court’s task. The District Court viewed recognition, like confirmation in the context of other arbitral proceedings, as a mere ministerial act preliminary to enforcement. Other courts have rested their reasoning about their obligations with respect to ICSID awards in part on this distinction. *See, e.g., Micula II*, 2015 WL 4643180, at *3 4.

As noted above, Article 54 of the Convention requires member states to “recognize an award rendered pursuant to this Convention as binding and *enforce* the pecuniary obligations imposed by that award.” ICSID Convention art. 54 (1) (2) (emphasis added). In this, the Convention seems to refer to “recognition” and “enforcement” as if they were distinct actions. *See Schreuer, Commentary*, at 1128 (describing “recognition” as “the formal confirmation that the award is authentic and that it has the legal consequences provided by the law” and noting that it may be “a step preliminary to enforcement”).

But the Convention is not self executing. *See Medellín*, 552 U.S. at 505 06 & n.3 (treaties not specified as self executing can be enforced only pursuant to implementing legislation); *id.* at 533 34 & n.1 (Stevens, J., concurring) (citing Section 1650a as an example). We must therefore focus in the first instance on the terms of the ICSID enabling act, Section 1650a, to determine the scope of a federal court’s authority with respect to awards under the Convention, and refer to the Convention only for aid in construing Section 1650a where needed.

In contrast to the Convention, Section 1650a(a) refers to enforcement, but not to recognition: it directs only that “[t]he pecuniary obligations imposed by such an award shall be *enforced* and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.” 22 U.S.C. §1650a(a) (emphasis added). It makes no mention of recognition as a separate, additional judicial action, and we think that its framing was intentional. Other language from Section 1650a confirms this conclusion. Section 1650a(b) grants federal courts “exclusive jurisdiction over *actions* and *proceedings* under subsection (a).” *Id.* § 1650a(b) (emphasis added). The terms “actions” and “proceedings” typically connote something more than a summary *ex parte* conference leading to entry of a judgment on an award: after all, those terms are the foundation of the Federal Rules of Civil Procedure. Rule 1 provides, for example, “These rules govern the procedure in all civil actions and proceedings in the United States district courts,” subject to a few exceptions not relevant here. Fed. R. Civ. P. 1. In similar vein, Rule 2 provides, “There is one form of action—the civil action.” Fed. R. Civ. P. 2; *see also* Fed. R. Civ. P. 3 (“A civil action is commenced by filing a complaint with the court.”). Accordingly, we understand these terms to contemplate enforcement obtained through a civil action on the award. *See Micula I*, 104 F. Supp. 3d at 50 (“The use of the words ‘actions’ and ‘proceedings’ strongly connotes a congressional intent to domesticate ICSID awards through a plenary action, rather than *ex parte* confirmation or recognition.”).

Further, Section 1650a directs that “[t]he Federal Arbitration Act . . . shall not apply to enforcement of awards rendered pursuant to the [ICSID Convention].” 5 U.S.C. § 1650a(a). This exemption carries two resonances of import here. First, the FAA specifically provides for confirmation of domestic arbitral awards by *court order*, not through an “action” or “proceeding.” 9 U.S.C. § 9 (“[A]t any time within one year after the award is made any party to the arbitration may apply . . . for an *order confirming* the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed [elsewhere in] this title.” (emphasis added)). That Congress so provided many years earlier suggests that,

although it knew how to provide for summary procedures in the arbitral context, it simply elected not to do so in Section 1650a. *See Micula I*, 104 F. Supp. 3d at 50 (“Congress was keenly aware that domestic arbitration awards could be confirmed, but elected not to use that procedure for ICSID awards.”).

Second, the FAA prescribes grounds for vacating an arbitral award where the award was tainted by, among other things, fraud, corruption, or misconduct by the arbitrator. *See* 9 U.S.C. § 10. By expressly precluding the FAA’s application to enforcement of ICSID Convention awards, Congress intended to make these grounds of attack unavailable to ICSID award debtors in federal court enforcement proceedings. *See* 112 Cong. Rec. 13148, 13149 (daily ed. June 15, 1966) (written statement of Sen. Fulbright) ... Congress’s exclusion of the FAA’s provisions from Section 1650a may suggest an expectation that actions to enforce ICSID awards would not be protracted, as emphasized by the District Court. But the exclusion of the substantive attacks available under the FAA from ICSID award actions does not, in our judgment, imply an intention that a foreign sovereign award debtor be denied notice of the action to enforce the award and the occasion to make non merits challenges to the award: for example, to question the authenticity of the award presented for enforcement, the finality of the award, or the possibility that an offset might apply to the award that would make execution in the full amount improper. If the debtor were not entitled to notice of an enforcement attempt, it would have no opportunity to level such attacks before the award became a federal judgment. Nor would remitting these challenges to the execution stage, which often would occur piecemeal and in various jurisdictions, be adequate, efficient, or in keeping with the general background of sovereign immunity law in the United States.

Our reading of Section 1650a thus suggests that Congress did not contemplate federal court “recognition” of ICSID awards; it contemplated only enforcement. And enforcement should proceed, the statute directs, “as if the award were a final judgment of a [state court]” for which enforcement were sought in federal court and which is owed full faith and credit. 22 U.S.C. § 1650a. Accordingly, we turn briefly to what it means to “enforce” a state court judgment in federal court and award it full faith and credit.

D. “Full faith and credit” under Section 1650a

Section 1650a requires federal courts to “enforce” ICSID awards and accord them “the same full faith and credit as if [they] were [] final judgment[s] of a court of general jurisdiction of one of the several States.” 22 U.S.C. § 1650a(a). To identify the type of action necessary to enforce ICSID awards in compliance with Section 1650a, we look to established procedures for enforcing state court judgments in federal court.

Since 1948, federal courts have been directed by 28 U.S.C. § 1738 to accord state court judgments full faith and credit. *See* Pub. L. No. 80 773, 62 Stat. 869, 947 (1948) (codified at 28 U.S.C. § 1738). Section 1738 does not, however, provide guidance as to how state court judgments may be enforced in federal court. Actions to enforce state court judgments in federal court are rare. *See Siag*, 2009 WL 1834562, at *1 (noting rarity). They are not unknown, however. *See, e.g., Weininger v. Castro*, 462 F. Supp. 2d 457, 466 (S.D.N.Y. 2006) (action brought in federal court on default judgment previously entered by state court against Republic of Cuba). As the United States’ brief *amicus curiae* points out, it was the case in 1966, and remains so today, that federal courts generally require that a civil action be filed, with notice to the judgment creditor, before enforcing a state court judgment. ... In light of this history, it is reasonable to conclude that Congress was aware of this practice when it enacted Section 1650a,

and thus would have contemplated that ICSID awards would be enforced in federal court by judgment entered on an action filed—and not on an *ex parte* petition—on an ICSID award.

* * * *

An examination of the available legislative history of Section 1650a also tends to confirm our view that Congress did not invite the incorporation of summary enforcement procedures against foreign sovereign award debtors.

* * * *

Our conclusion that Section 1650a does not support summary registration for converting ICSID awards into federal judgments, but rather requires commencement of an action on the award in federal court, brings Section 1650a into alignment with our interpretation of the FSIA. Following Supreme Court precedent, we have consistently described the FSIA as providing the sole source of subject matter jurisdiction over foreign sovereigns. We continue to do so today.

* * * *

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 [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] 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.”

The commercial activity exception was discussed in the *Bennett* and *Rubin* cases, though not as the primary issue. See *infra*, Section A.6.b. As discussed in *Digest 2016* at 402-06, *Helmerich & Payne Int’l Drilling Co., et al. v. Venezuela et al.*, No. 15-698, in which the United States filed an *amicus* brief opposing certiorari in 2016, also involved the commercial activity exception. On May 15, 2017, the Supreme Court denied the cross-petition for certiorari in *Helmerich*, seeking review of the commercial activity ruling of the D.C. Circuit.

3. Expropriation Exception to Immunity: Standard for Establishing Jurisdiction

The expropriation exception to immunity in the FSIA provides that a foreign state is not immune from any suit “in which rights in property taken in violation of international law are in issue” and a specified commercial-activity nexus to the United States is present. 28 U.S.C. 1605(a)(3). As discussed in *Digest 2016* at 406-14, the United States filed briefs as *amicus curiae* both at the petition stage and on the merits in the Supreme Court of the United States in *Venezuela et al. v. Helmerich & Payne Int’l Drilling Co., et al.*, No. 15-423, a case involving the expropriation exception. On May 1, 2017, the Supreme Court

issued its decision, vacating the decision below and remanding. Excerpts follow from the Supreme Court's opinion.

* * * *

In our view, a party's nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction. Rather, state and federal courts can maintain jurisdiction to hear the merits of a case only if they find that the property in which the party claims to hold rights was indeed "property taken in violation of international law." Put differently, the relevant factual allegations must make out a legally valid claim that a certain kind of right is at issue (*property* rights) and that the relevant property was taken in a certain way (in violation of international law). A good argument to that effect is not sufficient. But a court normally need not resolve, as a jurisdictional matter, disputes about whether a party actually held rights in that property; those questions remain for the merits phase of the litigation.

Moreover, where jurisdictional questions turn upon further factual development, the trial judge may take evidence and resolve relevant factual disputes. But, consistent with foreign sovereign immunity's basic objective, namely, to free a foreign sovereign from *suit*, the court should normally resolve those factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible. See *Verlinden B. V. v. Central Bank of Nigeria*, 461 U. S. 480, 493–494 (1983).

I

Since the mid-1970's a wholly owned Venezuela-incorporated subsidiary (Subsidiary) of an American company (Parent) supplied oil rigs to oil development entities that were part of the Venezuelan Government. In 2011 the American Parent company and its Venezuelan Subsidiary (the respondents here) brought this lawsuit in federal court against those foreign government entities. (The entities go by their initials, PDVSA, but we shall normally refer to them as "Venezuela" or the "Venezuelan Government.") The American Parent and the Venezuelan Subsidiary claimed that the Venezuelan Government had unlawfully expropriated the Subsidiary's oil rigs. And they sought compensation.

* * * *

For present purposes, it is important to keep in mind that the Court of Appeals did not decide (on the basis of the stipulated facts) that the plaintiffs' allegations *are* sufficient to show their property was taken in violation of international law. It decided instead that the plaintiffs *might* have such a claim. And it made clear the legal standard that it would apply. It said that, in deciding whether the expropriation exception applies, it would set an "exceptionally low bar." *Id.*, at 812. Any possible, *i.e.*, "non-frivolous," *ibid.*, claim of expropriation is sufficient, in the Court of Appeals' view, to bring a case within the scope of the FSIA's exception. In particular: If a plaintiff alleges facts and claims that permit the plaintiff to make an expropriation claim that is *not* "*wholly insubstantial or frivolous*," then the exception permits the suit and the sovereign loses its immunity. *Ibid.* (emphasis added). Given the factual stipulations, the Court of Appeals did not suggest further fact finding on this jurisdictional issue but, rather, decided that the

Subsidiary had “satisfied this Circuit’s forgiving standard for surviving a motion to dismiss in an FSIA case.” *Id.*, at 813.

Venezuela filed a petition for certiorari asking us to decide whether the Court of Appeals had applied the correct standard in deciding that the companies had met the expropriation exception’s requirements. We agreed to do so.

II

Foreign sovereign immunity is jurisdictional in this case because explicit statutory language makes it so. See §1604 (“[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided” by the FSIA’s exceptions); §1605(a) (“A foreign state shall not be immune from the jurisdiction” of federal and state courts if the exception at issue here is satisfied). Given the parties’ stipulations as to all relevant facts, our inquiry poses a “‘pure question of statutory construction,’ ” *Republic of Austria v. Altmann*, 541 U. S. 677, 701 (2004). In our view, the expropriation exception grants jurisdiction only where there is a valid claim that “property” has been “taken in violation of international law.” §1605(a)(3). A nonfrivolous argument to that effect is insufficient.

For one thing, the provision’s language, while ambiguous, supports such a reading. It says that there is jurisdiction in a “case... in which rights in property taken in violation of international law are in issue.” *Ibid.* Such language would normally foresee a judicial decision about the jurisdictional matter. And that matter is whether a certain kind of “right” is “at issue,” namely, a *property right taken in violation of international law*. To take a purely hypothetical example, a party might assert a claim to a house in a foreign country. If the foreign country nationalized the house and, when sued, asserted sovereign immunity, then the claiming party would as a jurisdictional matter prove that he claimed “property” (which a house obviously is) and also that the property was “taken in violation of international law.” He need not show as a *jurisdictional* matter that he, rather than someone else, owned the house. That question is part of the merits of the case and remains “at issue.”

We recognize that merits and jurisdiction will sometimes come intertwined. Suppose that the party asserted a claim to architectural plans for the house. It might be necessary to decide whether the law recognizes the kind of right that he asserts, or whether it is a right in “property” that was “taken in violation of international law.” Perhaps that is the only serious issue in the case. If so, the court must still answer the jurisdictional question. If to do so, it must inevitably decide some, or all, of the merits issues, so be it.

Our reading of the statute is consistent with its language. The case is one which the existence of “rights” remains “at issue” until the court decides the merits of the case. But whether the rights asserted are rights of a certain kind, namely, rights in “property taken in violation of international law,” is a jurisdictional matter that the court must typically decide at the outset of the case, or as close to the outset as is reasonably possible.

Precedent offers a degree of support for our interpretation. In *Permanent Mission of India to United Nations v. City of New York*, 551 U. S. 193 (2007), we interpreted a different FSIA exception for cases “in which . . . rights in immovable property situated in the United States are in issue.” §1605(a)(4). We held that there was jurisdiction over the case because the plaintiff’s lawsuit to enforce a tax lien “directly implicate[d]” the property rights described by the FSIA exception. See *id.*, at 200–201. We did not simply rely upon a finding that the plaintiff had made a nonfrivolous argument that the exception applied.

For another thing, one of the FSIA's basic objectives, as shown by its history, supports this reading. The Act for the most part embodies basic principles of international law long followed both in the United States and elsewhere. See *Schooner Exchange v. McFaddon*, 7 Cranch 116, 136–137 (1812); see also *Verlinden*, 461 U. S., at 493 (explaining that the Act “comprehensively regulat[es] the amenability of foreign nations to suit in the United States”). Our courts have understood, as international law itself understands, foreign nation states to be “independent sovereign” entities. To grant those sovereign entities an immunity from suit in our courts both recognizes the “absolute independence of every sovereign authority” and helps to “induc[e]” each nation state, as a matter of “international comity,” to “respect the independence and dignity of every other,” including our own. *Berizzi Brothers Co. v. S. S. Pesaro*, 271 U. S. 562, 575 (1926) (quoting *The Parlement Belge*, [1880] 5 P. D. 197, 214–215 (appeal taken from Admiralty Div.)).

In the mid-20th century, we, like many other nations, began to treat nations acting in a commercial capacity like other commercial entities. See *Permanent Mission*, *supra*, at 199–200. And we consequently began to limit our recognition of sovereign immunity, denying that immunity in cases “arising out of a foreign state's strictly commercial acts,” but continuing to apply that doctrine in “suits involving the foreign sovereign's *public acts*,” *Verlinden*, 461 U.S., at 487 (emphasis added).

At first, our courts, aware of the expertise of the Executive Branch in matters of foreign affairs, relied heavily upon the advice of that branch when deciding just when and how this “restrictive” sovereign immunity doctrine applied. *Ibid.* See also H. R. Rep. No. 94–1487, pp. 8–9 (1976) (similar). But in 1976, Congress, at the urging of the Department of State and Department of Justice, began to codify the doctrine. The resulting statute, the FSIA, “starts from a premise of immunity and then creates exceptions to the general principle.” *Id.*, at 17; *Verlinden*, *supra*, at 493. Almost all the exceptions involve commerce or immovable property located in the United States. *E.g.*, §§1605(a)(2) and (4); see also §1602 (expressing the finding that “[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned”). The statute thereby creates a doctrine that by and large continues to reflect basic principles of international law, in particular those principles embodied in what jurists refer to as the “restrictive” theory of sovereign immunity. See, *e.g.*, Restatement (Third) of Foreign Relations Law of the United States §451, and Comment *a* (1986) (describing the restrictive theory of immunity); United Nations General Assembly, Convention on Jurisdictional Immunities of States and Their Property, Res. 59/38, Arts. 5, 10–12 (Dec. 2, 2004) (adopting a restrictive theory of immunity and withdrawing immunity for loss of property where, among other requirements, “the act or omission occurred in whole or in part in the territory of th[e] other State”); United Nations General Assembly, Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, Supp. A/59/22 No. 1, pp. 7–11 (Mar. 1–5, 2004) (same).

We have found nothing in the history of the statute that suggests Congress intended a radical departure from these basic principles. To the contrary, the State Department, which helped to draft the FSIA's language (and to whose views on sovereign immunity this Court, like Congress, has paid special attention, *Altmann*, 541 U. S., at 696), told Congress that the Act was “drafted keeping in mind what we believe to be the general state of the law internationally, so that we conform fairly closely... to our accepted international standards,” Hearing on H. R. 3493 before the Subcommittee on Claims and Governmental Relations of the House of Representatives Committee on the Judiciary, 93d Cong., 1st Sess., 18 (1973). The Department

added that, by doing so, we would diminish the likelihood that other nations would each go their own way, thereby “subject[ing]” the United States “abroad” to more claims “than we permit in this country... .” *Ibid.* It is consequently not surprising to find that the expropriation exception on its face emphasizes conformity with international law by requiring not only a commercial connection with the United States but also a taking of property “*in violation of international law.*”

We emphasize this point, embedded in the statute’s language, history, and structure, because doing so reveals a basic objective of our sovereign immunity doctrine, which a “nonfrivolous-argument” reading of the expropriation exception would undermine. A sovereign’s taking or regulating of its own nationals’ property within its own territory is often just the kind of foreign sovereign’s public act (a “*jure imperii*”) that the restrictive theory of sovereign immunity ordinarily leaves immune from suit. See *Permanent Mission*, 551 U.S., at 199 (describing the FSIA’s distinction between public acts, or *jure imperii*, and purely commercial ones); Restatement (Third) of Foreign Relations Law of the United States §712, at 196 (noting that, under international law, a state is responsible for a “taking of the property of a *national of another state*” (emphasis added)). See also Restatement (Fourth) of Foreign Relations Law of the United States §455, Reporter’s Note 12, p. 9 (Tent. Draft No. 2, Mar. 22, 2016) (noting that “[n]o provision comparable” to the exception “has yet been adopted in the domestic immunity statutes of other countries” and that expropriations are considered acts *jure imperii*); *United States v. Belmont*, 301 U. S. 324, 332 (1937); B. Cheng & G. Schwarzberger, *General Principles of Law as Applied by International Courts and Tribunals* 37–38 (1953) (collecting cases describing “the power of the sovereign State to expropriate” (internal quotation marks omitted)); *Jurisdictional Immunities of the State (Germany v. Italy)*, 2012 I. C. J. 99, 123–125, ¶¶56–60 (Judgt. of Feb. 3) (noting consistent state practice in respect to the distinction between public and commercial acts and describing an international law of immunity recognizing such a difference); *Altmann, supra*, at 708 (BREYER, J., concurring) (describing the French Court of Appeals’ decision about whether a King who has abdicated the throne is “entitled to claim ... immunity” as “Hea[d] of State” when his sovereign status at the time of suit was in doubt (quoting *Ex-King Farouk of Egypt v. Christian Dior*, 84 Clunet 717, 24 I. L. R. 228, 229 (CA Paris 1957))).

To be sure, there are fair arguments to be made that a sovereign’s taking of its own nationals’ property sometimes amounts to an expropriation that violates international law, and the expropriation exception provides that the general principle of immunity for these otherwise public acts should give way. But such arguments are about whether such an expropriation does violate international law. To find jurisdiction only where a taking *does violate* international law is thus consistent with basic international law and the related statutory objectives and principles that we have mentioned. But to find jurisdiction where a taking does *not* violate international law (e.g., where there is a nonfrivolous but ultimately *incorrect* argument that the taking violates international law) is inconsistent with those objectives. And it is difficult to understand why Congress would have wanted that result.

Moreover, the “nonfrivolous-argument” interpretation would, in many cases, embroil the foreign sovereign in an American lawsuit for an increased period of time. It would substitute for a more workable standard (“violation of international law”) a standard limited only by the bounds of a lawyer’s (nonfrivolous) imagination. It would create increased complexity in respect to a jurisdictional matter where clarity is particularly important. *Hertz Corp. v. Friend*, 559 U. S.

77, 94–95 (2010). And clarity is doubly important here where foreign nations and foreign lawyers must understand our law.

Finally, the Solicitor General and the Department of State also warn us that the nonfrivolous-argument interpretation would “affron[t]” other nations, producing friction in our relations with those nations and leading some to reciprocate by granting their courts permission to embroil the United States in “expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated.” Brief for United States as *Amicus Curiae* 21–22. (At any given time the Department of Justice’s Office of Foreign Litigation represents the United States in about 1,000 cases in 100 courts around the world. *Ibid.*) See also *National City Bank of N. Y. v. Republic of China*, 348 U. S. 356, 362 (1955) (noting that our grant of immunity to foreign sovereigns dovetails with our own interest in receiving similar treatment).

* * * *

4. Exceptions to Immunity from Jurisdiction: Torts and Terrorism

The tort exception to immunity in the FSIA provides that a foreign state is not immune in certain actions “for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission” of a foreign state. 28 U.S.C. § 1605(a)(5). The FSIA’s definitions section specifies that “[t]he ‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.” *Id.* § 1603(c).

The terrorism exception applies, *inter alia*, in certain cases in which money damages are sought for “personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act . . . engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.” 28 U.S.C. § 1605A(a)(1). The provision further specifies that “[t]he court shall hear a claim under this section if” certain additional requirements are met, *id.* § 1605A(a)(2), including that “the foreign state was designated as a state sponsor of terrorism at the time the act [at issue] occurred, or was so designated as a result of such act, and ...either remains so designated when the claim is filed ...or was so designated within the 6-month period before the claim is filed....” *Id.* § 1605A(a)(2)(A)(i).

As discussed in *Digest 2016* at 415-20, the United States filed a statement of interest in *Schermerhorn et al. v. Israel*, No. 16-0049, a case in which plaintiffs asserted jurisdiction under the FSIA tort and terrorism exceptions. The district court dismissed the case for lack of jurisdiction on January 25, 2017, and the plaintiffs filed a notice of appeal on February 15, 2017. The U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal in a decision issued on December 1, 2017, excerpted below.

* * * *

The FSIA provides “the sole basis for obtaining jurisdiction over a foreign state in our courts.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under the FSIA, foreign sovereigns enjoy absolute immunity from suit unless the case falls within one of several specified exceptions, two of which—the “non-commercial torts” exception, 28 U.S.C.

§ 1605(a)(5), and the “terrorism” exception, *id.* § 1605A—are at issue in this case. We consider each in turn, “[r]eview[ing] the District Court’s sovereign immunity determination de novo.” *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 35 (D.C. Cir. 2014).

Non-Commercial Torts Exception

The FSIA’s non-commercial torts exception confers jurisdiction in any case in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. 28 U.S.C. § 1605(a)(5). In this case, the dispositive question is whether Israel’s alleged torts—which took place aboard a U.S.-flagged vessel in international waters—“occur[ed] in the United States.” *Id.*

Under the FSIA, the “‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.” *Id.* § 1603(c). Although this definition speaks primarily in geographic terms, Plaintiffs argue that it also includes U.S.-flagged ships on the high seas.

Plaintiffs begin by noting that the definition of “United States” is introduced by the word “includes” rather than the word “means.” Appellants’ Br. 13-15. Invoking the rule of statutory interpretation that “[a] definition which declares what a term ‘means’ ... excludes any meaning that is not stated,” *Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1979) (alterations in original) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978)), Plaintiffs contend that the use of “includes” permits us to adopt a broader interpretation of the term “United States.” Appellants’ Br. 14; *see also National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 171-72 (D.C. Cir. 1982) (contrasting the “restrictive phrasing” using the word “means” with “the looser phrase ‘includes’”).

Relying on this interpretative leeway, Plaintiffs contend that a U.S.-flagged ship in international waters is part of the “United States.” The determinative test, Plaintiffs assert, is whether a U.S.-flagged ship and the territory and waters of the United States “share a comparable degree of U.S. sovereign control.” Appellants’ Br. 15. Arguing that they do, Plaintiffs invoke several non-FSIA cases that refer to a ship sailing under a particular country’s flag in international waters as constructively part of the flag state’s territory. Appellants’ Br. 19-20; *see Patterson v. Eudora*, 190 U.S. 169, 176 (1903) (“A ship which bears a nation’s flag is to be treated as a part of the territory of that nation.” (quoting *Queen v. Anderson*, (1868) L. R. 1 C. C. 161 (U.K.)); *Ross v. McIntyre*, 140 U.S. 453, 464 (1891) (“The deck of a private American vessel, it is true, is considered, for many purposes, constructively as territory of the United States...”). Plaintiffs also point out that a country’s law may extend to vessels flying its flag. *See Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953) (holding that Danish tort law extends to a Danish ship because it “is deemed to be a part of the territory of that sovereignty (whose flag it flies)” (quoting *United States v. Flores*, 289 U.S. 137, 155 (1933))).

Were we tasked with identifying the outer limits of the “United States” in general terms, Plaintiffs’ arguments might have some merit. But this case requires that we interpret a particular term in a particular law. And, fatal to Plaintiffs’ theory, the cases interpreting the FSIA—as opposed to the ones cited by Plaintiffs—not only “counsel[] that [section 1605(a)(5)] should be

narrowly construed,” *MacArthur Area Citizens Ass’n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987), but also require that we read the term “United States” in the FSIA to include only the geographic territory of the United States.

Our starting point is the Supreme Court’s discussion of the non-commercial torts exception in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). That case involved a Liberian-chartered oil tanker traveling from the Virgin Islands to Alaska around Cape Horn in South America during the Falklands War. *Id.* at 431. When the tanker was approximately 600 nautical miles from Argentina, it was attacked by the Argentine military. *Id.* at 431-32. The Liberian companies that owned and chartered the tanker brought suit against Argentina in the United States under the FSIA’s non-commercial torts exception, arguing that because the high seas were within the admiralty jurisdiction of the United States, the tort occurred “in the United States.” *Id.* at 440. Rejecting that view—and calling into question how Plaintiffs in our case read the term “United States”—the Supreme Court explained that it “construe[s] the modifying phrase ‘continental and insular’ to restrict the definition of United States to the continental United States and those islands that are part of the United States or its possessions; any other reading would render this phrase nugatory.” *Id.*

Of course, as Plaintiffs point out, *Amerada Hess* does not entirely foreclose their position because it primarily addresses whether the term “waters” includes the high seas, *see id.* at 441 (“Because respondents’ injury unquestionably occurred well outside the 3-mile limit then in effect for the territorial waters of the United States, the exception for noncommercial torts cannot apply.”), whereas they are concerned with whether the term “territory” is capacious enough to include U.S.-flagged vessels. Although the Supreme Court had no occasion to resolve the question before us—the ship involved was a foreign vessel—it did instruct courts interpreting the term “United States” to give full effect to the “modifying phrase ‘continental and insular’” and to “apply ‘[t]he canon of construction which teaches that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” *Id.* at 440 (alteration in original) (quoting *Foley Brothers v. Filardo*, 336 U.S. 281, 285 (1949)).

But even if Plaintiffs’ reading of “United States” survives *Amerada Hess*, it is defeated by our court’s decision in *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984). There, plaintiffs sought to invoke the non-commercial torts exception with respect to torts that allegedly occurred at the United States Embassy in Tehran, arguing that Congress has “power to exercise jurisdiction over certain activities at U.S. embassies.” *Id.* at 839. Although the court acknowledged that “the United States has some jurisdiction over its Embassy in Iran,” it rejected plaintiffs’ invocation of the non-commercial torts exception because the embassy was not within the territorial United States. *Id.* As the court explained, the use of “the words ‘continental or insular’ to modify the scope of the phrase ‘all territory and waters . . . subject to the jurisdiction of the United States’” is “clearly intended to restrict the definition of the United States to the continental United States and such islands as are part of the United States or are its possessions.” *Id.* (alteration in original) (quoting 28 U.S.C. § 1603(c)). This unambiguous language makes plain that the “United States,” at least for purposes of the FSIA, is limited to the geographic territories and waters of the United States.

Plaintiffs seek to distinguish *Persinger* on two grounds. First, they argue that unlike the plaintiffs in *Persinger*, they rely on “the unique status of ships” as part of the flag state’s territory “deriving from centuries of legal evolution,” rather than the mere fact that the United States exercises “some form of jurisdiction” over U.S. embassies on foreign soil. Appellants’ Br. 29. It is true, as Plaintiffs point out, that several cases recognize that “for the purposes of jurisdiction a

ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies.” *Scharrenberg v. Dollar S. S. Co.*, 245 U.S. 122, 127 (1917). But not only are these non-FSIA cases, they caution that “in the physical sense this expression is obviously figurative.” *Id.* (rejecting a claim that seamen employed on a ship are working “in the country of its registry” for purposes of a labor law); *see also Lauritzen*, 345 U.S. at 585 (“Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flagstate ...”). Thus, even outside the FSIA context, courts have sometimes rejected attempts to include U.S.-flagged vessels within the statutory definition of “United States,” *see, e.g., Cunard S. S. Co. v. Mellon*, 262 U.S. 100, 122, 128 (1923) (holding that the Eighteenth Amendment and National Prohibition Act’s restriction on the sale and transport of liquors within “the United States and all territory subject to the jurisdiction thereof” does not include U.S.-registered ships outside territorial waters), and we have no indication that the drafters of the FSIA intended a different result, *see Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1525 (D.C. Cir. 1984) (Scalia, J.) (explaining that the legislative history of section 1605(a)(5) indicates that the primary purpose of the exception “was to enable officials and employees of foreign sovereigns to be held liable for the traffic accidents which they cause in this country” (discussing H.R. Rep. No. 94-1487, at 20-21 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6605, 6619-20)).

Plaintiffs also seek to distinguish *Persinger* on the ground that the U.S. Embassy in Tehran was within the territory of Iran, and thus necessarily could not be “in the United States.” Appellants’ Br. 30. *Persinger*’s discussion of what was “in the United States,” Plaintiffs argue, is dicta. *Id.* But Plaintiffs misunderstand the court’s holding in *Persinger*. Like this panel, the court in *Persinger* was asked to determine whether a particular location was “within the definition of ‘United States’” under the FSIA. *Persinger*, 729 F.2d at 839. To resolve that issue, the court set forth a positive account of what the FSIA meant by “United States”—“the continental United States and such islands as are part of the United States or are its possessions”—and determined that U.S. embassies on foreign soil did not fall within that definition. *Id.* Hardly dictum, this discussion was necessary to the court’s holding. *See De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1113 (D.C. Cir. 2017) (explaining that “it is not only the result but also those portions of the opinion necessary to that result by which we are bound” (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996))). It would not have been enough, as Plaintiffs suggest, for the court to rely only on the fact that the U.S. Embassy in Tehran was on foreign soil, given that the *Persinger* plaintiffs argued for an interpretation of “United States” that included all areas—including those outside the territorial United States—where the U.S. exercised some jurisdiction. Bound by *Persinger*’s strictly geographical interpretation of the “United States,” we hold that U.S.-flagged ships on the high seas do not fall within the FSIA’s non-commercial torts exception. Accordingly, this exception gives Plaintiffs no basis for invoking the district court’s jurisdiction in this case.

Terrorism Exception

Congress first enacted the FSIA’s terrorism exception as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code). As initially drafted, the exception—then codified at 28 U.S.C. § 1605(a)(7)—abrogated a foreign sovereign’s immunity in any case

(7) ... in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... [if] engaged in by an official,

employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under [certain statutes] at the time the act occurred, unless later so designated as a result of such act ...

Pub. L. No. 104-132, § 221, 110 Stat. at 1241-43 (codified at 28 U.S.C. § 1605(a)(7) (2006) (repealed 2008)).

Had this case been brought under section 1605(a)(7), Plaintiffs “readily concede that this action would be barred ...because... Israel has never been designated a state sponsor of terrorism by the Government of the United States.” Appellants’ Br. 32. But Congress amended the FSIA’s terrorism exception in 2008, and although the primary impetus for the amendment was to resolve a dispute over whether the exception provided a cause of action directly against a foreign state, *see Owens v. Republic of Sudan*, 864 F.3d 751, 763-65 (D.C. Cir. 2017) (discussing the history of FSIA amendments), Plaintiffs believe that it also eliminated the requirement that a state be designated a sponsor of terrorism for the exception to apply.

As amended by section 1083 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44 (2008) (codified at 28 U.S.C. § 1605A), the revised terrorism exception, now codified at 28 U.S.C. § 1605A, provides in relevant part:

(1) No Immunity.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred

28 U.S.C. § 1605A(a) (2012).

Although section 1605A(a) and its predecessor section 1605(a)(7) are nearly identical, Plaintiffs emphasize the slight shift from the double negative construction of the old exception—“the court *shall decline* to hear a claim ...if the foreign state *was not* designated as a state sponsor of terrorism”—to the affirmative, two-sentence construction of the new exception—“The court *shall* hear a claim ...if ... the foreign state *was* designated as a state sponsor of terrorism.” According to Plaintiffs, by so revising the exception, Congress established a two-tiered approach to jurisdiction. The first sentence, section 1605A(a)(1), strips all foreign states of immunity in cases involving “personal injury or death” caused by certain specified terroristic acts. And the second sentence, section 1605A(a)(2), provides that when certain other conditions are met, such as when the defendant state is designated a state sponsor of terrorism, a court has no choice but to hear the case. Read together, these sentences, Plaintiffs argue, mean that when a case is brought only under section 1605A(a)(1), a court still has discretion to dismiss the case on grounds such as political question, act of state, or *forum non conveniens*; by contrast, a court

must hear cases that fit the criteria of section 1605A(a)(2). And although Plaintiffs agree that their case does not qualify as one the district court must hear, they contend that the court should have considered whether it might nonetheless have jurisdiction under section 1605A(a)(1).

Plaintiffs' reading of the statute is intriguing. Treating each sentence in isolation, as Plaintiffs urge, we could read section 1605A(a)(1) as establishing a seemingly unqualified abrogation of sovereign immunity and section 1605A(a)(2) as providing only when cases *must* be heard.

But this construction of the statute simply cannot be correct. The FSIA is premised on "a presumption of foreign sovereign immunity" qualified only by a small number of "discrete and limited exceptions." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87-88 (D.C. Cir. 2002) (collecting cases). As our court has explained, the terrorism exception, in particular, represents a "delicate legislative compromise" that rests in part on the fact that "only a defendant that has been specifically designated by the State Department as a 'state sponsor of terrorism' is subject to the loss of its sovereign immunity." *Id.* at 89 (quoting 28 U.S.C. § 1605(a)(7)(A)) (discussing the historical evolution of the FSIA).

Yet under Plaintiff's view, Congress, without any acknowledgement whatsoever, abandoned this longstanding compromise and authorized victims of alleged terrorism to bring suit against any state without regard to its designation as a state sponsor of terrorism. Asked at oral argument whether they knew of any support in the legislative history for their reading, Plaintiffs' counsel conceded they knew of none. *See* Oral Arg. 12:27-33 ("There is nothing that we have been able to find in the legislative history that discusses this either way."). In fact, the only relevant legislative history discusses the terrorism exception as though the state-sponsor requirement remains a mandatory prerequisite to invoking jurisdiction. *See Ensuring Legal Redress for American Victims of State-Sponsored Terrorism: Hearing on Victims of State-Sponsored Terrorism Before the H. Comm. on the Judiciary*, 110th Cong. 6 (2008), available at 2008 WL 2441390 (statement of Rep. Bruce Braley) (explaining that under the proposed amendment Iraq faced "no threat of future claims since Iraq is no longer designated as a state sponsor of terrorism").

Plaintiffs' reading of section 1605A is all the more implausible given that it would require discarding not just the state-sponsor prerequisite, but also other longstanding prerequisites to invoking the terrorism exception. Although this case concerns only the state-sponsor prerequisite, former section 1605(a)(7)—now section 1605A(a)(2)—listed several other requirements for invoking the exception. For instance, section 1605(a)(7)(B) provided that, even if a foreign state was designated a sponsor of terrorism, "the court shall decline to hear a claim ... if ... neither the claimant nor the victim was a national of the United States ... when the act upon which the claim is based occurred." 28 U.S.C. § 1605(a)(7)(B)(ii) (2006). After eliminating the double negative, the NDAA amendment carried this language into section 1605A(a)(2) in the clause just after the state-sponsor requirement. *See id.* § 1605A(a)(2)(A)(ii)(I) ("The court shall hear a claim under this section if ... the claimant or the victim was ... a national of the United States ..."). Under Plaintiffs' interpretation of section 1605A(a)—which reads the provisions of section 1605A(a)(2) as establishing only when a court must hear a case but not limiting when a court may hear such a case—this requirement would also no longer be a necessary prerequisite to invoking the court's jurisdiction.

The implications of Plaintiffs' reading of section 1605A(a)(1) are breathtaking. Without the state-sponsor and U.S.-national requirements, individuals with no connection at all to this country could bring suit here against any foreign sovereign, including a U.S. ally, for any injury

or death caused by an “act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.” *Id.* § 1605A(a)(1). As counsel for Israel pointed out at oral argument—and Plaintiffs’ counsel agreed—this would mean that “if a foreign national is concerned that someone has been killed in Iraq or Afghanistan by the British, that would be an extrajudicial killing and this court would have jurisdiction.” *Compare* Oral Arg. 23:46- 24:02 (raising hypothetical), *with id.* 30:54-31:21 (“Congress opened the door to that kind of suit.”).

Although Congress may one day decide that the state-sponsor and U.S.-national requirements are no longer necessary, we cannot conclude from an unexplained editorial change that it has already done so. Such “[f]undamental changes in the scope of a statute are not typically accomplished with so subtle a move.” *Kellogg Brown & Root Services Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1977 (2015). Rather, the FSIA’s terrorism exception continues to apply only to a foreign state “designated as a state sponsor of terrorism at the time the act . . . occurred, or was so designated as a result of such act.” 28 U.S.C. § 1605A(a)(2)(A)(i)(I).

Given the consequences of Plaintiffs’ interpretation, it is unsurprising that no court has countenanced such a reading of the terrorism exception after the NDAA amendment. Rather, cases in this circuit and elsewhere have continued to treat the state-sponsor requirement as a jurisdictional prerequisite to invoking the terrorism exception. *See, e.g., Owens*, 864 F.3d at 777 (“§ 1605A strives to hold designated state sponsors of terrorism accountable for their sponsorship of terror . . .”); *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 14 (D.C. Cir. 2015) (“The exception further requires that (i) the foreign country was designated a ‘state sponsor of terrorism at the time [of] the act’” (quoting 28 U.S.C. § 1605A(a)(2))); *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 109, 115 n.7 (2d Cir. 2013) (explaining that section 1605A “is only available against a nation that has been designated by the United States government as a state sponsor of terrorism at the time of, or due to, a terrorist act”); *Doe v. Bin Laden*, 663 F.3d 64, 65 (2d Cir. 2011) (finding it undisputed that section 1605A “is not available against Afghanistan . . . because the State Department has not designated Afghanistan as a state sponsor of terrorism”). Although none of those cases squarely confronted the precise argument before us, they provide further support for the proposition that this slight revision to the terrorism exception did not bring about the dramatic departure from well-established FSIA practice that Plaintiffs seek.

* * * *

5. Service of Process

a. Harrison v. Sudan

As discussed in *Digest 2015* at 386-89, and *Digest 2016* at 420, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit on a petition for rehearing in *Harrison v. Sudan*, asserting the invalidity of service on a foreign sovereign via delivery of a summons and complaint to its embassy in the United States addressed to its foreign minister. The Second Circuit decided, contrary to the U.S. view, that this method of service was valid. On March 9, 2017, the Republic of Sudan filed a petition in

the U.S. Supreme Court for a writ of certiorari. On October 2, 2017, the Supreme Court invited the views of the United States.*

b. Kumar v. Sudan

In February 2017, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Fourth Circuit in support of reversal of a district court decision construing the FSIA as authorizing service on a foreign state by mail addressed to the foreign minister at the state's embassy in the United States. Plaintiffs sought damages for the death of their family members in al Qaeda's terrorist bombing of the U.S.S. Cole in the Port of Aden in Yemen on October 12, 2000. They obtained multiple default judgments, but Sudan asserted when it appeared in 2015 that service was improper. Excerpts follow from the U.S. *amicus* brief, which is available in full at <https://www.state.gov/s/l/c8183.htm>.**

* * * *

THE [FSIA] DOES NOT PERMIT A LITIGANT TO SERVE A FOREIGN STATE BY HAVING PROCESS ADDRESSED TO THE FOREIGN MINISTER MAILED TO THE STATE'S EMBASSY IN THE UNITED STATES

1. The FSIA provides the sole basis for civil suits against foreign states and their agencies or instrumentalities in United States courts. The FSIA establishes the rule that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided” by the statute. 28 U.S.C. § 1604. If a suit comes within a statutory exception to foreign sovereign immunity, the FSIA provides for subject matter jurisdiction in the district courts. 28 U.S.C. § 1330(a). The statute provides for personal jurisdiction over the foreign state in such suits “where service has been made under section 1608.” 28 U.S.C. § 1330(b).

Section 1608 provides the exclusive means for serving a foreign state in civil litigation. See Fed. R. Civ. P. 4(j)(1) (“A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.”). Section 1608(a) provides for service on “a foreign state or political subdivision of a foreign state.” Section 1608(b) provides for service on “an agency or instrumentality of a foreign state.” Both subsections specify hierarchical methods of service. First, service must be effected on a foreign state or its agency in accordance with any “special arrangement for service” between the plaintiff and the foreign state or agency. 28 U.S.C. § 1608(a)(1), (b)(1). If no such special arrangement exists, then service must be provided “in accordance with an applicable international convention on

* Editor's note: On May 22, 2018, the United States filed its brief in the U.S. Supreme Court. The brief will be discussed in *Digest 2018*.

** Editor's note: On January 19, 2018, the Fourth Circuit issued its decision adopting the Department's view that the FSIA's service provisions do not permit service of process on a foreign state by mail sent to the foreign state's embassy in the United States addressed to the foreign minister. The panel agreed that this method of service is not consistent with the statute's legislative history, the VDCR, or the Department's considered views. The decision rejects the reasoning of the Second Circuit in *Harrison v. Republic of Sudan*, which reached the opposite result.

service of judicial documents” or, in the case of an agency or instrumentality, on any agent authorized to receive service on behalf of the agency in the United States. *Id.* § 1608(a)(2), (b)(2).

If service cannot be made by one of those methods, then Section 1608 provides for service by delivery. The delivery provisions applicable to foreign states and to their agencies or instrumentalities differ in an important respect, however. While Section 1608(b)(3) authorizes service on a foreign state agency by delivery “if reasonably calculated to give actual notice,” section 1608(a)(3) says nothing about actual notice. Instead, it authorizes service “by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.” 28 U.S.C. § 1608(a)(3). In light of the differences between the text of the two delivery provisions, courts have concluded that a private party may serve a foreign state by delivery only through “strict compliance” with the terms of Section 1608(a). *Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001); see also *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994); but see *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1129 (9th Cir. 2010) (upholding defective service on foreign state because of substantial compliance with Section 1608(a)(3)).

Finally, Section 1608(a) provides for a fourth method of service on a foreign state, if service cannot be made under the delivery provision within thirty days. In that case, a plaintiff may deliver process to the State Department for service on the foreign state through diplomatic channels. 28 U.S.C. § 1608(a)(4).

2. Section 1608(a)(3) does not permit a private party to serve a foreign state by having process mailed to the embassy of the foreign state in the United States, addressed to the minister of foreign affairs. See U.S. Department of State, Bureau of Consular Affairs, Foreign Sovereign Immunities Act, <http://go.usa.gov/x9FGq> (“Service on a foreign embassy in the United States or mission to the United Nations is not one of the methods of service provided in the FSIA.”).

As noted, Section 1608(a)(3) authorizes service “by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.” Although the provision does not expressly identify the place of service, the most natural understanding of the provision is that it requires that service be delivered to “the ministry of foreign affairs of the foreign state” and addressed to the specified government official, the head of the ministry. Thus, naturally read, the provision requires delivery to the official’s principal place of business, the ministry of foreign affairs in the foreign state’s seat of government. A state’s foreign minister does not work in the state’s embassies. Had Congress contemplated delivery to embassies, it would have enacted a statute requiring service to be addressed to the foreign state’s ambassador.

In construing Section 1608(a)(3), the D.C. Circuit has explained that the provision “mandates service on the Ministry of Foreign Affairs, the department most likely to understand American procedure.” *Transaero*, 30 F.3d at 154; see also *Barot v. Embassy of Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (directing service to be sent “to the ‘head of the ministry of foreign affairs’ in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency”) (citing 28 U.S.C. § 1608(a)(3)). The D.C. Circuit’s interpretation is particularly instructive because most suits against foreign states (as opposed to suits against foreign state agencies or instrumentalities) are brought in that circuit. See *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 (D.C. Cir. 2003) (describing the District of Columbia as “the dedicated venue for actions against foreign states”) (quoting amicus brief); 28 U.S.C.

§ 1391(f)(4) (providing for venue in suits against a foreign state or political subdivision thereof in the United States District Court for the District of Columbia).

Construing Section 1608(a)(3) to require service on the foreign minister by delivery to the state's foreign ministry is consistent with the courts' recognition that Congress required strict compliance with the service-by-delivery provision applicable to foreign states. See *Magness*, 247 F.3d at 615; *Transaero*, 30 F.3d at 154. While Congress permitted delivery on foreign state agencies or instrumentalities so long as the delivery is "reasonably calculated to give actual notice," 28 U.S.C. § 1608(b)(3), the provision governing service-by-delivery on a foreign state makes no mention of actual notice, *id.* § 1608(a)(3). A state's foreign minister's principal place of business is in the seat of government, not in the state's foreign embassies. Thus, a private party's service by mail or in person on a foreign minister at one of the state's embassies necessarily would require the further transmission of the summons and complaint to the foreign minister by the embassy staff. While the district court may have viewed that means of service as reasonably calculated to give actual notice to the foreign minister, that is insufficient for service by delivery under Section 1608(a)(3).

As we next show, the United States' treaty obligations and the FSIA's legislative history, which explains the statute's consistency with those treaty obligations, further support the understanding that Section 1608(a)(3) does not permit a private party to serve a foreign state by having process mailed to one of its embassies. Such service of process on a foreign mission would be inconsistent with the United States' treaty obligations. But because Section 1608(a)(3) may be interpreted to prohibit such service, it must be so construed. See Restatement (Third) of the Foreign Relations Law of the United States § 114 (Am. Law Inst. 1986) ("Where fairly possible, a United States statute is to be construed so as not to conflict with * * * an international agreement of the United States.") (Third Restatement); see also, *e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

Article 22, Section 1 of the VCDR provides that "the premises of the mission shall be inviolable." VCDR, *done* April 18, 1961, 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 104. There is an international consensus that a litigant's service of process through mail or personal delivery to a foreign mission is inconsistent with the inviolability of the mission enshrined in VCDR Article 22. The United Nations International Law Commission prepared the preliminary draft of the Vienna Convention and presented the draft to the United Nations member states for their consideration. Int'l L. Comm'n, Report of the Commission to the General Assembly, U.N. GAOR, 12th Sess., Supp. 9, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, 131, U.N. Doc. A/CN.4/SER.A/1957/Add.1, <https://goo.gl/26RrG3> (Commission Report). In describing the almost identical provision that became Article 22, the International Law Commission explained that:

[a] special application of this principle [of the inviolability of the premises of the mission] is that no writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry for Foreign Affairs of the receiving State.

Commission Report, [1957] 2 Y.B. Int'l L. Comm'n at 137. The states that became parties to the VCDR have so understood Article 22, as is documented in numerous treatises describing state practice under the treaty. See, e.g., Eileen Denza, *Diplomatic Law* 124 (4th ed. 2016) ("The view that service by post on mission premises is prohibited seems to have become generally accepted in practice."); James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) ("[Article 22] implicitly also protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State."). And, reflecting the international consensus, other nations' state immunity statutes do not authorize a litigant's service on a foreign state through mail or personal delivery to a foreign state's embassy, in the absence of express consent by the foreign state. See, e.g., Act on the Civil Jurisdiction of Japan with respect to a Foreign State, Act No. 24 of 2009, art. 20 (Japan); Foreign States Immunity Law, 5769-2008, § 13 (Israel); *Foreign State Immunities Act 1985*, §§ 24, 25 (Austl.); State Immunity Act, R.S.C. 1985, c S-18, § 9 (Can.); Foreign States Immunities Act 87 of 1981, § 13 (S. Afr.); State Immunity Act 1978, c. 33, § 12 (U.K.).

Moreover, the Executive Branch has long and consistently construed Article 22, and the customary international law it codifies, as precluding a litigant from serving process by mail or personal delivery to a foreign embassy as a means of serving a foreign state. See *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965) (Washington, J., concurring) ("The establishment by one country of a diplomatic mission in the territory of another does not implicitly or explicitly empower that mission to act as agent of the sending state for the purpose of accepting service of process." (quoting Letter from Leonard C. Meeker, Acting Legal Adviser, to John W. Douglas, Assistant Attorney General, August 10, 1964)). The courts owe deference to that interpretation. See *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight." (quotation marks omitted)).

In light of that longstanding understanding of the Vienna Convention, the United States routinely refuses to recognize the propriety of a private party's service through mail or personal delivery to a United States embassy. When a foreign litigant (or foreign court official on behalf of a foreign litigant) purports to serve the United States through its embassy, the embassy sends a diplomatic note to the foreign government explaining that the United States does not consider itself to have been served consistently with international law and thus will not appear in the litigation or honor any judgment that may be entered against it. For that reason, the United States has a strong interest in ensuring that its courts afford foreign states the same treatment the United States contends it is entitled to under the Vienna Convention. Cf. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) (noting that, in construing the FSIA, courts should consider the United States' interest in reciprocal treatment abroad).

Reflecting the Executive Branch's understanding and international practice, United States courts have recognized that a private party's delivery of process to a foreign mission or ambassador in the United States for service on another is inconsistent with the concept of inviolability enshrined in the VCDR. Thus, the Seventh Circuit held invalid a private party's service on a foreign-state agency by delivery to the foreign state's embassy in the United States because "service through an embassy is expressly banned" by the VCDR. *Autotech Tech. LP v.*

Integral Research & Dev. Corp., 499 F.3d 737, 748 (2007). Similarly, the D.C. Circuit has held that a litigant's service of process on an ambassador "as an agent of his sending country" is inconsistent with the inviolability of diplomatic agents established by VCDR Article 29. *Hellenic Lines*, 345 F.2d at 980; see *id.* at 980 n.4.

In addition, the FSIA's legislative history expressly addresses and repudiates the idea that a litigant's service on a foreign state may be effected by delivery of process to its mission in the United States. The House Report's section-by-section analysis explains that, prior to the FSIA's enactment, some litigants attempted to serve foreign states by "mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state." H.R. Rep. No. 94-1487, at 26 (1976); see *id.* (describing such service as being of "questionable validity"). The report states that "Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the [VCDR], which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill." *Id.*

Because the VCDR prohibits a private party from serving a state by having process mailed to a foreign mission, because Section 1608(a)(3) may fairly be construed to prohibit such delivery, and because the FSIA's legislative history demonstrates Congress's intent to prevent private-party service on an embassy, the district court erred in concluding that plaintiffs had properly served the Republic of Sudan. *Charming Betsy*, 6 U.S. (2 Cranch) at 118; Third Restatement § 114.

3. Relying in part on the Second Circuit's decision in *Harrison v. Republic of Sudan*, the district court held that plaintiffs properly served Sudan because Section 1608(a)(3) "does not prescribe the place of service, only the person to whom process must be served." J.A. 468; see *id.* (citing 838 F.3d 86, 93 (2016)). But the Second Circuit's reasoning was that plaintiffs' service through "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C." is permissible under the statute because it "could reasonably be expected to result in delivery to the intended person." *Harrison*, 838 F.3d at 90. That approach is legally erroneous. As we explained above, while Section 1608(b)(3) authorizes service on a foreign state *agency or instrumentality* by delivery "if reasonably calculated to give actual notice," section 1608(a)(3) does not permit service on a foreign state itself by delivery reasonably calculated to give notice.

In addition, in light of the United States' international treaty obligations and the FSIA's legislative history discussed above, Section 1608(a)(3) cannot plausibly be construed to permit a private party to serve a foreign state by delivering process to the foreign state's embassy. The Second Circuit believed that the House Report discussion of Section 1608 "fails to make the distinction at issue in the instant case, between '[s]ervice on an embassy by mail,' [H.R. Rep. No. 94-1487, at 26] (emphasis added), and service on a minister of foreign affairs *via* or *care of* an embassy." *Harrison*, 838 F.3d at 92. But the distinction between service "on" an embassy and service on a foreign minister "via" an embassy is a false one. In both cases, the suit is against the foreign state itself. See 28 U.S.C. § 1603(a); *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 31-32 (D.C. Cir. 2000) (treating suit against foreign embassy as suit against foreign state for purposes of the FSIA). There is no statutory basis for prohibiting a plaintiff's service at an embassy when the plaintiff names a foreign state's embassy as the defendant but not when the plaintiff instead names the foreign state.

Moreover, the Second Circuit plainly misconstrued the legislative history. The House Report unambiguously expressed disapproval for the method of “attempting to commence litigation against *a foreign state*” by “the mailing of a copy of the summons and complaint *to a diplomatic mission* of the foreign state.” H.R. Rep. No. 94-1487, at 26 (emphasis added). Private parties’ attempted service by mailing a summons and complaint to an embassy, however addressed, was the harm Congress sought to remedy in enacting Section 1608(a)(3).

That conclusion again is buttressed by the international obligation to respect mission inviolability. As discussed above, the House Report explains that Congress enacted Section 1608 to avoid inconsistency with VCDR Article 22(1), which provides categorically that “[t]he premises of the mission shall be inviolable,” and which precludes a private party from making a foreign state a defendant in a suit through any type of service through mail or personal delivery to its embassy. The district court below and the Second Circuit in *Harrison* believed that service on a foreign minister sent to an embassy is not precluded by the inviolability of the mission because it is the foreign minister who is served, not the embassy. J.A. 469; 838 F.3d at 92. But that purported distinction reflects a misunderstanding of Article 22 and the concept of inviolability it embodies, as explained above. See also Eileen Denza, *Interaction Between State and Diplomatic Immunity*, 102 American Soc. of Int’l L. Proc. 111, 111 (2008) (“At the very outset of legal proceedings against a state there is the problem of service of process—proceedings against the defendant cannot be begun through service on its embassy premises in the light of Article 22 of the Vienna Convention on Diplomatic Relations.”).

The district court and the Second Circuit also believed that because an embassy employee had accepted the delivery of the service of process, the embassy had consented to receive service, even if service of process would otherwise be a violation of its inviolability. J.A. 469; 838 F.3d at 95 (“Here, the Sudanese Embassy’s acceptance of the service package surely constituted ‘consent.’”). Article 22(1) provides, however, that “[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent *of the head of the mission*.” (emphasis added). There is no evidence in either this case or *Harrison* that the Ambassador consented to receive plaintiffs’ service of process by mail delivery on behalf of the foreign minister or Sudan. Other embassy employees do not have authority under Article 22 to consent to an action that otherwise would be a breach of a foreign mission’s inviolability.

In short, the text of the FSIA, its legislative history, and the United States’ international treaty obligations all support interpreting Section 1608(a)(3) as not permitting private parties to serve process on a foreign state through its embassy in the United States. Because plaintiffs in this case did not properly serve Sudan, the district court lacked personal jurisdiction. 28 U.S.C. § 1330(b). Accordingly, the district court erred in denying Sudan’s motion to vacate the judgments as void under Rule 60(b)(4). See *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005).

* * * *

c. Savang v. Lao People’s Democratic Republic

The United States filed a suggestion of immunity and statement of interest on behalf of the president and the prime minister of Laos in federal district court in California on July 13, 2017. The section of the U.S. statement of interest relating to the proper method of

service under the FSIA is excerpted below. The suggestion of immunity is excerpted in Section C, *infra*. On July 31, 2017, the court dismissed the case for lack of subject matter jurisdiction. *Savang v. Lao People's Democratic Republic*, No. 16-cv-02037 (E.D. Ca. 2017).

* * * *

The FSIA establishes “the sole basis for obtaining jurisdiction over a foreign state in our courts.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Personal jurisdiction exists under the statute where there is both subject matter jurisdiction and proper service. *See* 28 U.S.C. § 1330(a)–(b). Section 1608(a) of the act contains the four exclusive means of service of process on a foreign state, and specifies the order in which they must be attempted. *See id.* § 1608(a); *accord Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010). These methods are (1) service according to a “special arrangement between the plaintiff and the foreign state,” (2) service under “an applicable international convention on service,” (3) service by mail to the foreign minister of the foreign state, or (4) service by transmission of process to the State Department, which will forward necessary papers “through diplomatic channels to the foreign state.” 28 U.S.C. § 1608(a). Consistent with the United States’ position, most courts have required “strict compliance” with § 1608(a). *See, e.g., Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2010); *Transaero, Inc. v. La Fuerza Aérea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994). The Ninth Circuit, by contrast, has held that “substantial compliance” will do. *Peterson*, 627 F.3d at 1129.

Even under a more liberal substantial compliance standard, however, Plaintiffs’ attempt to serve Laos was ineffective to satisfy any of § 1608(a)’s four methods of service. Subsection (a)(1) is inapposite, because there is no suggestion in the record of a “special arrangement” between Plaintiffs and Laos. Subsection (a)(2) is similarly inapplicable, because there are no international treaties on service of process in force between the United States and Laos. While Plaintiffs’ supplemental brief discusses service under the Hague Service Convention, *see* Pls.’ Supp. Br. at 6–8, Laos is not a party to that Convention, so service under (a)(2) is not an option available to Plaintiffs.

Plaintiffs’ purported service also failed to “substantially comply” with subsection (a)(3). To satisfy that provision, a plaintiff must:

send[] a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. § 1609(a)(3). Here, the summons and complaint were not sent via the clerk of the court. They did not include a “notice of suit” — a particular legal document whose components are specified in 22 C.F.R. § 93.2. Plaintiffs also concede that the summons and complaints were not translated into Lao. *See* Pls.’ Supp. Br. 6. And they were not addressed to the Lao minister of foreign affairs. *See* Affidavit of Process Server at 2, ECF No. 9.

Finally, Plaintiffs have made no attempt to effect service under subsection (a)(4) by requesting the clerk of the court to dispatch the requisite documents to the Secretary of State for transmission through diplomatic channels.

Accordingly, Plaintiffs' attempt to serve Laos by sending via Federal Express copies of the summons, Complaint, and civil cover sheet to the Presidential Palace, addressed to the former President of Laos, does not satisfy § 1608(a)'s requirements.

The Court therefore lacks personal jurisdiction over Laos.

* * * *

d. Valdevieso v. Tourist Office of Spain in New York

The United States submitted a statement of interest in another case in which service was attempted via mail to a foreign consulate in 2017. In *Valdevieso v. Tourist Office of Spain in New York*, No. 711.SCQ 2017 (Civ. Ct. NY, Queens), plaintiff attempted to effect service by mail to the Tourist Office of New York, which is part of the Spanish consulate. The U.S. statement of interest, dated May 23, 2017, is excerpted below.

* * * *

The FSIA is “the sole basis for obtaining jurisdiction over a foreign state” in United States courts. *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)); see also *Garb v. Republic of Poland*, 440 F.3d 579, 581 (2d Cir. 2006). A lawsuit against a consulate is considered a suit against the foreign state itself for purposes of the FSIA. See, e.g., *Fagan v. Deutsche Bundesbank*, 438 F. Supp. 2d 376, 385 (S.D.N.Y. 2006); *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 345 (9th Cir. 1993). As explained further below, the United States considers the Tourist Office of Spain in New York part of the Spanish Consulate. Personal jurisdiction exists under the FSIA where there is both subject matter jurisdiction and proper service. See 28 U.S.C. § 1330(a)–(b); *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 241 F.3d 135, 151 (2d Cir. 2001) (“[S]ubject matter jurisdiction plus service of process equals personal jurisdiction under the FSIA.”).

The FSIA sets out, in hierarchical order, four exclusive methods for service of process on foreign states in 28 U.S.C. § 1608. The first two procedures allow for service according to a special arrangement between the parties or “an applicable international convention on service of judicial documents.” 28 U.S.C. § 1608(a)(1)–(2). If service cannot be made using either of these methods, it may be accomplished

by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

Id. at § 1608(a)(3). If service cannot be accomplished in that fashion within thirty days, it must be done under section 1608(a)(4), which provides for service

by sending two copies of the summons and complaint and a notice of suit together with a translation of each into the official language of the foreign state by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

Id. at § 1608(a)(4). None of these options, however, permits mailing a summons to a foreign state's consulate in the United States. Plaintiff therefore has failed to comply with the FSIA's requirements in this case. Courts have made clear that section 1608(a) "mandate[s] strict adherence to its terms, not merely substantial compliance." *Finamar Investors, Inc. v. Republic of Tajikistan*, 889 F. Supp. 114, 117 (S.D.N.Y. 1995); *see also Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001); *Transaero, Inc. v. La Fuerza Boliviano*, 30 F.3d 148, 154 (D.C. Cir. 1994); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983).

In addition, both Spain and the United States are parties to the VCCR, which provides that "[c]onsular premises shall be inviolable." 21 U.S.T. 77, art. 31. Article 1(j) of the VCCR defines "consular premises" to mean "the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post." The VCCR further defines "consular functions" to include, among other things, "furthering the development of commercial, economic, cultural and scientific relations between the sending state and the receiving state." VCCR, Art. 5(b). Under these provisions, the Tourist Office of Spain in New York is considered part of the consulate. Courts have held that service of process on consular premises is contrary to the VCCR's guarantee of consular inviolability. *See Swezey v. Merrill Lynch*, 997 N.Y.S.2d 45, 47 (N.Y. App. Div. 2014); *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) ("Service of process at diplomatic or consular premises is prohibited."). Thus, under both the FSIA and the VCCR, the attempted service on the Tourist Office in this case is inappropriate and ineffective.

The United States has strong reciprocity interests in the enforcement of the applicable rules governing service of process on sovereign states, including application of and strict adherence to the requirements of the FSIA and the VCCR. The United States has long maintained that the United States must be served in a manner consistent with international law when it is sued abroad, and the United States regularly objects when such service does not take place. If the FSIA and VCCR were interpreted to permit parties in the United States to serve papers by mailing them to a consulate, it could make U.S. consulates abroad vulnerable to similar treatment by foreign courts, contrary to the United States' consistently asserted view of the law.

Absent service in strict compliance with the FSIA, 28 U.S.C. § 1608(a), this Court does not have personal jurisdiction over the Tourist Office of Spain in New York in this case.

6. Execution of Judgments against Foreign States and Other Post-Judgment Actions

a. Hilt Construction v. Permanent Mission of Chad

See discussion in Section E.2., *infra*, from the U.S. brief in *Hilt Construction v. Permanent Mission of Chad*, regarding an impermissible attempt to enforce a default judgment without seeking an order in accordance with the FSIA.

b. Bennett v. Bank Melli and Rubin v. Iran

As discussed in *Digest 2015* at 396-400, and *Digest 2016* at 435-36, in *Bennett v. Bank Melli*, Nos. 13-15442, 13-16100 (9th Cir. 2015), the United States filed a brief concerning the proper interpretation of section 1610(g) of the FSIA and certain provisions of the Terrorism Risk Insurance Act (“TRIA”). Section 1610(g) provides that, for individuals holding judgments under section 1605A of the FSIA, “the property of a foreign state,” as well as the “property of” its agency or instrumentality, “is subject to attachment in aid of execution, and execution, ... as provided in this section.” Section 201(a) of TRIA provides that “[n]otwithstanding any other provision of law,” certain terrorism-related judgment holders may attach “the blocked assets of” certain foreign states, including the blocked assets of any of their agencies or instrumentalities.

The Ninth Circuit’s 2016 holding in *Bennett* that §1610(g) contains “a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities,” 825 F.3d at 959, conflicted with the U.S. government view articulated in its *amicus* brief, as well as with the Seventh Circuit’s 2016 decision interpreting §1610(g), *Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (2016). Petitions for writs of certiorari to the U.S. Supreme Court were filed in both *Bennett* and *Rubin*. On January 9, 2017, the Court invited the views of the U.S. government.

In its brief on the petition in *Bennett*, No. 16-334, the United States recommended that the Supreme Court resolve the issue of whether §1610(g) creates a freestanding exception to attachment immunity in its consideration of *Rubin* and that it deny certiorari on the second issue presented, regarding ownership of targeted assets. Excerpts follow from the U.S. brief filed on May 23, 2017 in *Bennett*.

* * * *

I. WHETHER SECTION 1610(g) CREATES A FREESTANDING EXCEPTION TO ATTACHMENT IMMUNITY WARRANTS THIS COURT’S REVIEW, BUT THE COURT SHOULD RESOLVE THAT QUESTION IN *RUBIN*

A. The Decision Below Incorrectly Interprets Section 1610(g)

1. Subsection (g) provides that “the property of a foreign state” against which a judgment has been 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 such an entity, “is subject to attachment in aid of execution, and execution, upon

that judgment *as provided in this section*, regardless of” the *Bancec* factors discussed above.** 28 U.S.C. 1610(g)(1) (emphasis added). Subsection (g) thus sets aside the need for a *Bancec* inquiry in certain cases involving the terrorism exception. When a plaintiff obtains a Section 1605A judgment, the plaintiff can attempt to execute against the property of the foreign state itself or an agency or instrumentality, without regard to the *Bancec* factors. That significantly expands the universe of assets potentially available in such cases. But by its terms, the plaintiff still must proceed “as provided in this section.” *Ibid*. That is, the creditor must also satisfy one of the exceptions to attachment immunity “as provided in” Section 1610. Congress thus did not take the further step of creating a freestanding exception to attachment immunity that would override the carefully crafted exceptions to immunity elsewhere in Section 1610. See *Rubin*, 830 F.3d at 474.

2. The court of appeals’ alternative view would render much of the relevant provisions insignificant or superfluous.

a. First, subsection (g)’s statement that property may be attached “as provided in this section” would be essentially meaningless, because the statute would function the same way with or without it. The court of appeals appeared to recognize that the phrase must refer to some other part of Section 1610, and concluded that it “refer[s] to procedures contained in § 1610(f).” Pet. App. 14a. But as the Seventh Circuit explained in *Rubin*, “it would be very odd” for Congress to refer to subsection (f) in that way. 830 F.3d at 484. Congress would not be expected to say “this section” when it really meant “the preceding subsection.” Cf. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 938-939 (2017).

Moreover, even on its own terms, the Ninth Circuit’s interpretation would not support attachment. Paragraph (f)(1) could theoretically allow the attachment of certain blocked assets—but the President exercised his statutory authority to waive paragraph (f)(1) before it went into effect. See *Rubin*, 830 F.3d at 486-487. Subsection (f) thus has been “inoperative from the start,” and “does not allow *any* form of execution.” *Id.* at 487. Accordingly, if subsection (g) referred solely to subsection (f), it “would mean no execution at all.” *Ibid*.

b. Second, the court of appeals’ interpretation of subsection (g) would render subsection (a)(7) largely irrelevant. See *Rubin*, 830 F.3d at 484. Subsection (a)(7) provides that a foreign state’s property used in commercial activity is not immune from attachment if the plaintiff is enforcing a judgment that “relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008).” 28 U.S.C. 1610(a)(7). Section 1605A is the current version of the terrorism exception. ... Subsections (a)(7) and (g) thus work together to enable holders of terrorism-related judgments to pursue property used in commercial activity (via subsection (a)(7)), and to do so whether that

** Editor’s note: The *Bancec* discussion earlier in the brief is excerpted below:

In *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*), this Court recognized a general presumption that courts should respect the separate legal status of a state’s agencies and instrumentalities. *Id.* at 626-628. A foreign state’s judgment creditor therefore generally cannot satisfy that judgment by attaching the property of an agency or instrumentality. That presumption may be overcome as appropriate under the totality of the circumstances, however, if the instrumentality is “so extensively controlled by its owner that a relationship of principal and agent is created,” or if recognizing the entity’s separate juridical status would “work fraud or injustice.” *Id.* at 629 ... Some courts have identified “*Bancec* factors” to consider in making that determination. ... Subsection (g) thus establishes that courts need not engage in a *Bancec* analysis in enforcement proceedings in covered terrorism cases.

property is owned by the foreign state or by its agencies or instrumentalities, without need for a *Bancec* inquiry (via subsection (g)).

The court of appeals' interpretation of subsection (g), however, would make the two provisions work at cross-purposes by enabling Section 1605A creditors to evade subsection (a)(7)'s key limitation. Subsection (a)(7) allows a Section 1605A judgment creditor to pursue property only if it is used in commercial activity—but those same creditors could pursue property without that limitation simply by invoking subsection (g). For those creditors, subsection (a)(7) and its limitations would be superfluous.

Even worse, the court of appeals' interpretation would have made subsection (a)(7) entirely irrelevant when it was adopted. The very same statute—the 2008 NDAA—both amended subsection (a)(7) to refer to Section 1605A and enacted subsection (g). NDAA § 1083(b)(3)(A) and (D), 122 Stat. 341. And at the time, subsection (a)(7) referred *solely* to judgment creditors under Section 1605A. § 1083(b)(3)(A), 122 Stat. 341. Thus, under the court's interpretation, subsection (g)'s enactment rendered subsection (a)(7) completely pointless—even though Congress was making substantive changes to subsection (a)(7) at the very same time.

B. The Decision Below Conflicts With *Rubin*

1. The Ninth Circuit's decision here conflicts with *Rubin*. The Ninth Circuit held below that subsection (g) “contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities.” Pet. App. 13a. On that view, persons with a judgment against a foreign state under Section 1605A need not demonstrate any nexus between the property of the foreign state (or its agency or instrumentality) and commercial activity before proceeding to execution. The Seventh Circuit reached the opposite result in *Rubin*, while acknowledging the split in authority. 830 F.3d at 487 (“[W]e disagree with the Ninth Circuit's interpretation of subsection (g).”). And Iran, owner of the artifacts at issue in *Rubin*, acknowledges the split as well and agrees that the question warrants certiorari. See Iran Mem. in Response at 14-17, *Rubin*, *supra* (No. 16-534).

The Ninth Circuit's conclusion that the assets were attachable under subsection (g) is a holding, notwithstanding the court's conclusion that they are also attachable under TRIA. See Pet. App. 10a-12a. An alternative holding is still binding precedent. See *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Operating Eng's Pension Trust v. Charles Minor Equip. Rental, Inc.*, 766 F.2d 1301, 1304 (9th Cir. 1985). Moreover, the court's Section 1610(g) analysis—which prompted a dissent solely on that issue, see Pet. App. 27a-34a (Benson, J., concurring in part and dissenting in part)—gave the court's judgment a broader scope: It permitted the district court on remand to consider attachment under TRIA *and* Section 1610(g). TRIA permits creditors to recover only up to the amount of their compensatory damages, see § 201(a), 116 Stat. 2337, and only so long as the relevant assets remain “blocked,” see *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 369 (2009). Section 1610(g) contains neither limitation. Accordingly, there is a direct conflict on this question.

Respondents nonetheless contend (Joint Br. in Opp. 19-20) that there is no direct conflict because this case involves blocked assets, whereas *Rubin* does not. The Ninth Circuit's broad holding forecloses that view, however, because there is no suggestion that its interpretation of the reach of subsection (g) is applicable only to blocked assets. See Pet. App. 13a (“We hold that subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities.”). Respondents also point to paragraph (g)(2), which renders the *United States*' own sovereign immunity inapplicable when assets are blocked.

See 28 U.S.C. 1610(g)(2). But that does not suggest that subsection (g)'s provisions concerning *foreign state* immunity are inapplicable when assets are not blocked. And the Ninth Circuit never even mentioned paragraph (g)(2). Pet. App. 12a-20a.

Unless this Court intervenes, the circuit conflict will likely persist. The court of appeals denied en banc review here, even after soliciting (and receiving) from the United States an amicus brief arguing that the panel's interpretation of Section 1610(g) was wrong. Pet. App. 2a-3a. And although the court denied rehearing en banc before the Seventh Circuit decided *Rubin* and created the circuit conflict, the Seventh Circuit's analysis was similar to the analysis the parties and the United States had already presented to the Ninth Circuit in this case. It is thus unlikely that the Ninth Circuit would grant en banc review in a future case to adopt the Seventh Circuit's position. The Seventh Circuit also declined to grant en banc review in *Rubin*. 830 F.3d at 487 n.6.

C. The Question Presented Is Important

The meaning of Section 1610(g) is a pure question of statutory interpretation that has divided the circuits and that implicates foreign affairs. The court of appeals' interpretation of subsection (g) significantly broadens its scope by denying attachment immunity for property without any need for a nexus to commercial activity. Congress has carefully crafted exceptions in the FSIA relating to state sponsors of terrorism, and they should not be subject to unwarranted judicial expansion.

The interpretation of subsection (g) may have little practical impact in many cases involving enforcement of judgments obtained under the terrorism exception, because such creditors may be able to attach blocked property under TRIA (as the individual respondents seek to do here), without regard to the interpretation of subsection (g). The interpretation of subsection (g) is critical, however, when the assets at issue do not meet TRIA's specialized definition of "blocked property." § 201(d)(2), 116 Stat. 2338. For example, TRIA would not govern attachment involving judgments against Sudan, because Sudan's assets are no longer blocked for purposes of TRIA, see, e.g., *Harrison v. Republic of Sudan*, No. 13-cv-3127, 2017 WL 946422, at *3 (S.D.N.Y. Feb. 10, 2017), or judgments against Iran where the creditor seeks to attach assets that (like the assets at issue in *Rubin*) were unblocked by the Algiers Accords, Jan. 19, 1981, 20 I.L.M. 224. The court of appeals' rule would create an exception to immunity for all such unblocked property, even when it lacks any nexus to commercial activity.

D. The Court Should Grant The *Rubin* Petition And Hold This Case Pending The Outcome Of That Decision

Rubin is a better vehicle than this case for this Court's plenary review. *Rubin* arises from a final judgment, and if the Court denies review on the second question presented in that case, the *Rubin* petitioners' ability to attach the assets at issue will stand or fall on the interpretation of subsection (g). It is undisputed that the assets are Iran's property, and there would be final determinations that they are not attachable under subsection (a)'s commercial-activity exception or under TRIA. That case also demonstrates the impact of attaching assets that the foreign sovereign has not used in commercial activity and that are not blocked, and thus are not attachable under subsection (a) or TRIA. The plaintiffs seek to attach what Iran describes as "irreplaceable artifacts of [its] cultural heritage," which it loaned to an American university for academic study. Iran Mem. in Response at 26, *Rubin*, *supra* (No. 16-534).

By contrast, this case presents several complicating factors. First, it is interlocutory. The district court denied a motion to dismiss but certified the decision for interlocutory review, and the court of appeals affirmed. Pet. App. 3a, 103a. Ordinarily, an interlocutory posture "itself

alone furnishe[s] sufficient ground for the denial” of a petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, e.g., *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari).

Second, in part because of the interlocutory posture, it is unclear whether the interpretation of subsection (g) will ultimately make a practical difference here. The court of appeals held that respondents could attach the assets under TRIA. Pet. App. 10a-12a. And although the panel’s interpretation of subsection (g) gives a broader scope to the judgment, see pp. 14-15, *supra*, as a practical matter TRIA will likely resolve the case on remand unless there is some change in circumstances. For subsection (g) to have practical importance, the disputed assets would need to become unblocked, or respondents would have to find enough Iranian assets to satisfy their sizable compensatory damage awards (which dwarf the estimated \$17.6 million in property at issue here) and then seek to satisfy their punitive damage awards, which may be enforced under the FSIA but not TRIA.

Third, respondents here may raise alternate grounds for affirming the Ninth Circuit’s judgment. See Joint Br. in Opp. 22 (arguing that the assets are independently attachable under subsections (a)(7) and (b)(3)); see also Pet. App. 27a (Benson, J., concurring in part and dissenting in part) (concluding that the assets would be attachable by virtue of subsection (b)(3)). Those issues could be a distraction in the briefing and argument, and could interfere with the Court’s ability to resolve the question on which the circuits are divided. The appropriate course is accordingly for the Court to grant the petition in *Rubin*, and to hold the petition here for its decision in that case.

II. THIS COURT SHOULD NOT GRANT REVIEW ON THE SECOND QUESTION PRESENTED REGARDING OWNERSHIP UNDER TRIA AND SECTION 1610(g)

TRIA applies to the “assets of” a terrorist party or its agency/instrumentality, TRIA § 201(a), and Section 1610(g) applies to the “property of” a foreign state or its agency/instrumentality. In seeking this Court’s review to consider how to interpret those provisions, petitioner is actually seeking review of two distinct questions: whether these statutes require “ownership” or some lesser interest in property, and whether the relevant interest is determined under state or federal law. Neither question warrants this Court’s review here.

A. 1. Insofar as the question is whether TRIA and Section 1610(g) have an “ownership” requirement, the United States agrees with petitioner that they do. See Gov’t C.A. Br. 14-17; see also Pet. 29 (collecting citations to United States briefs taking this position). But the court of appeals does not appear to have rejected such a requirement. Indeed, in part of its opinion, the court appears to have assumed that both statutes require ownership. See Pet. App. 22a (“Like most courts, we look to state law to determine the ownership of assets in this context.”).

Petitioner’s contrary understanding of the Ninth Circuit’s opinion appears to rest on petitioner’s position that it could not have an ownership interest in funds that are owed to it, but that have not yet been paid. That seems to be a fact-bound argument that the court of appeals misapplied California law (or failed to properly understand the federal common law of property) on the facts of this case. Such fact-based disputes are not a basis for certiorari.

2. There is no clear split among the courts of appeals on this issue. The D.C. Circuit has concluded that both TRIA and Section 1610(g) require ownership. *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 938-940 (2013). No court of appeals has squarely held to the contrary. In *Calderon-Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993 (2014), cert. denied, 136 S. Ct. 893 (2016), the Second Circuit concluded that Congress “has not defined the type of property

interests” subject to attachment under Section 1610(g), and the court ultimately looked to state law. *Id.* at 1000-1001. But as the court understood state law, only one entity could have *any* property interest in the asset at issue (midstream electronic funds transfers). *Id.* at 1001-1002. The court thus did not need to confront the question whether an interest less than ownership would have sufficed under Section 1610(g). See *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207, 211-212 (2d Cir. 2014) (per curiam) (following *Calderon-Cardona* in a TRIA case involving midstream electronic funds transfers), cert. denied, 136 S. Ct. 893 (2016).

B. The Court’s review also is not warranted to consider whether a court should apply state or federal law in determining any ownership interest.

1. The Second and D.C. Circuits appear to have split on that question. Compare *Calderon-Cardona*, 770 F.3d at 1000-1001, and *Hausler*, 770 F.3d at 211-212, with *Heiser*, 735 F.3d at 940-941. That conflict does not make any practical difference, however, unless state property law and federal common law lead to different results, and they often will not. For example, although the Second and D.C. Circuits were ostensibly applying different bodies of law, they came to the same conclusion that downstream entities have no attachable interest in midstream electronic fund transfers. See *Calderon-Cardona*, 770 F.3d at 1001-1002 (applying U.C.C. Article 4-A as a matter of state law); *Heiser*, 735 F.3d at 940-941 (looking to U.C.C. Article 4-A to supply a rule of decision for federal common law).

The same is true in this case. The court of appeals concluded that it would reach the same result regardless of whether state or federal law applied, because the two are “aligned” here. Pet. App. 23a. Accordingly, unless this Court were prepared to review not only the question of which body of law applied, but also the court of appeals’ predicate understanding of California property law and federal common law, *and* the Court found a meaningful difference between the two here—case and fact-specific inquiries not worthy of certiorari—there would be no basis to set aside the judgment of the court of appeals and no need to decide the issue on which the circuits are divided.

C. Finally, this case would be a poor vehicle for resolving the question because petitioner elides the important issue of exactly what the court of appeals understood the targeted property to be. Although the opinion is ambiguous, it can fairly be read to conceive of the targeted property as the right of Bank Melli to receive payment from Visa/Franklin (an asset Bank Melli almost surely owns under any relevant law), as distinguished from the Visa/Franklin account itself. See Pet. App. 22a-23a (“Bank Melli has a contractual right to obtain payments from Visa and Franklin. Under California law, those assets are property of Bank Melli and may be assigned to judgment creditors.”). That ambiguity counsels denial of certiorari in its own right, particularly given this case’s interlocutory posture, because the issue may be clarified (and mooted) on remand. Furthermore, if the asset at issue is understood to be the right to receive payment (as opposed to ownership of the funds themselves), it is particularly doubtful that state and federal law would differ as to whether Bank Melli owned that asset.

* * * *

On May 23, 2017, the United States filed its *amicus* brief on the petition in *Rubin*, No. 16-534, expressing the view that certiorari should be granted, limited to the first question presented—whether 1610(g) creates a freestanding exception to attachment immunity. For background on *Rubin*, in which plaintiffs seek to execute on a judgment by attaching Iranian artifacts on loan to the University of Chicago, see *Digest 2011* at

318-21; *Digest 2012* at 307-09; and *Digest 2014* at 383-86. The U.S. brief in the Supreme Court in *Rubin* at the petition stage reiterates the arguments in the *Bennett* brief (filed the same day) as to the importance of resolving the circuit split and the superiority of the *Rubin* case as a vehicle for deciding the correct interpretation of 1610(g). On June 27, 2017, the Supreme Court granted the petition, limited to the first question presented, on interpreting 1610(g). The U.S. *amicus* brief at the merits stage, filed on October 30, 2017, is excerpted below.***

* * * *

SECTION 1610(g) DOES NOT CREATE A FREESTANDING EXCEPTION TO THE IMMUNITY OF FOREIGN SOVEREIGN PROPERTY FROM EXECUTION

A. Section 1610(g) Provides For Veil Piercing

1. The analysis under the FSIA “begin[s], as always, with the text of the statute.” *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 197 (2007). The text establishes that subsection (g) provides for veil piercing, but does not in addition allow execution regardless of the other provisions of Section 1610. Rather, it subjects additional entities’ property to execution only “as provided in th[at] section.” 28 U.S.C. 1610(g). Subsection (g) thus is not a stand-alone exception to immunity; it is expressly linked to the other exceptions in Section 1610.

a. Subsection (g) consists of a single sentence. ... Because this sentence is dense, it helps to break it into its components.

First, there must be “a foreign state against which a judgment is entered under Section 1605A.” 28 U.S.C. 1610(g). Section 1605A is the current version of the terrorism exception, so subsection (g) comes into play when a victim of terrorism has obtained a judgment under that provision against a designated state sponsor of terrorism.

Second, subsection (g) overrides the ordinary rule for piercing the veil in FSIA cases. Ordinarily, a creditor with a judgment against a foreign state can execute only against that state’s own property; if property is owned not by the state itself but by an agency or instrumentality (or a corporation or other separate entity owned by the state, agency, or instrumentality), it would be out of reach, unless unusual circumstances justified piercing the veil and treating that separate entity as if it were the foreign state itself. See *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983); see also *Dole Food Co. v. Patrickson*, 538 U.S. 468, 473-478 (2003).

Subsection (g) plainly overrides that rule for creditors of judgments obtained under the current version of the terrorism exception: Those creditors can potentially reach not merely “the property of [the] foreign state” itself, but also “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.” 28 U.S.C. 1610(g)(1). And such veil piercing may occur “regardless of” the *Bancec* factors that courts would otherwise have considered. *Ibid.*; see Pet. App. 23-26.

*** Editor’s note: On February 21, 2018, the Supreme Court issued its opinion holding that Section 1610(g) of the FSIA is not a freestanding exception to the immunity of foreign state property. The opinion is consistent with the arguments in the U.S. brief and will be discussed further in *Digest 2018*.

Third, and critical to the resolution of this case, sub-section (g) then specifies what can happen to the property in that broader pool: It is “subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section*.” 28 U.S.C. 1610(g)(1) (emphasis added). That is, the property of the state, agency, or instrumentality (including property that is or is held in another separate entity) is subject to execution “as provided in” other provisions of Section 1610.

Subsection (g) thus makes it easier for victims of terrorism to pierce the veil between a state and its agencies and instrumentalities. By the statute’s plain terms, however, a plaintiff can subject those entities’ property to execution only “as provided in this section.” 28 U.S.C. 1610(g)(1). Consequently, even if a creditor invokes subsection (g) to pierce the veil, the creditor still must satisfy one of the exceptions to immunity “provided in” Section 1610 to execute against that property.

In short, subsection (g) consists of one sentence with one subject: veil piercing. It does not also take the very different step of enabling a creditor to execute a judgment without regard to the exceptions to immunity provided in Section 1610. Instead, subsection (g) works together with Section 1610’s existing exceptions by magnifying their impact: It makes more entities’ property amenable to execution under those exceptions, and thereby places more property within the potential reach of victims of terrorism.

For example, before subsection (g) was enacted in 2008, a victim’s family with a judgment against Iran under the terrorism exception could not invoke subsection (a)(7) to execute against California real estate that was owned by a wholly-owned subsidiary of Bank Saderat Iran, an instrumentality of Iran. *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1067, 1075 (9th Cir. 2002), cert. denied, 538 U.S. 944 (2003). The judgment was against Iran, not the Bank; and applying the *Bancec* factors, the Ninth Circuit held that the family had not overcome *Bancec*’s presumption that the Bank was a separate juridical entity. *Id.* at 1071-1074. Accordingly, the family could not treat the property as Iran’s. Subsection (g) removes that barrier to execution: It would enable treatment of the Bank subsidiary’s real estate for purposes of subsection (a)(7) as if it were the state’s own property. See 154 Cong. Rec. 500 (2008) (statement of Sen. Lautenberg) (explaining that subsection (g) would abrogate *Flatow*).

Similarly, before subsection (g) was enacted, victims’ families that held judgments against Cuba under the terrorism exception could not use Section 1610 to garnish commercial debts owed by Empresa de Telecomunicaciones de Cuba, S.A. (ETECSA), an instrumentality of Cuba. *Alejandro v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1279-1280, 1283 (11th Cir. 1999). Without deciding whether Section 1610 would permit execution if they pierced the veil, the court held that the families could not do so: The judgment was against Cuba, not ETECSA; and applying the *Bancec* factors, the court held that the families had not overcome the presumption of separateness. *Id.* at 1282-1290. Subsection (g) removes that barrier.

Unlike in cases like *Flatow* and *Alejandro*, however, subsection (g)’s veil-piercing rule does not help petitioners in this case because the corporate veil is not a barrier to execution here. Petitioners’ judgment is against Iran, and Iran itself (not an agency or instrumentality) owns the Persepolis Collection. Petitioners instead are trying to use subsection (g) to circumvent the existing limitations on executing against a foreign state’s property that are set forth in Section 1610. They cannot do so, because subsection (g) subjects property to execution only “as provided in th[at] section.” 28 U.S.C. 1610(g)(1).

No other subsection of Section 1610 “provide[s]” for execution here. Subsection (a) can potentially provide for execution of a judgment obtained under the current version of the terrorism exception, and petitioners have obtained such a judgment against Iran. See 28 U.S.C. 1610(a)(7). But that exception reaches only property with the requisite commercial nexus, which the Collection lacks. Pet. App. 16-21. It is undisputed that subsections (b), (c), (d), and (e) do not provide for execution here. See Pets. Br. 39. Nor does subsection (f) provide for execution, because the President has exercised his authority to waive subsection (f)(1). See pp. 4-5, *supra*; Pet. App. 33-34. The court of appeals therefore correctly held that petitioners cannot execute against the Collection.

B. Section 1610(g) Subjects Property To Execution “As Provided In This Section,” Not “Regardless Of What Is Provided In This Section”

1. Petitioners’ interpretation of subsection (g) as a freestanding exception to execution immunity is fundamentally inconsistent with Congress’s express direction that property is subject to execution only “as provided in this section.” 28 U.S.C. 1610(g)(1). On petitioners’ interpretation, that phrase would be essentially meaningless because the statute would function exactly the same way even if it were deleted. Indeed, petitioners effectively read “as provided in this section” to mean “regardless of what is provided in this section.”

The notion that Congress said “as provided” when it meant “regardless of what is provided” is particularly implausible here. In subsection (g), Congress expressly stated that a terrorism creditor may pierce the veil “regardless of” the *Bancec* factors. 28 U.S.C. 1610(g)(1). If Congress had intended to allow such a creditor also to execute against property even when none of Section 1610’s exceptions were satisfied, one would expect Congress to have said so using parallel language, such as by stating that property is subject to execution “regardless of” the *Bancec* factors *and* “regardless of the provisions of this section.” Congress did not do so. Congress’s choice to expressly set aside some barriers to execution (the *Bancec* inquiry), but not others (the limitations “provided in this section”), is appropriately treated as deliberate. Cf. *Department of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (“Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”).

The textual differences between subsections (f) and (g) reinforce this reading. Subsection (f)(1) provides that, absent Presidential waiver, certain blocked property “shall be subject to execution” of a terrorism judgment “[n]otwithstanding any other provision of law.” 28 U.S.C. § 1610(f)(1) and (3). And unlike subsection (g), subsection (f)(1) does not further state that such property is subject to execution only “as provided in this section.” Subsection (f)(1) is thus naturally read to create a freestanding exception that can allow execution even when no other provision of Section 1610 permits it. By contrast, Congress did not say that subsection (g) applies “[n]otwithstanding any other provision of law.” To the contrary, Congress specified that subsection (g) makes property subject to execution only “as provided in this section,” 28 U.S.C. § 1610(g)(1), thus affirmatively establishing that subsection (g) is *not* freestanding. Rather, subsection (g) simply provides for veil piercing to make more entities’ property subject to execution as provided elsewhere in Section 1610.

2. Petitioners make multiple attempts to explain the meaning of the phrase “as provided in this section,” but none is persuasive.

a. Petitioners first contend (Br. 44) that subsection (g)’s reference to “this section” actually refers solely to subsection (f). See *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 959 (9th Cir. 2016), petition for cert. pending, No. 16-334 (filed Sept. 12, 2016). But as the court of appeals explained, “it would be very odd” for Congress to refer solely to subsection (f) in that

way. Pet. App. 27. Congress would not be expected to say “this section” if it really meant “as provided in subsection (f).” *Id.* at 33. Indeed, Congress demonstrated in subsection (g) that it knew how to write precise cross-references. See 28 U.S.C. 1610(g)(1), (2), and (3) (“Subject to paragraph (3), the property of a foreign state”; “Any property * * * to which paragraph (1) applies”; “Nothing in this subsection shall be construed.”).

Petitioners admit (Br. 37, 44) that it is “strained” to interpret “this section” to mean “that other subsection.” They argue, however, that the court of appeals’ interpretation suffers from the same problem by interpreting “this section” to refer solely to subsections (a) and (b). But the court of appeals did not adopt that interpretation. Rather, the court correctly concluded that “[t]he word ‘section’ must mean what it says: Subsection (g) modifies *all* of § 1610.” Pet. App. 27; cf. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 938-939 (2017). The court looked to subsection (a) in particular when analyzing potential exceptions because that was the only exception petitioners contended was applicable. See Pet. App. 14.

Petitioners’ construction is not merely implausible, but also would be self-defeating. Even if “as provided in this section” meant only “as provided in subsection (f),” petitioners still would be unable to execute on the property here because subsection (f) does not provide for execution in this case. Subsection (f)’s only provision that potentially authorizes execution (paragraph (1)) was waived by the President in 2000 before it ever went into effect, and well before Congress enacted subsection (g) in 2008. See pp. 4-6, *supra*. So subsection (f)(1), “being inoperative from the start, does not allow *any* form of execution.” Pet. App. 34.

b. For the first time in this litigation, petitioners now contend in the alternative that the phrase “as provided in this section” is a mistake, asserting that it refers not to the section of the U.S. Code where Congress codified it, 28 U.S.C. § 1610, but to the section of the Public Law that enacted it, Section 1083 of the NDAA. This argument lacks merit.

Title 28 of the U.S. Code has “been enacted into positive law”; it is not merely an editorial compilation that is *prima facie* evidence of the law. 1 U.S.C. § 204(a); see Act of June 25, 1948, ch. 646, § 1, 62 Stat. 869. Petitioners do not point to any textual or contextual indication that “this section” in subsection (g) means anything other than Section 1610 of Title 28 as enacted into positive law. Petitioners thus are merely speculating that Congress made a drafting error. But “when [a] statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

In any event, Congress made no error. In Section 1083(a) of the NDAA, Congress added the current version of the terrorism exception (Section 1605A) to “title 28, United States Code.” § 1083(a)(1), 122 Stat. 338. Congress then made “Conforming Amendments” to the U.S. Code, *id.* § 1083(b), 122 Stat. 341, including by adding subsection (g) to 28 U.S.C. 1610. Specifically, Congress provided that “Section 1610 of title 28, United States Code is amended” by adding, in quotation marks, the full text of subsection (g). *Id.* § 1083(b)(3)(D), 122 Stat. 341-342. Congress thus inserted “as provided in this section” directly into “Section 1610 of title 28.” *Ibid.* “[T]his section” therefore plainly refers to “Section 1610 of title 28.” *Ibid.*

Other amendments to the U.S. Code reinforce that this choice was deliberate. When Congress was amending the U.S. Code, it consistently used “section,” “subsection,” or “paragraph” to refer to the U.S. Code. *E.g.*, NDAA § 1083(a)(1), 122 Stat. 338-340 (adding 28 U.S.C. 1605A(a)(2), (c), (d), (e)(1), (e)(2), (f), (g), and (h)); *id.* § 1083(b)(1)(C), (b)(3)(C) and (D), 122 Stat. 341-342. By contrast, Congress used “this section” to refer to the Public Law only

when Congress was not changing the U.S. Code at all. See *Pets. Br.* 47 (recognizing this pattern); e.g., NDAA § 1083(c)(1), 122 Stat. 342. And when Congress intended for the U.S. Code to refer to a section of the Public Law, it did so expressly: Congress inserted 28 U.S.C.

§ 1605A(a)(2)(A)(i)(II), which refers to “an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act.” NDAA § 1083(a)(1), 122 Stat. 339.

There is thus no sound basis for concluding that Congress mistakenly said “this section” in 28 U.S.C. 1610(g) when Congress was otherwise so precise. Petitioners note (*Br.* 46) that an earlier version of Section 1610(g) erroneously referred to a “judgment entered under this section,” when it really meant a judgment entered under Section 1605A. But as petitioners recognize (*ibid.*), Congress corrected that language before the bill was enacted into law. As enacted, subsection (g) refers to a judgment “entered under section 1605A.” 28 U.S.C.

§ 1610(g)(1). That drafting history thus undermines petitioners’ argument: It shows that Congress carefully edited the references in subsection (g) to correct any mistakes, but did *not* change “as provided in this section.” That further underscores that Congress meant what it said.

Petitioners’ speculation that “as provided in this section” refers to the NDAA also would make that phrase effectively meaningless. Petitioners assert (*Br.* 48) that it indicates that subsection (g) “override[s] the prohibition on punitive damages contained in [28 U.S.C.] 1606.” But no such prohibition applies here in the first place. The prohibition on punitive damages applies only to a claim where “a foreign state is not entitled to immunity under section 1605 or 1607.” 28 U.S.C. 1606. A person needs to have a judgment under a different section of the U.S. Code (Section 1605A) in order to invoke subsection (g). See 28 U.S.C. § 1610(g)(1). Section 1606’s prohibition on punitive damages is thus inapplicable in subsection (g) cases. Indeed, Section 1605A’s private right of action expressly allows “punitive damages.” 28 U.S.C. § 1605A(c). And it would be incongruous for Section 1610(g) to say anything about the kinds of damages that are available in the underlying suit, because Section 1610 comes into play only after the suit is over and the plaintiff is seeking to enforce the judgment.

c. Petitioners’ amici offer yet another explanation, contending that “as provided in this section” refers only to Section 1610’s procedures but not its substantive requirements. See *Former Officials Amici Br.* 23-25. But Section 1610 does not provide any procedures that would ever apply to execution under petitioners’ interpretation of subsection (g). The only provision in Section 1610 that establishes procedures for execution is subsection (c), which requires notice in certain cases—but it applies only to “execution referred to in subsections (a) and (b).” 28 U.S.C. § 1610(c). Under petitioners’ interpretation, however, nobody using subsection (g) would ever execute under subsections (a) or (b), because those same creditors could reach all the same property and more through subsection (g) itself. See pp. 22-25, *infra*. Subsection (c)’s procedures thus would never apply in a subsection (g) case. Amici also point (*Br.* 24) to subsection (f)(2), but that does not establish procedures for execution at all; it encourages federal agencies to assist plaintiffs in locating executable assets. 28 U.S.C. § 1610(f)(2); see p. 18 n.3, *supra*. Amici’s interpretation is thus functionally equivalent to deleting “as provided in this section” from subsection (g).

C. Petitioners' Interpretation Of Section 1610(g) Would Defeat Limitations Congress Imposed On The Same Creditors In Section 1610(a)(7)

Petitioners' interpretation of Section 1610(g) is further flawed because it would render other portions of the FSIA "inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citation omitted). In particular, it would render superfluous Congress's decision in Section 1610(a)(7) to allow creditors under the current version of the terrorism exception to execute only against property with a commercial nexus, because those same creditors could defeat that critical limitation simply by invoking subsection (g) instead of subsection (a).

1. Subsection (a)(7) provides that a foreign state's property is not immune from execution if the plaintiff is enforcing a judgment that "relates to a claim for which the foreign state is not immune under section 1605A"—that is, under the current version of the terrorism exception—and the property is used in commercial activity in the United States. 28 U.S.C. § 1610(a)(7). Under the court of appeals' interpretation, subsections (a)(7) and (g) work together to enable holders of judgments under the current terrorism exception to pursue property used in commercial activity (via subsection (a)(7)), and to do so whether that property is owned by the foreign state or an agency or instrumentality, without need for a *Bancec* inquiry (via subsection (g)).

Petitioners' interpretation of subsection (g), however, would make the two provisions work at cross-purposes by enabling creditors under the current version of the terrorism exception to use subsection (g) to defeat subsection (a)(7)'s crucial limitation. Subsection (a)(7) allows a creditor under the current version of the terrorism exception to pursue property *only if it is used in commercial activity*—but petitioners would allow those same creditors to pursue property without that limitation simply by invoking a different subsection of Section 1610 (subsection (g) instead of (a)). Under petitioners' interpretation, subsection (g) would thus render subsection (a)(7)'s commercial-nexus requirement wholly superfluous for those creditors.

Petitioners have no answer. They merely note (Br. 41-44) that subsection (g) does not render superfluous Congress's reference in subsection (a)(7) to the *former* version of the terrorism exception as well. See 28 U.S.C. § 1610(a)(7). But as set forth above, the problem is that petitioners' interpretation renders superfluous Congress's express imposition of a commercial-nexus requirement on individuals holding a judgment under the *current* version, Section 1605A. *Ibid.*

Indeed, petitioners' interpretation of subsection (g) would have made subsection (a)(7) entirely irrelevant at the time Congress adopted those provisions. The same statute—the NDAA—amended subsection (a)(7) to refer to Section 1605A *and* added subsection (g). § 1083(b)(3)(A) and (D), 122 Stat. 341. And at the time, subsection (a)(7) referred *solely* to the current version of the terrorism exception. *Id.* § 1083(b)(3)(A), 122 Stat. 341.4 Thus, under petitioners' interpretation, subsection (g)'s enactment rendered subsection (a)(7) completely superfluous—even though Congress made substantive changes to subsection (a)(7) at the very same time. But Congress does not usually "give with one hand what it takes away with the other." *Greenlaw v. United States*, 554 U.S. 237, 251 (2008).

2. Some of petitioners' amici contend that subsection (a)(7)'s reference to the current version of the terrorism exception (Section 1605A) is not superfluous because, they assert, creditors who relied on Section 1605A to obtain jurisdiction but then invoked a state-law cause of action can use subsection (a)(7) for execution, but cannot use subsection (g). See Victims of Terrorism Amici Br. 24-25. Specifically, they contend that such a judgment is not "entered under

Section 1605A,” as required to invoke subsection (g). *Ibid.* (quoting 28 U.S.C. 1610(g)(1)). But that is incorrect. Section 1605A provides that a “court *shall hear a claim under this section*” if the requirements for jurisdiction are met, 28 U.S.C. § 1605A(a)(2) (emphasis added), and jurisdiction does not depend on the source of the plaintiff’s cause of action, 28 U.S.C. § 1605A(a)(1). Accordingly, whenever a court has jurisdiction under Section 1605A and enters judgment, that judgment is “entered under section 1605A” and the plaintiff can invoke Section 1610(g). The source of the cause of action is irrelevant.

3. a. Petitioners contend (Br. 37-39) that the court of appeals’ interpretation renders superfluous subsection (g)’s references to “the property of a foreign state against which a judgment is entered under section 1605A” and to the “property of an agency or instrumentality of such a state.” 28 U.S.C. § 1610(g)(1). They argue that subsection (g) could instead consist solely of the “separate juridical entity” clause—*i.e.*, it could simply say that a creditor can execute against “property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity.” *Ibid.* But Congress’s clear purpose in enacting subsection (g) was to enable a creditor with a judgment against a foreign state under the current version of the terrorism exception to execute against property of (1) the state; (2) its agencies or instrumentalities; and (3) separate juridical entities owned by the state or its agencies or instrumentalities, if an exception elsewhere in Section 1610 provides for execution. The natural way to say that is to identify all three categories expressly.

Congress also had good reason to specify each category. First, subsection (g) specifies the state itself because that is how Congress identified the subset of cases in which subsection (g) permits veil piercing: When there is “property of a foreign state against which a judgment is entered under section 1605A.” 28 U.S.C. § 1610(g)(1). Without that limitation, subsection (g) would abrogate the *Bancec* inquiry in *all* cases, not merely terrorism cases. Second, Congress had obvious reason to specify that subsection (g) reaches agencies and instrumentalities: It was the decision in *Flatow* that prompted the proposal to override the *Bancec* inquiry in terrorism cases, and both *Flatow* and *Bancec* involved property of agencies or instrumentalities. See *Bancec*, 462 U.S. at 621; *Flatow*, 308 F.3d at 1071 & n.10. Third, Congress needed to include the “separate juridical entity” category in order to extend veil piercing to corporate subsidiaries of an agency or instrumentality (which are not ordinarily themselves agencies or instrumentalities, see *Dole Food*, 538 U.S. at 473-478), and corporate subsidiaries of the state itself that do not qualify as agencies or instrumentalities (which occurs if the subsidiary is a citizen of the United States or a third country, see 28 U.S.C. 1603(b)(3)). Subsection (g) is thus a comprehensive veil-piercing provision.

Petitioners contend (Br. 38) that the “agencies or instrumentalities” category is unnecessary because the “separate juridical entity” category would cover agencies and instrumentalities whenever they are separate juridical entities, and because veil piercing is unnecessary when the entity is *not* such a separate entity. But under the FSIA’s definition, an agency or instrumentality must be a “separate legal person, corporate or otherwise.” 28 U.S.C. § 1603(b)(1). The second category in subsection (g) clearly refers to an “agency or instrumentality” as so defined. And it is unlikely that Congress would enact subsection (g) without expressly saying that it reaches both the state and its agencies and instrumentalities specifically, when the primary purpose of subsection (g) is to reach both the state and its agencies and instrumentalities. The third category then expands veil piercing still further by covering certain entities that do not satisfy the definition of “agency or instrumentality.” That structure is sensible, not superfluous.

b. Petitioners also contend (Br. 32) that the *Bancec* factors listed in subsection (g) “cannot be reconciled with a requirement that the property being attached must be used by the foreign state judgment debtor for commercial activities.” But that argument fundamentally misperceives how subsection (g) works. When subsection (g) pierces the veil and causes the property of an agency or instrumentality to be treated as the state’s property for purposes of execution, the proper inquiry under subsection (a)(7) is not to ask whether the property is used for commercial activity by the *state*. Rather, the question is whether it is used for commercial activity by *that agency or instrumentality*.

Given Congress’s purpose of making it easier for victims of terrorism to pierce the veil, Congress sensibly directed courts that they may proceed “regardless of” factors they otherwise would have considered. *E.g.*, 28 U.S.C. 1610(g)(1)(C) (instructing courts not to consider “the degree to which officials of that government manage the property or otherwise control its daily affairs”). There is nothing incongruous about using one inquiry in subsection (g) and another in subsection (a), as they are asking different questions for different reasons.

D. Petitioners’ Reliance On The Statutory Purpose And Legislative History Is Misplaced

It is undisputed that Congress intended for subsection (g) to “expand successful plaintiffs’ options for collecting judgments against state sponsors of terrorism.” *Bennett*, 825 F.3d at 961. But that general purpose does not help resolve the question presented here, because both competing interpretations advance that purpose: The court of appeals’ interpretation “expand[s] successful plaintiffs’ options for collecting [such] judgments,” *ibid.*, by making it easier to pierce the veil.

The question presented here is *how far* Congress went in advancing that purpose, and in particular whether Congress intended (1) to provide for veil piercing *and* (2) to make property subject to execution regardless of the other requirements of Section 1610. As set forth above, Section 1610(g)’s text and context unambiguously establish that Congress took the first step but not the second: It made property of different entities subject to execution “regardless of” the *Bancec* factors, but only “as provided in th[at] section.” 28 U.S.C. 1610(g)(1). Because the text is clear, “reliance on legislative history is unnecessary.” *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 458 (2012) (citation omitted).

In any event, the legislative history does not support petitioners. Just as the text of subsection (g) is focused on a single topic—veil piercing—the legislative history of subsection (g) is focused on that one topic as well. *E.g.*, H.R. Conf. Rep. No. 447, 110th Cong., 1st Sess. 1001-1002 (2007) (Conf. Rep.) (discussing veil piercing and protections for third-party joint property holders); 154 Cong. Rec. at 500 (statement of Sen. Lautenberg) (explaining that the bill would remedy “misapplication of the ‘Bancec doctrine’ ”); *ibid.* (giving *Flatow* as an example of such misapplication); 151 Cong. Rec. 12,869 (2005) (statement of Sen. Specter) (it would “chang[e] the legal standard of the Bancec doctrine”). There is no similar indication in the legislative history that Congress even considered allowing execution without regard to a commercial nexus or the other limitations in Section 1610, notwithstanding that dispensing with all such limitations would be a very different—and more dramatic—step.

Petitioners primarily rely (Br. 57) on a statement in the Conference Report that subsection (g) would “permit[] any property in which the foreign state has a beneficial ownership to be subject to execution of [a] judgment.” Conf. Rep. at 1001. But the lone word “any” cannot bear the weight petitioners place upon it. That Report does not even mention the commercial-activity requirement or other limitations on execution under Section 1610, much less say that

subsection (g) would override them. Indeed, petitioners acknowledge that “any” is an overstatement that must be qualified: Petitioners agree (Br. 17; Pet. 13) that subsection (g) does not circumvent the FSIA’s prohibitions against executing upon central bank, diplomatic, or consular property. See 28 U.S.C. 1609, 1611(b); Vienna Convention on Diplomatic Relations, Art. 22(3), *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. Imprecise language in one passage of the legislative history provides no sound basis for concluding that subsection (g)’s reach is limited by Sections 1609 and 1611—yet not by anything in Section 1610—when subsection (g) is expressly tied to what is “provided in” Section 1610. 28 U.S.C. § 1610(g)(1); cf. *Milner v. Department of Navy*, 562 U.S. 562, 572 (2011) (refusing to “allow[] ambiguous legislative history to muddy clear statutory language”).

At bottom, petitioners’ argument boils down to the position that their interpretation would be more favorable to victims of terrorism. But “no legislation pursues its purposes at all costs.” *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam). And this Court’s function is “to give [a] statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve.” *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 270 (2010); e.g., *Mohamed*, 566 U.S. at 461 (“Congress has seen fit to proceed in more modest steps.”); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 383 (2009) (rejecting an interpretation of TRIA that would have been more favorable to a victim of Iranian terrorism; stating that “Congress had a more complicated set of purposes in mind”).

Here, Congress enacted Section 1610’s limitations on execution for good reason. The “judicial seizure” of a foreign state’s property “may 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) (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945)). Indeed, “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.” *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 255-256 (5th Cir. 2002); see *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 14, 22 (1973) (statement of Acting Legal Adviser Brower), Ian Brownlie, *Principles of Public International Law* 346 (5th ed. 1998). The FSIA’s exceptions to execution immunity in turn are “narrower” than its exceptions to jurisdictional immunity. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014).

Even in the context of actions against state sponsors of terrorism, execution could provoke serious foreign policy consequences, including impacts on the treatment of the United States’ own property abroad. Execution could also lead to the diversion of assets that might otherwise be used to serve critical United States foreign policy objectives, such as when a formerly terrorist country has undergone a regime change. For example, President George W. Bush initially vetoed the NDAA because of concern that its execution provisions “would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation’s reconstruction efforts.” *Republic of Iraq v. Beatty*, 556 U.S. 848, 853-854 (2009) (citation omitted). Congress then added a provision allowing the President to waive the relevant provisions as to Iraq, which the President did immediately upon signing the bill into law. *Ibid.*

Section 1610’s limitations on execution exist to protect against these kinds of potentially adverse foreign-policy repercussions. For example, Section 1610(a) limits execution to property that is used for commercial activity in the United States. 28 U.S.C. 1610(a). That exception

reflects the idea that “subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty” and embroiling the United States in a foreign relations conflict “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, 703-704 (1976) (plurality opinion). And although subsection (f) is not limited to commercial property, Congress limited it to property that is blocked or otherwise regulated under certain sanctions programs—and Congress made execution subject to Presidential waiver. See 28 U.S.C. § 1610(f)(3). Congress thus ensured that the Executive can eliminate or fine-tune execution in light of foreign policy concerns. The President has done just that, waiving subsection (f) on the ground that it “would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions.” 65 Fed. Reg. at 66,483.

The property at issue here consists of ancient Persian artifacts, documenting a unique aspect of Iran’s cultural heritage, that were lent to a U.S. institution in the 1930s for academic study. Iran has never used the Collection for commercial activity in the United States; the Collection is not blocked; and it is not subject to execution under subsection (f). Execution against such unique cultural artifacts could cause affront and reciprocity problems that are different in kind from execution under any other provision of Section 1610.

If Congress were going to take the step of enabling execution even against property that is *not* commercial, *not* blocked, and *not* otherwise subject to execution under Section 1610, one would expect Congress to have said so expressly after squarely considering the ramifications of that decision. Congress did neither. Subsection (g) subjects additional property to execution only “as provided in th[at] section.” 28 U.S.C. 1610(g)(1).

* * * *

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. As discussed in *Digest 2015* at 420-25, the U.S. Supreme Court denied the third petition for a writ of certiorari in *Samantar*. The cases discussed below involve the consideration of foreign official immunity in light of the Court’s 2010 decision.

2. *Ali v. Warfaa*

Like *Samantar*, *Warfaa v. Ali* involves claims against a former Somali official. On February 1, 2016, the Fourth Circuit Court of Appeals issued a decision in *Warfaa v. Ali* that Ali was not immune from suit under the Torture Victim Protection Act (“TVPA”) for the alleged torture and attempted extrajudicial killing of Warfaa, while dismissing Warfaa’s claims under the Alien Tort Statute (“ATS”). Ali filed a petition for certiorari, No. 15-1345, on the immunity question, and Warfaa filed a conditional cross-petition,

No. 15-1464, on the ATS question. On October 3, 2016 the Supreme Court invited the Solicitor General to file briefs on both petitions expressing the views of the United States. The U.S. brief in *Warfaa v. Ali* (on the ATS issue) is discussed in Chapter 5.

The U.S. brief filed in the Supreme Court on May 23, 2017 identifies the errors in the Fourth Circuit's opinion in the case, but argues nonetheless that the Supreme Court need not review it because both the Fourth Circuit and the Executive Branch had concluded that Ali was not entitled to immunity. Excerpts follow from the U.S. brief in *Ali v. Warfaa*, No. 15-1345, arguing that the petition should be denied. On June 26, 2017, the Supreme Court denied the petition.

* * * *

A. The Decision Of The Court Of Appeals Rests On Erroneous Circuit Precedent

1. Under this Court's decisions, an Executive Branch determination whether a foreign official is immune from suit is binding on the courts. That principle applies both to status-based and conduct-based immunity, and the court of appeals erred in holding otherwise in *Samantar II*, which the court followed in this case.

a. In *Samantar v. Yousuf*, 560 U.S. 305 (2010), this Court held that the FSIA left in place the Executive Branch's historical authority to determine the immunity of foreign officials in the same manner as it determined the immunity of foreign states. See *id.* at 321-325. The pre-FSIA immunity decisions that this Court cited in *Samantar* confirm that the State Department's determination regarding immunity is, and long has been, binding in judicial proceedings. See *id.* at 311-312. In *Ex parte Peru*, 318 U.S. 578 (1943), for example, the 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 *United States v. Lee*, 106 U.S. 196, 209 (1882)). In *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), 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." *Id.* at 35; see, e.g., *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938).

In pre-FSIA suits against foreign officials, courts followed the same two-step procedure as in suits against foreign states. See, e.g., *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Heaney v. Government of Spain*, 445 F.2d 501, 503-506 (2d Cir. 1971) (applying principles articulated by Executive Branch because the Executive did not express a position); see also *Samantar*, 560 U.S. at 311-312.

b. In *Samantar II*, the Fourth Circuit drew a distinction between Executive Branch determinations concerning status-based immunities, which the court acknowledged would be binding, and Executive Branch determinations concerning conduct-based immunities, which the court erroneously considered itself free to second-guess. See 699 F.3d at 769-773.

This Court in *Samantar* did not distinguish between conduct-based and status-based immunities in discussing the deference traditionally accorded to the Executive Branch. Rather, in endorsing the two-step approach to immunity questions, the *Samantar* Court recognized that the same procedures applied in cases involving the conduct-based immunity of foreign officials. See 560 U.S. at 311-312; see also *id.* at 308 (noting that *Samantar* was a former official, who would

not have status-based immunity). Indeed, the two cases cited by this Court involving foreign officials— *Heaney*, 445 F.2d at 504-505, and *Waltier v. Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960)—both concerned consular officials who were entitled only to conduct-based immunity for acts carried out in their official capacity. And in reasoning that Congress did not intend to modify the historical practice regarding individual foreign officials, the Court cited *Greenspan*, in which the district court deferred to the State Department’s recognition of conduct-based immunity of individual foreign officials. 1976 WL 841, at *2; see *Samantar*, 560 U.S. at 321-322.

In concluding that conduct-based immunity determinations are not binding on the Judiciary, *Samantar II* relied on two law review articles for the proposition that the Executive’s determinations of status-based immunity are based on its power to recognize foreign sovereigns, see U.S. Const. Art. II, § 3, while the Executive’s conduct-based determinations are not grounded on a similar “constitutional basis.” *Samantar II*, 699 F.3d at 773. But this Court has long recognized that the Executive’s authority to make foreign sovereign immunity determinations, and the requirement of judicial deference to such determinations, flow from the Executive’s constitutional responsibility for conducting the Nation’s foreign relations, without tying that authority to the more specific recognition power. See, e.g., *Ex parte Peru*, 318 U.S. at 589 (suggestion of immunity “must be accepted by the courts as a conclusive determination by the political arm of the Government” that “continued retention of the vessel interferes with the proper conduct of our foreign relations”); see also *Hoffman*, 324 U.S. at 34; *Lee*, 106 U.S. at 209; *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360-361 (1955); see generally *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (under the Constitution, the Executive is “the guiding organ in the conduct of our foreign affairs”).

The Executive’s authority to make foreign official immunity determinations similarly is grounded in its power to conduct foreign relations. See *Samantar*, 560 U.S. at 323. Although foreign state and foreign official immunity are not invariably coextensive in scope, see *id.* at 321, the basis for recognizing the immunity of current and former foreign officials is that “the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.” *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), *aff’d*, 168 U.S. 250 (1897); see *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (foreign officials have immunity “from suits brought in [United States] tribunals for acts done within their own States, in the exercise of governmental authority”). As a result, suits against foreign officials—whether they are heads of state or lower-level officials—implicate much the same considerations of comity and respect for other Nations’ sovereignty as suits against foreign states. See 65 F. at 579; see also *Heaney*, 445 F.2d at 503.

The deference owed to the Executive concerning conduct-based immunity determinations is, therefore, based on the constitutional principle of separation of powers. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (“[T]raditional ways of conducting government... give meaning to the Constitution.”) (citation and internal quotation marks omitted). In the absence of a governing statute such as the FSIA, it continues to be the Executive Branch’s role to determine whether current or former foreign officials are entitled to immunity from suit. See, e.g., *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005).

2. The conclusion in *Samantar II* that the Executive’s immunity determinations are not binding in cases involving foreign-official conduct (rather than status) is closely related to another serious error in that decision: creation of a new categorical judicial exception to

immunity for claims alleging violation of *jus cogens* norms. 699 F.3d at 775-777. In this case, the court of appeals' rejection of immunity for petitioner relied entirely on *Samantar II*'s erroneous holding that "foreign official immunity could not be claimed 'for *jus cogens* violations, even if the acts were performed in the defendant's official capacity.'" Pet. App. 78a (quoting *Samantar II*, 699 F.3d at 777); see *id.* at 79a.

a. The *per se* rule of non-immunity created by the Fourth Circuit is not drawn from a determination made or principles articulated by the Executive Branch. To the contrary, the United States specifically asked the court in *Samantar II* not to address the argument that a foreign official cannot be immune from a private civil action alleging *jus cogens* violations. U.S. Amicus Br. at 19 n.3, *Yousuf v. Samantar*, No. 11-1479 (4th Cir. Oct. 24, 2011). The court's decision is thus inconsistent with the basic principle that Executive Branch immunity determinations establish "substantive law governing the exercise of the jurisdiction of the courts." *Hoffman*, 324 U.S. at 36.

Indeed, both before and after this Court's decision in *Samantar*, the United States has suggested immunity for former foreign officials who were alleged to have committed *jus cogens* violations. See U.S. Amicus Br. at 23-34, *Ye v. Zemin*, No. 03-3989 (7th Cir. Mar. 5, 2004); U.S. Amicus Br. at 19-25, *Matar v. Dichter*, No. 07-2579-cv (2d Cir. Dec. 19, 2007); see also Suggestion of Immunity at 6, *Doe v. De León*, No. 11-cv-01433 (D. Conn. Sept. 7, 2012); Statement of Interest at 7-11, *Rosenberg v. Lashkar-e-Taiba*, No. 10-cv-5381 (E.D.N.Y. Dec. 17, 2012); Suggestion of Immunity at 9, *Doğan v. Barak*, No. 15-cv-08130 (C.D. Cal. June 10, 2016). The courts deferred to the United States' Suggestions of Immunity in those cases. See *Ye*, 383 F.3d at 626-627; *Matar v. Dichter*, 563 F.3d 9, 14-15 (2d Cir. 2009); *Doe v. De León*, 555 Fed. Appx. 84, 85 (2d Cir.), cert. denied, 135 S. Ct. 78 (2014); *Rosenberg v. Pasha*, 577 Fed. Appx. 22, 23-24 (2d Cir. 2014); *Doğan v. Barak*, No. 15-cv-08130, 2016 WL 6024416, at *10 (C.D. Cal. Oct. 13, 2016), appeal pending, No. 16-56704 (9th Cir. docketed Nov. 14, 2016).

b. Respondent argues (Br. in Opp. 23-25) that a foreign official can never be immune from a suit involving allegations of *jus cogens* violations because such acts are "by definition, *ultra vires*" and so "cannot be officially 'authorized' by a state" (*id.* at 24). That argument is mistaken.

In *Samantar*, this Court unanimously held that courts should continue to adhere to official immunity determinations formally submitted by the Executive Branch, just as they did before enactment of the FSIA. See 560 U.S. at 321-325; see also *id.* at 311-312 (concluding that if the Executive does not make an immunity determination in a particular case, the court is to look to principles articulated by the Executive Branch rather than independently creating its own standard). In making conduct-based immunity determinations, the Executive Branch considers whether to credit a foreign state's representation that the defendant's conduct was undertaken in his or her official capacity. See *Doğan*, WL 6024416 at *3, *9 (discussing diplomatic note endorsing defendant's conduct as acts taken in official capacity); *id.* at *7 (noting that State Department's suggestion of immunity was based on determination that suit challenged "exercise of [defendant's] official powers"). A categorical bar on conduct-based immunity whenever a plaintiff alleges a violation of a *jus cogens* norm, regardless of the foreign government's representations and the views of the Executive Branch, would unduly constrain the Executive's authority to determine the principles governing the immunity of foreign officials.

B. This Court Should Deny Certiorari

Although the court of appeals' controlling precedent is erroneous for the reasons stated above, its judgment affirming denial of petitioner's immunity is in accord with the Executive Branch's determination that petitioner is not immune. As in *Samantar*, this Court's review therefore is not warranted, although review may be warranted in the future in an appropriate case raising similar issues.

1. Earlier in this litigation, the United States informed the district court that the government was "not in a position to present views to the Court concerning this matter at this time." Pet. App. 28a (quoting statement of interest). At that time, the government was still engaged in diplomatic discussions with the Somali Government, with which the United States had established diplomatic relations only the year before. The United States' diplomatic engagement with Somalia led to discussions in 2014 in which the representative of Somalia stated that Somalia did not seek immunity for petitioner—a statement that was subsequently memorialized in a diplomatic note from the United States. See 13-1361 U.S. Amicus Br. at App. 3a-5a. More recently, discussions with Somalia resulted in a January 2017 letter from the then-President of the country, Hassan Sheikh Mohamud, which was sent to the State Department through diplomatic channels. See App., *infra*, 6a-8a. That letter waived any immunity petitioner might have claimed from this suit. The Executive Branch recognizes President Mohamud's letter as the official position of the Somali Government, and it accepts Somalia's waiver of any immunity from this suit, including any immunity its former official might have claimed.

Because the Executive Branch has now determined that petitioner is not immune from this suit, it is clear that the judgment of the court of appeals is consistent with the Executive Branch's determination, even if the rationale for the court's judgment is erroneous. In light of the unusual circumstances presented here— involving the need for extended diplomatic engagement with a newly recognized foreign government— review of the court of appeals' decision is not warranted.

2. As petitioner explains (Pet. 8-11), the Fourth Circuit's reasoning in *Samantar II*, on which the court of appeals relied in this case, is inconsistent with *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), and *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005). In those decisions, which pre-dated this Court's decision in *Samantar*, the Second and Seventh Circuits held that no categorical exception to immunity exists in a case involving alleged violations of *jus cogens* norms, because courts must defer to an immunity determination by the Executive Branch in such a case (as in other cases). See *Rosenberg*, 577 Fed. Appx. at 23-24 (following *Matar* and acknowledging conflict with Fourth Circuit); *Matar*, 563 F.3d at 13-15; *Ye*, 383 F.3d at 625-627 (involving a head of state); see also *Estate of Kazemi v. Islamic Republic of Iran*, 2014 SCC 62, ¶ 106 (Can.) (recognizing conflict and declining to recognize a *jus cogens* exception to official immunity).

An appellate decision holding that courts need not defer to the Executive's immunity determination and applying a categorical judicial exception for cases involving alleged violations of *jus cogens* norms would therefore warrant review by this Court at an appropriate time. The issue of the respective roles of the Executive Branch and the courts in identifying the controlling principles of foreign official immunity, in light of this Court's determination that such immunity is "governed by the common law," *Samantar*, 560 U.S. at 325, is working its way through the lower courts. See, e.g., *Doğan v. Barak*, No. 15-cv-08130, 2016 WL 6024416, at *10 (C.D. Cal. Oct. 13, 2016) ("Because the common law immunity inquiry centers on what conduct the

Executive has seen fit to immunize, courts are not free to carve out such an exception.”) (citation omitted), appeal pending, No. 16-56704 (9th Cir. docketed Nov. 14, 2016). This Court therefore may well have an opportunity to consider the issue in the future.

* * * *

3. Immunity of Former Defense Minister of Israel

As discussed in *Digest 2016* at 450-52, the United States filed a suggestion of immunity in the U.S. District Court for the Central District of California in *Doğan et al. v. Barak*, No. 2:15-CV-08130. On July 26, 2017, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit in *Doğan*, No. 16-56704, supporting affirmance of the district court’s dismissal of the case in deference to the State Department’s determination of the immunity of Ehud Barak. Excerpts follow from the U.S. brief, which is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

THE DISTRICT COURT PROPERLY DEFERRED TO THE STATE DEPARTMENT’S DETERMINATION THAT EHUD BARAK IS IMMUNE FROM THIS SUIT

Governing precedent of the Supreme Court and this Court requires a court to dismiss a civil suit against a foreign official when the State Department determines that the official is immune from suit. The district court correctly complied with that precedent in dismissing plaintiffs’ suit in light of the Executive Branch’s suggestion of immunity on behalf of Ehud Barak. In urging this Court to reverse, plaintiffs ignore that precedent. They also ignore the fact that no court has ever required a foreign official to be subject to suit after the State Department has determined that the official is immune. The Court should decline plaintiffs’ invitation to be the first court to do so.

I. *Samantar* and *Chuidian* Make Clear That the State Department’s Determinations Are Controlling Under the Common Law of Foreign-Official Immunity

In *Samantar v. Yousuf*, a case, like this one, involving the conduct-based immunity of a former foreign official, the Supreme Court held that the FSIA left in place the State Department’s common-law authority to determine the immunity of foreign officials, as it had previously determined the immunity of foreign states. See 560 U.S. 305, 321-25 (2010). The pre-FSIA immunity decisions that the Supreme Court cited in *Samantar* confirm that the State Department’s determination regarding immunity is, and long has been, binding in judicial proceedings. See *Samantar*, 560 U.S. at 311-12. In *Ex parte Peru*, 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.” 318 U.S. 578, 588 (1943) (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)). In *Republic of Mexico v. Hoffman*, 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.” 324 U.S. 30, 35 (1945); see also *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938).

The Supreme Court recognized that the same procedure “was typically followed when a foreign official asserted immunity.” *Samantar*, 560 U.S. at 312; see, e.g., *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Heaney v. Government of Spain*, 445 F.2d 501, 503-06 (2d Cir. 1971) (applying principles articulated by the State Department because the Executive Branch did not express a position in the case). The Supreme Court explained that when Congress enacted the FSIA, thereby codifying the principles of foreign-state immunity, it left in place “the State Department’s role in determinations regarding individual official immunity.” *Samantar*, 560 U.S. at 323.

This Court has also recognized that, if the FSIA does not govern the immunity of foreign officials from suit, the State Department’s determinations are controlling. In *Chuidian v. Philippine National Bank*—another suit against a foreign official not entitled to status-based immunity—this Court explained that

[t]he principal distinction between pre-1976 common law practice and post-1976 statutory practice is the role of the State Department. If individual immunity is to be determined in accordance with the Second Restatement [which describes the common-law regime], presumably we would once again be required to give conclusive weight to the State Department’s determination of whether an individual’s activities fall within the traditional exceptions to sovereign immunity.

912 F.2d 1095, 1102 (9th Cir. 1990) (citing *Ex parte Peru*, 318 U.S. at 589, and Restatement (Second) of the Foreign Relations Law of the United States § 69 n.1 (1965)). *Chuidian* held that Congress intended the FSIA to codify the principles governing foreign-official immunity, in part because this Court concluded that Congress did not intend to create “a bifurcated approach to sovereign immunity.” *Id.* The Supreme Court disagreed with that assessment and held that Congress did, indeed, intend such an approach. See *Samantar*, 560 U.S. at 322-323. But the Supreme Court did agree with *Chuidian*’s assessment of the controlling nature of the State Department’s immunity determinations under the common-law procedure that predated the FSIA. See *id.* at 311 (explaining that if the Executive Branch suggested immunity, “the district court surrendered its jurisdiction”).

Samantar and *Chuidian* resolve this appeal. The State Department determined that Ehud Barak is immune from plaintiffs’ suit, and the district court accepted that determination as controlling and dismissed the suit. ER 27. This Court should affirm.

II. Plaintiffs’ Contrary Arguments Lack Merit

Plaintiffs make a number of arguments urging the Court to ignore the State Department’s immunity determination. All of those arguments fail to engage the precedent discussed above; none has merit.

A. Plaintiffs’ principal argument (Br. 12-32) is that, in their view, the TVPA abrogated foreign-official immunity, and that judicial deference to the State Department’s determination of foreign-official immunity offends the separation of powers by permitting the Executive Branch to override the will of Congress. The premise is mistaken. The TVPA does not address, let alone abrogate, the common-law immunity of foreign officials.

In the TVPA, Congress created a right of action against, and imposed a corresponding monetary liability on, “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation,” subjects an individual to torture or extrajudicial killing. TVPA § 2(a), 106

Stat. 73. Plaintiffs do not contend that the TVPA expressly abrogates foreign-official immunity. Instead, they argue that the TVPA's text eliminates a foreign official's immunity because the right of action "makes no exception" for officials (Br. 13), in contrast to the Anti-Terrorism Act, which excludes foreign officials acting within their official capacities from its right of action (Br. 14). But that argument confuses the scope of a right of action with the separate question of immunity from suit.

When Congress creates a right of action, it defines the class of persons who may potentially be held liable for wrongful conduct. The TVPA includes within its scope any individual acting under actual or apparent authority or color of law, which includes a foreign official acting in his or her official capacity; the Anti-Terrorism Act excludes such foreign officials. But whether a defendant may be immune from suit under a specific statute is an issue that is distinct from the scope of a cause of action.

For example, 42 U.S.C. § 1983 creates a right of action against "[e]very person who, under color of [law],” deprives another of his or her legal rights. The Supreme Court has described Section 1983 as a statute that “creates a species of tort liability that on its face admits of no immunities.” *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Nevertheless, because the distinction between the creation of a right of action and immunity from suit is “an entrenched feature” of American law, *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012), the Supreme Court has interpreted Section 1983's right of action “in harmony with general principles of tort immunities and defenses rather than in derogation of them,” *Imbler*, 424 U.S. at 418. The text of the TVPA defines the scope of a right of action and identifies a class of persons who may be liable. But it, like Section 1983, simply does not address the immunities that may be available to a defendant.

Plaintiffs next argue that the TVPA's legislative history demonstrates that Congress intended to abrogate foreign-official immunity. Br. 16-21. That, too, is mistaken. As an initial matter, the House and Senate reports expressly observed that the TVPA would not affect status-based immunities such as diplomatic or head-of-state immunity, as plaintiffs acknowledge. S. Rep. No. 102-249, at 7-8 (1991); H.R. Rep. No. 102-367, at 5 (1991); see Br. 17.

Plaintiffs argue, however, that the Senate Judiciary Committee clearly intended to abrogate the immunity of former officials in suits under the TVPA. Br. 17. Even assuming that statement in a committee report would suffice, what the committee said was both significantly less definitive and premised on an erroneous view of the law. The report expressed the view that to support an official's claim of immunity, the official's state would have to “admit some knowledge or authorization of relevant acts.” S. Rep. No. 102-249, at 8. But the committee believed that, “[b]ecause all states are officially opposed to torture and extrajudicial killing,” states would be unlikely to make such an admission. *Id.* Accordingly, as the district court concluded, the TVPA's legislative history does not clearly demonstrate an intent by Congress to abrogate a foreign official's immunity in suits under the TVPA, “at least where the sovereign state officially acknowledges and embraces the official's acts.” ER 26. Moreover, consistent with this Court's then-recent decision in *Chuidian*, the Senate Judiciary Committee erroneously assumed that a foreign official's immunity would be governed by the FSIA. See S. Rep. No. 102-249, at 8. As explained above, however, see *supra* pp. 12-13, the FSIA did not disturb the preexisting authority of the Executive Branch to determine the immunity of foreign officials from suit.

Plaintiffs contend that the district court's conclusion creates a “blanket exception” (Br. 13) to the TVPA and establishes a categorical immunity any time a foreign state endorses its official's conduct (Br. 18, 21, 47), which, plaintiffs say, conflicts with the TVPA's purpose of

holding accountable foreign government officials who engage in torture or extrajudicial killing (Br. 15-16). Plaintiffs misdescribe the district court's holding. See also, *e.g.*, Br. 24 (incorrectly suggesting that district court recognized "absolute immunity for acts of torture"); *id.* at 25, 30, 48 (similar). The district court did not hold that foreign officials would be entitled to immunity in suits under the TVPA any time the official's state endorses the official's alleged conduct. It held that a foreign official is entitled to immunity in any civil suit in which the State Department has determined that the official is immune. ER 15, 27.

The State Department does not invariably determine that foreign officials sued under the TVPA are immune. See, *e.g.*, *Yousuf v. Samantar*, 699 F.3d 763, 777- 78 (4th Cir. 2012) (discussing State Department's determination that former Somali official was not immune in TVPA suit in the circumstances of that case). Although the State Department takes into account whether a foreign state "asserts that the actions of its official were authorized acts taken in an official capacity" in making an immunity determination (ER 93), that factor is not controlling (see *id.*). Thus, for example, even if a foreign state purports to endorse the acts of a former foreign official, the State Department would not determine that the former foreign official is immune from suit if it concludes that the acts alleged were not taken in an official capacity. For these same reasons, the district court's interpretation of the TVPA as leaving in place the State Department's authority to determine a foreign official's immunity from suit does not "render the TVPA a nullity" (Br. 27), any more than the availability of qualified immunity renders 42 U.S.C. § 1983 a nullity. Moreover, a plaintiff could pursue a claim under the TVPA when a defendant is sued for acts taken not in an official capacity but under "color of law" (TVPA § 2(a), 106 Stat. 73; see, *e.g.*, *Kadic v. Karadžić*, 70 F.3d 232, 245 (2d Cir. 1995)), or when the State Department accepts a foreign state's waiver of its official's immunity (see, *e.g.*, *Mamani v. Berzain*, Nos. 07-22459, 08-21063, 2009 WL 10664387, at *13 (S.D. Fla. Nov. 25, 2009), *rev'd in part on other grounds by* 654 F.3d 1148 (11th Cir. 2011)).

Plaintiffs further invite the Court to consider domestic immunity law, especially as it relates to suits under 42 U.S.C. § 1983. Br. 21-27. To the extent Section 1983 is relevant to the question here, it supports the government's position. As noted above, see *supra* p. 16, the Supreme Court has interpreted Section 1983 in harmony with principles of tort immunity. The Court has done so because in construing that statutory right of action, it "proceed[s] on the assumption that common-law principles of ... immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (quoting *Pulliam v. Allen*, 466 U.S. 522, 529 (1984)) (omission in original). Finding no such clear intent in Section 1983, the Supreme Court "time and again" has recognized common-law immunity principles as precluding suit under that statute. *Rehberg*, 566 U.S. at 361 (discussing cases). As we have explained above, see *supra* pp. 15-18, the TVPA evinces no "clear legislative intent" to abrogate the State Department's authority to make controlling immunity determinations in suits against foreign officials. See also *Manoharan v. Rajapaksa*, 711 F.3d 178, 179-80 (D.C. Cir. 2013) (*per curiam*) (holding that TVPA does not clearly abrogate head-of-state immunity).

Because the TVPA does not abrogate foreign-official immunity, judicial deference to the State Department's immunity determinations does not "override the will of Congress." Br. 30 (some capitalization and emphasis omitted).

B. Plaintiffs next argue that this Court should follow the Fourth Circuit's decision on remand in *Samantar* in holding that there is no constitutional basis for the Executive Branch's determinations of conduct-based foreign-official immunity, and that courts may craft their own

principles governing the immunity of former officials, including a categorical exception to immunity for alleged *jus cogens* violations. Br. 32-41; 50-53; see *supra* p. 9, n.1 (explaining the difference between conduct- and status-based immunity), p. 9 (explaining the concept of *jus cogens*). But the distinction plaintiffs seek to make between the State Department's authority to make status- and conduct-based immunity determinations conflicts with the governing Supreme Court precedent.

As an initial matter, the Supreme Court in *Samantar* did not distinguish between conduct- and status-based immunities. Rather, in explaining that courts historically deferred to the State Department's foreign-official immunity determinations, the Court cited two cases involving consular officers who were entitled only to conduct-based immunity for acts carried out in their official capacities. See *Samantar*, 560 U.S. at 312 (discussing *Heaney*, 445 F.2d 501, and *Waltier*, 189 F. Supp. 319). And in reasoning that Congress did not intend to modify the established practice regarding individual foreign officials, the Court cited *Greenspan*, in which the district court deferred to the State Department's recognition of conduct-based immunity of individual foreign officials. See *id.* at 321-22 (citing *Greenspan*, 1976 WL 841). Most significantly, *Samantar* itself involved claims against a former foreign official who would be entitled only to conduct-based immunity, if any. *Id.* at 308. The Supreme Court nevertheless gave no qualification to its holding that, in enacting the FSIA, Congress did not wish to alter "the State Department's role in determinations regarding individual official immunity." *Id.* at 323; see *id.* at 325-26 (remanding the case for consideration of whether the former official "may be entitled to immunity under the common law").

More fundamentally, the Fourth Circuit's holding on remand in *Samantar* and plaintiffs' argument endorsing that decision both rest on the premise that the Supreme Court's pre-FSIA foreign sovereign immunity decisions are based solely on the President's constitutional authority to recognize foreign states. See, e.g., Br. 36 (discussing *Yousuf*, 699 F.3d at 722); see generally U.S. Const. art. II, § 3; *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). That constitutional power supports the State Department's status-based determinations, plaintiffs argue, but not its conduct-based determinations. See Br. 36-37. Again, the premise is mistaken.

The Supreme Court's pre-FSIA decisions recognize that the State Department's authority to make foreign sovereign immunity determinations, and the courts' obligation to defer to those determinations, flow from the Executive Branch's constitutional responsibility for conducting the Nation's foreign relations, not only from its more specific recognition power. See, e.g., *Ex parte Peru*, 318 U.S. at 589 (suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that continuation of the suit "interferes with the proper conduct of our foreign relations"); *Hoffman*, 324 U.S. at 34 (stating that courts will "surrender[]" jurisdiction upon a suggestion of immunity "by the political branch of the government charged with the conduct of foreign affairs"); see also *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360-61 (1955) (stating that "[a]s the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit," and that judicial deference rests on the need to avoid interfering with the United States' "diplomatic relations").

As plaintiffs point out (e.g., Br. 37), the President's general foreign-affairs powers are not exclusive and are shared in many contexts with Congress. Congress thus could codify some aspects of foreign-official immunity if it chose to do so. But in the absence of an applicable statute (such as the FSIA), it continues to be the role of the Executive Branch, not the courts, to

determine the principles governing foreign-official immunity from suit. That role is supported by the President's constitutional foreign relations authority.

By contrast, courts have no authority to create federal common-law principles of foreign-official immunity, absent Executive Branch guidance. The Supreme Court in *Samantar* made clear that a court is required to “surrender[] its jurisdiction” when the Executive Branch files a suggestion of immunity. 560 U.S. at 311. And when the Executive Branch does not participate in the litigation, courts must “inquire[] whether the ground of immunity is one which it is the established policy of the [State Department] to recognize.” *Id.* at 312 (second alteration in original; quotation marks omitted); see *id.* at 323 (“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.”).

Plaintiffs’ proposal that the Court create a *jus cogens* exception to foreign-official immunity would bring to the fore the question of the courts’ authority to create federal common-law immunity principles in a manner not presented by the Fourth Circuit’s remand decision in *Samantar*. In *Samantar*, the State Department determined that the former foreign official was not immune from suit. See 699 F.3d at 777-78. Thus, the Fourth Circuit’s judgment was at least consistent with the Executive Branch’s immunity determination. In this case, by contrast, the State Department has determined that Ehud Barak is immune. Were the Court to accept plaintiffs’ invitation and declare that Barak is not immune simply because plaintiffs allege a *jus cogens* violation, it would be the first court to require a foreign official to be subject to suit notwithstanding the State Department’s determination that the official is immune from suit.

C. Finally, plaintiffs urge the Court to reject the State Department’s immunity determination because it “is entirely silent on the foreign policy implications of this case” and so is not “reasonable.” Br. 42 (*italics omitted*). That argument misperceives both the nature of the State Department’s immunity determinations and the judicial role.

In making immunity determinations, the State Department takes “into account principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by customary international law.” ER 93. In doing so, the State Department may consider “the overall impact of [the suit] on the foreign policy of the United States.” *Ibid.* But there is no requirement that the Executive Branch articulate the extent and basis of that conclusion. Under the common law of foreign-state and foreign-official immunity, the Executive Branch’s foreign-policy considerations are not subject to judicial review. See, e.g., *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) (“[T]he degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive.”); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) (“The State Department is to make this determination, in light of the potential consequences to our own international position.”); *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) (*per curiam*) (“We think that the doctrine of separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his [immunity] conclusion.”).

* * * *

C. HEAD OF STATE IMMUNITY

President and Prime Minister of Laos

On July 13 2017, the United States filed a suggestion of immunity on behalf of both the president and prime minister of Laos. See *Digest 2016* at 459-60 for discussion of a separate suggestion of immunity in a different case against the heads of state and government in Laos, *Hmong v. Lao People's Democratic Republic*.**** The July 13, 2017 suggestion of immunity is excerpted below, omitting footnotes and sections that were previously argued in *Hmong*. The suggestion of immunity in its entirety, and its exhibits, are available at <http://www.state.gov/s/l/c8183.htm>. The statement of interest filed as part of the July 13, 2017 submission by the United States is discussed in Section A.5., *supra*. On July 31, 2017, the court dismissed the case for lack of subject matter jurisdiction, also dismissing with prejudice the claims against the president and prime minister in recognition of the U.S. suggestion of immunity. *Savang v. Lao People's Democratic Republic*, No. 16-cv-02037 (E.D. Ca. 2017).

* * * *

The United States respectfully informs the Court of its interest in the pending claims against President Bounnhang, Laos's sitting head of state, and Prime Minister Thongloun, its sitting head of government, and hereby informs the Court that both officials are immune from suit. 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 the sole authority to determine the immunity from suit of incumbent heads of state and heads of government. The interest of the United States in this matter arises from a determination by the Executive Branch, 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, that President Bounnhang and Prime Minister Thongloun are immune from this suit. As discussed more fully below, this determination is controlling and is not subject to judicial review. Indeed, the United States is aware of no case in which a court has ever subjected a sitting head of state or head of government to suit once the Executive Branch has determined that he or she is immune.

Here, the Office of the Legal Adviser of the U.S. Department of State has informed the U.S. Department of Justice that the government of Laos has formally requested that the United States recognize President Bounnhang's and Prime Minister Thongloun's immunity from this lawsuit. See Dep't of State Letter, *supra*. The Office of the Legal Adviser has further informed

**** Editor's note: On August 18, 2017, the district court entered its judgment denying plaintiffs' motion to amend their complaint and effectively dismissing the *Hmong I* case. However, the court's opinion was not based on immunity but rather the requirement in *Kiobel* that ATS claims sufficiently touch and concern the United States to displace the presumption against extraterritoriality. *Hmong I*, No. 2:15-cv-02349-TLN-AC (E.D. Ca.).

the Department of Justice that the “Department of State recognizes and allows the immunity of President Bounnhang as a sitting head of state and Prime Minister Thongloun as a sitting head of government from the jurisdiction of the United States District Court in this suit.” *Id.*

* * * *

D. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Determinations under the Foreign Missions Act

By Foreign Missions Act determinations dated August 31, 2017, the State Department restricted entry or access to multiple facilities leased or owned by the Government of the Russian Federation (in New York, Washington, D.C., and San Francisco) pursuant to section 204(b) of the Foreign Missions Act (22 U.S.C. § 4304(b)). 82 Fed. Reg. 44,484 & 44,485 (Sep. 22, 2017).

As discussed in *Digest 2016* at 462-63, the State Department had previously restricted entry or access to other Russian facilities in the United States in response to Russia’s interference in the 2016 U.S. election and a pattern of harassment of U.S. diplomats overseas. Russia responded in July 2017 by ordering the United States to reduce its diplomatic presence in Russia. The United States made the reductions as directed by the Russian government. On August 31, 2017, the State Department announced that it would require the closure of specified facilities in New York, Washington, D.C., and San Francisco to achieve parity with the Russians with respect to the number of consulates. In an August 31, 2017 State Department press statement, available at <https://www.state.gov/r/pa/prs/ps/2017/08/273738.htm>, Department Spokesperson Heather Nauert explained:

The United States has fully implemented the decision by the Government of the Russian Federation to reduce the size of our mission in Russia. We believe this action was unwarranted and detrimental to the overall relationship between our countries.

In the spirit of parity invoked by the Russians, we are requiring the Russian Government to close its Consulate General in San Francisco, a chancery annex in Washington, D.C., and a consular annex in New York City. These closures will need to be accomplished by September 2.

With this action both countries will remain with three consulates each. While there will continue to be a disparity in the number of diplomatic and consular annexes, we have chosen to allow the Russian Government to maintain some of its annexes in an effort to arrest the downward spiral in our relationship.

The United States hopes that, having moved toward the Russian Federation’s desire for parity, we can avoid further retaliatory actions by both sides and move forward to achieve the stated goal of both of our presidents: improved relations between our two countries and increased cooperation on

areas of mutual concern. The United States is prepared to take further action as necessary and as warranted.

The State Department also held a special briefing on August 31, 2017 regarding Russia. The transcript of the briefing, excerpted below, is available at <https://www.state.gov/r/pa/prs/ps/2017/08/273751.htm>.

* * * *

SENIOR ADMINISTRATION OFFICIAL: ...So ... in San Francisco, what we required to be closed was the Russian consulate general, and there is also an official residence, so that's what they will be closing there. And in Washington, D.C. and New York, they have a number of annexes that have different offices. The annex in Washington, D.C. ...currently houses their trade mission and the one in New York also houses a trade mission.

Regarding previous actions, the actions that this government took in December—I think you all know the reasons why we took those steps. It had to do with harassment of our diplomats and interference in our domestic affairs, in our elections. So I think those actions spoke for themselves. I think that we are responding in this instance to the Russian desire for parity in the diplomatic relationship, and we have taken these steps in that measure, in that spirit, and it is our hope that the Russians will recognize that since they were the ones who started the discussion on parity and we're responding and complying with what they required of us.

* * * *

SENIOR ADMINISTRATION OFFICIAL: ... Russian consulates, I can't really speak to how large each of them are, but they have four consulates now. They'll be going down to three. They're all on the smaller side compared to the embassy. San Francisco is the one that is the oldest and most established ... of the four. So I think in looking at which annexes or which consulates to close, we weighed a variety of criteria, and that just for a variety of reasons appeared to be the one that made the most sense.

* * * *

SENIOR ADMINISTRATION OFFICIAL: ... Secretary Tillerson phoned [Foreign Minister] Lavrov today to inform him that we had met their required reduction in size by their deadlines. And he also informed him of our plans to close the facilities in question. There was also a meeting between our acting Assistant Secretary for European and Eurasian Affairs John Heffern, who conveyed the decisions and our response to the Russian Deputy Chief of Mission Dmitry Zhirnov.

...[W]e are not expelling any Russians at this time. We have informed the Russians that they may be reassigned to other diplomatic or consular posts in the United States if they choose to do so.

* * * *

SENIOR ADMINISTRATION OFFICIAL: I don't have information with me on other trade missions, but ... those activities can be carried out in other annexes or other locations if they choose to do so.

In terms of what will happen to the buildings, ... the buildings that are owned by the Russians will continue to be owned by the Russians, and it will be up to them to determine whether they wish to sell those or dispose in some other way. They just will not be authorized for diplomatic or consular activities, and ... they won't be recognized as such. I think at least one of the facilities is leased, so I would presume they're just going to end their lease for that facility.

... the only authorized activities would be the protection and maintenance of the property.

* * * *

SENIOR ADMINISTRATION OFFICIAL: I think I didn't say anything about how long-term this was. I mean, certainly we continue to want to improve our relations between the two countries. We have areas of contention between our countries and concerns that the Russian side has not addressed. So I can't really say that this is permanent. Certainly, if the Russian side wanted to try to address some of our concerns, we would always be willing to listen and keep an open mind, because our fundamental goal is to find a way to improve the relations between our countries.

* * * *

SENIOR ADMINISTRATION OFFICIAL: ... I'm confirming the Russians required that we reduce our presence to a total of 455, so I'm confirming that we have met that requirement.

* * * *

SENIOR ADMINISTRATION OFFICIAL: ... Let me just say that the Russian requirement had an impact on both Russian and American staff. And we've had to respond in both taking care of the Americans and the Russians in different ways. So I'm not really prepared to go into any details there.

* * * *

SENIOR ADMINISTRATION OFFICIAL: So ... in terms of our visa processing, we had to temporarily suspend it because of the disruption caused, and we will be resuming shortly visa processing but at a much reduced rate because of the reduction in personnel.

* * * *

2. Enhanced Consular Immunities

As discussed in *Digest 2016* at 463, Section 501 of the Department of State Authorities Act, Fiscal Year 2017, P.L. 114-323, codified at 22 U.S.C. §254c, amended the Diplomatic Relations Act (22 U.S.C. §254c) to include permanent authority for the Secretary of State

to extend enhanced privileges and immunities to consular posts and their personnel. See also *Digest 2015* at 436-37.

In 2017, the United States signed two bilateral agreements, under which, upon entry into force, the United States and the other party reciprocally extend enhanced protections for consular posts, consular officers and consular employees and their family members. On January 19, 2017, the “Agreement Between the Government of the United States of America and the Government of the Republic of India Regarding Consular Privileges and Immunities” was signed. It entered into force upon signature. On March 17, 2017, the “Agreement Between the Government of the United States of America and the Government of the Hellenic Republic Regarding Consular Privileges and Immunities” was signed. The Agreement is not yet in force.

E. INTERNATIONAL ORGANIZATIONS

1. International Organizations Immunities Act

On January 12, 2017, President Obama designated the World Organisation for Animal Health (“OIE”) as a public international organization entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act (“IOIA”). 82 Fed. Reg. 5323 (Jan. 17, 2017). The President made the designation pursuant to section 1 of the IOIA (22 U.S.C. 288), finding that OIE is a public international organization in which the United States participates within the meaning of the IOIA. *Id.*

2. *Hilt Construction v. Permanent Mission of Chad*

On May 3, 2017, the United States filed a statement of interest in *Hilt Construction & Management Corp. v. Permanent Mission of Chad to the UN in New York*, No. 16-Civ-6421 (S.D.N.Y.). Plaintiff obtained a default judgment against the Chad Mission for its alleged failure to pay \$1,400,460.00 for renovation services performed by Hilt on property owned by the Mission. Plaintiff’s counsel then sought to enforce the judgment without seeking further assistance from the court by subpoenaing Bank of America where the Chad Mission has its official account. Excerpts follow from the U.S. statement of interest explaining the immunity of UN mission property from attachment. The statement in its entirety is available at <https://www.state.gov/s/l/c8183.htm>.

* * * *

I. ... CHAD’S UN MISSION PREMISES AND OFFICIAL BANK ACCOUNT ...ARE IMMUNE FROM ENFORCEMENT ACTION

Under international agreements to which the United States is a party, Plaintiff cannot enforce its judgment against property on UN Mission premises or UN Mission bank accounts used for official Mission purposes. While the FSIA identifies limited exceptions to the

presumption of foreign state immunity, *see* 28 U.S.C. § 1610(a), the FSIA does not displace immunities enjoyed by foreign state property under international agreements to which the United States was a party at the time of the statute's enactment. 28 U.S.C. § 1609 (providing that the FSIA provisions addressing the immunity from attachment and execution of a foreign state's property are "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act."); *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 which establish its obligations to protect the property of UN missions from interference. The Vienna Convention on Diplomatic Relations ("Vienna Convention"), to which both the United States and Chad are parties, provides that "[t]he premises of the mission, their furnishings and other property thereon ... shall be immune from search, requisition, attachment or execution." Vienna Convention, art. 22, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502. The Vienna Convention also provides that "the receiving state shall accord full facilities for the performance and functions of the mission." *Id.* art. 25. Diplomats accredited to the United Nations and the permanent missions through which they operate receive the same protections afforded to diplomatic missions, including to diplomatic property, under these provisions of the Vienna Convention. In particular, the U.N. Charter provides that the representatives of its Members 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. The UN Headquarters Agreement further specifies 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.

In interpreting these international agreements, the Second Circuit Court of Appeals has held that the protections afforded to diplomatic missions and their property under the Vienna Convention extend to permanent missions to the U.N. *See 767 Third Avenue Assocs.*, 988 F.2d at 298 (determining that the Vienna Convention, which codified principles of customary international law concerning diplomatic relations, establishes the inviolability of permanent missions to the U.N.). Accordingly, property on UN mission premises, like property on embassy premises, is immune from attachment or execution. *See* Vienna Convention art. 22(3). This Court in fact noted that "foreign missions and their premises are immune from attachment and execution under the Vienna Convention" in its decision dismissing Plaintiff's original action due to improper service of the complaint. *Hilt Constr. & Mgmt. Corp.*, 2016 WL 3351180, at *6–7. Accordingly, Plaintiff is clearly foreclosed from executing upon personal property on Chad's Mission premises, and the New York City Marshal's Notice must be vacated.

Further, courts have drawn on these international agreements to recognize that bank accounts of UN missions that are used for mission purposes are immune from enforcement as well, because a mission's access to its bank funds in the receiving state is critical to the mission enjoying "full facilities for the performance and functions of the mission." For example, in *Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations*, 796 F. Supp. 761, 763 (S.D.N.Y. 1992), despite the entry of a default judgment against Uganda's U.N. mission, the court held that "attachment of defendant's bank account is in violation of the United

Nations Charter and the Vienna Convention because it would force defendant to cease operations.” Similarly, in *Avelar v. J. Cotoia Constr., Inc.*, No. 11-CV-2172, 2011 WL 5245206, at *4 (E.D.N.Y. Nov. 2, 2011), the court vacated the plaintiff’s execution of a default judgment against the bank accounts of Congo’s U.N. Mission on the ground that “[b]ank accounts used by the mission for diplomatic purposes are immune from execution under [Article 25 of the Vienna Convention] as facilities necessary for the mission to function.” (citing *Sales v. Republic of Uganda*, No. 90 Civ. 3972, 1993 WL 437762, at *1 (S.D.N.Y. Oct. 23, 1993)).

Here, Ambassador Alifei has submitted a sworn statement that the bank account restricted by Plaintiff’s restraining notice is used by the Mission for the fulfilment of its diplomatic duties and general operations. *See* Alifei Aff. ¶ 6. Indeed, Ambassador Alifei attests that without access to the bank account, the Mission cannot continue to perform its official functions or to pay its employees. *See id.* ¶¶ 6, 7. He further states that the account is not used for commercial purposes. *See id.* ¶ 6. Any additional investigation into the complete range of uses is unnecessary, as courts have held that a mission official’s sworn statement is sufficient to establish that the mission’s bank account is used for diplomatic purposes, even if it were possible that a portion of the account funds other activities. *See e.g., Sales*, 1993 WL 437762, at *2 (rejecting plaintiff’s contention that some funds may be used for non-diplomatic purposes and noting, to remain consistent with principles of sovereign immunity, reliance on the foreign state’s declaration as to use of an account is necessary to avoid “painstaking examination of the Mission’s budget and books of account”); *Liberian E. Timber Corp. v. Gov’t of Republic of Liberia*, 659 F. Supp. 606, 610 (D.D.C. 1987) (“Indeed, a diplomatic mission would undergo a severe hardship if a civil judgment creditor were permitted to freeze bank accounts used for the purposes of a diplomatic mission for an indefinite period of time until exhaustive discovery had taken place to determine the precise portion of the bank account used for commercial activities.”).

Because the Chad Mission’s bank account supports its diplomatic activities and operations, it constitutes mission property immune from enforcement. Accordingly, Plaintiff’s restraint on its account should be vacated to ensure compliance with the United States’ international obligations and to permit Mission operations to continue, and the associated information subpoena seeking information about the account should also be withdrawn.

II. PLAINTIFF’S ... EFFORTS ARE IMPERMISSIBLE UNDER THE FSIA

Even if the property at issue were not immune from enforcement under the United States’ international agreements, Plaintiff’s efforts to enforce the default judgment would be impermissible under the FSIA. Section 1609 of the FSIA states, “Subject to existing international agreements to which the United States is a party at the time of enactment of this Act 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.” 28 U.S.C. § 1609.

Section 1610(c) prohibits the restriction of a foreign state’s property unless, after a reasonable period of time has elapsed from the entry of judgment and the provision of any notice required under Section 1608(e), the court issues an order permitting attachment or execution. “[E]xecution depends on a judicial determination that the property at issue falls within one of the exceptions to immunity...” *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011).

Here, there is no indication in the docket that Plaintiff sought an order from the Court or that the Court determined that personal property at the Chad Mission or the Chad Mission’s bank account were not immune from enforcement. *See generally* Dkt. That the Court granted

Plaintiff's request for a default judgment is immaterial, as the decision as to whether a foreign state is liable in an action is separate from the subsequent determination concerning the way in which the judgment may be enforced, if at all. *See, e.g., Avelar*, 2011 WL 5245206, at *5 n.8 (“[T]he FSIA requires that any steps taken by a judgment creditor to enforce the judgment must be pursuant to a court order authorizing the enforcement, independent of the judgment itself, and not merely the result of the judgment creditor’s unilateral delivery of a writ to the sheriff or marshal.”). Moreover, to the extent that Plaintiff’s notices were properly executed under New York State law, these procedures do not satisfy the FSIA such that the property of a foreign state may be attached. *See, e.g., First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 256 (S.D.N.Y. 2000), *aff’d sub nom. First City, Texas Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002) (vacating restraining notice as plaintiff failed to seek a court order pursuant to §1610(c) before serving it); *Trans Commodities, Inc. v. Kazakstan Trading House*, No. 96 CIV. 9782, 1997 WL 811474, at *2 (S.D.N.Y. May 28, 1997) (finding restraining notice to be “procedurally defective” under the FSIA).

In addition, a foreign government’s failure to appear to contest a judgment or enforcement action does not constitute a waiver of immunity such that attachment of property is proper without an express determination by the court that an exception to immunity applies. *See, e.g., Walters*, 651 F.3d at 293-94. In any event, it is unclear whether the Chad Mission was served with a copy of the default judgment in the manner required by the FSIA and thus had knowledge of it, as Plaintiff has not filed an affidavit of service. *See* 28 U.S.C. § 1608(e) (requiring a copy of any default judgment be sent to the foreign state in the same manner prescribed for service of process, set forth in § 1608(a)). Moreover, Plaintiff’s counsel signed the restraining notice issued to Bank of America three days *before* the Court filed the default judgment, despite the fact that enforcement against a foreign state’s property is not permitted without a court order issued “a reasonable time” after the entry of judgment and the provision of requisite notice. *See* Exhibit A annexed to Donovan Dec., p. 4, Dkt No. 16; 28 U.S.C. § 1610(c). Plaintiff therefore has failed to comply with the requirements of the FSIA governing the enforcement of judgments, and as a result, even if the property at issue could be attached, which it cannot, Plaintiff’s restraining notice would be improper.

* * * *

3. *Laventure v. United Nations*

As discussed in *Digest 2014* at 434-47, *Digest 2015* at 437-46, and *Digest 2016* at 463-68, both the federal district court and the appeals court in *Georges v. United Nations*, No. 13-7146 (2015) and 834 F.3d 88 (2d Cir. 2016), respectively, agreed with the United States that the UN and UN officials are immune from a suit alleging their liability for a cholera outbreak in Haiti. A second suit was filed alleging UN officials’ liability for the cholera outbreak in Haiti, *Laventure v. UN*, No. 14-1611 (E.D.N.Y.). Excerpts follow from the May 24, 2017 U.S. letter to the court in response to its invitation for U.S. views. The submission in its entirety is available at <https://www.state.gov/s/l/c8183.htm>.

* * * *

...Pursuant to 28 U.S.C. § 517, the United States files this Statement of Interest, explaining that the United Nations is absolutely immune from suit and service of process under the Convention on Privileges and Immunities of the United Nations (“General Convention”). In light of the UN’s immunity, the Court lacks subject matter jurisdiction over the UN. *See Georges v. United Nations*, 834 F.3d 88, 98 (2d Cir. 2016). Similarly, the individual UN defendants enjoy immunity for their official actions, and two of the individual defendants, by virtue of their high-ranking positions, also enjoy diplomatic immunity.

BACKGROUND

I. PLAINTIFFS’ COMPLAINT

Plaintiffs allege that the United Nations (“UN”), the United Nations Stabilization Mission in Haiti (“MINUSTAH”) and certain UN officials are responsible for an epidemic of cholera that broke out in Haiti in 2010, killing approximately 9,000 Haitians and injuring approximately 700,000 more. First Amended Complaint (FAC) ¶ 1. ECF No. 5. Specifically, they allege the UN negligently caused the cholera epidemic by failing to screen Nepalese peacekeeping forces who were deployed to Haiti in October 2010, despite a known outbreak of cholera in Nepal, *id.* ¶¶ 1, 5, 75-89, and by failing to use adequate sanitation for the peacekeepers, which allegedly led to the contamination of a major Haitian water supply. *Id.* ¶¶ 3-5, 90-104.

Plaintiffs also allege that the UN failed to establish a claims commission to address third-party claims of individuals injured by the cholera epidemic, purportedly 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” or “SOFA”). *Id.* ¶¶ 7, 17, 27, 189-91. Plaintiffs allege they made claims for compensation and remediation to the UN and that the UN “refused to substantively respond to the claims.” *Id.* ¶¶ 193-94. Plaintiffs also allege that the General Convention requires the UN to provide for appropriate modes of settlement for third-party private law claims, including those arising from the cholera epidemic in Haiti. *Id.* ¶¶ 16, 192. *See* General Convention, *adopted* Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, § 29. Plaintiffs allege that, despite this obligation, the UN has not provided plaintiffs with any relief. FAC ¶ 192.

The Laventures (Marie, Maggie, Sane, and Carmen) are Haitian or U.S. citizens who allege that their parents died in the cholera epidemic, and bring suit on behalf of themselves and the estates of their parents. *Id.* ¶¶ 20-24. In addition, there are 2641 named plaintiffs on Exhibit 1 to the First Amended Complaint who are allegedly either individuals who were infected by the epidemic or, if deceased, representatives of estates of individuals who died in the epidemic. *Id.* ¶ 26 & Exhibit 1. Plaintiffs also bring suit on behalf of a putative class of similarly situated individuals and seek compensatory and punitive damages in an amount to be determined at trial. *Id.* ¶ 44.

In addition to the UN and MINUSTAH, which is a subsidiary organ of the UN and thus part of the UN, plaintiffs also named six individual defendants: (i) former UN Secretary-General Ban-Ki Moon, who as the former chief administrative officer of the UN is alleged to have had overall responsibility for the management of the UN and its operations; (ii) Assistant Secretary-General Edmond Mulet, the former Special Representative of the Secretary-General and Head of MINUSTAH from March 2010 to May 2011, who is alleged to have had overall authority for the UN’s conduct in Haiti during that period; (iii) Chandra Srivastava, former Chief Engineer for

MINUSTAH, who is alleged to have been responsible for the environmental and sanitation units in Haiti during October 2010; (iv) Paul Aghadjanian, former Chief of Mission Support for MINUSTAH, who is alleged to have been responsible for managerial, logistical, and administrative support in Haiti during 2010; (v) Pedro Medrano, former Assistant Secretary-General and UN Senior Coordinator for the Cholera Response to Haiti, who was alleged at the time the First Amended Complaint was filed to have been responsible for coordinating the UN's cholera response in Haiti; and (vi) Miguel de Serpa Soares, current Under-Secretary-General for Legal Affairs, who is alleged to be responsible for all legal issues arising from the UN's cholera response. *Id.* ¶¶ 29-36. *See also* Letter from Stephen Mathias, Assistant Secretary-General for Legal Affairs to the Permanent Representative of the United States Mission to the United Nations (May 2, 2017 Letter) (attached hereto as Exhibit A).

II. PROCEDURAL HISTORY

In response to plaintiffs' request, this Court stayed the case in March 2015 to await the Second Circuit's decision in *Georges v. United Nations*, which involved a similar suit brought against the UN (including MINUSTAH), former Secretary-General Ban, and Assistant Secretary-General Mulet by victims of the Haitian cholera outbreak. ECF No. 8. In August 2016, the *Georges* panel affirmed the district court's ruling that the defendants were immune from suit under the General Convention. *Georges*, 834 F.3d 88, 98 & n.64 (2d Cir. 2016). The plaintiffs did not inform the Court of the Second Circuit's decision. As a result, on March 30, 2017, this Court issued an order to the plaintiffs to show cause why their suit should not be dismissed for lack of jurisdiction in light of the *Georges* immunity decision or, in the alternative, for failure to prosecute. ECF No. 13.

In response, plaintiffs argued that in *Georges* the Second Circuit upheld the UN's immunity on the "narrow" ground that the UN's obligation to provide for appropriate modes of settlement for third-party private law claims under Section 29 of the General Convention is not a condition precedent to the UN having immunity against such claims. Plaintiffs' Response to Order to Show Cause (Plaintiffs' Response) at 2. ECF No. 14. According to plaintiffs, the Second Circuit's holding does not render their case "moot," because plaintiffs (unlike the plaintiffs in *Georges*) take the position that the UN is not immune because it purportedly "has repeatedly and expressly waived sovereign immunity on multiple occasions..." *Id.* at 8. Plaintiffs seek permission to file a new amended complaint adding additional plaintiffs, and they also intend to move for a default judgment.

After this Court invited the Government to file a letter expressing its views on plaintiffs' motion to amend their complaint to add additional plaintiffs and to move for default judgment, on April 20, 2017, the Department of Justice filed a Notice of Potential Participation indicating that it would decide whether to file a Statement of Interest by May 24, 2017, and if so would file the statement no later than that date as well. ECF No. 16.

The UN has requested that the United States inform the Court of the UN's immunity and that of its named officials from this suit. *See* May 2, 2017 Letter. Exhibit A.

DISCUSSION

I. THE ABSOLUTE IMMUNITY OF THE UN

A. UN's Immunity

Absent an express waiver, the UN is absolutely immune from suit and all legal process. The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such

privileges and immunities as are necessary for the fulfillment of its purposes.” The Charter of the United Nations, June 26, 1945, 59 Stat. 1031, art 105.1. The General Convention, adopted Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, defines the UN’s privileges and immunities by providing that “[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” General Convention, art. II, sec. 2 (emphasis added).

The United States understands the General Convention to mean what it unambiguously says: the UN enjoys absolute immunity from “every form of legal process,” including suit and service of process, unless the UN has “expressly waived” its immunity in a “particular case.” Courts routinely recognize the UN’s absolute immunity from suit absent an express waiver on the part of the UN. “Under the [General] 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) (Nickerson, J.). “[W]here, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs’ claims against the United Nations for lack of subject matter jurisdiction.” *Brzak v. United Nations*, 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008), *aff’d*, 597 F.3d 107, 112 (2d Cir. 2010). In addition, the UN enjoys immunity from suit under the International Organizations Immunity Act (“IOIA”), 22 U.S.C. § 288a(b). *Brzak*, 597 F.3d at 112.

The UN’s immunity under the General Convention extends to MINUSTAH, which is a UN peacekeeping mission that reports directly to the Secretary-General and the Security Council, and is therefore an integral part of the UN. In addition, the Status of Forces Agreement between the UN and Haiti explicitly provides that MINUSTAH “shall enjoy the privileges and immunities... provided for in the [UN General] Convention.” Status of Forces Agreement, art. III, § 3. Accordingly, MINUSTAH is entitled to the same immunities established by the General Convention. *See, e.g., Emmanuel v. United States*, 253 F.3d 755, 756 (1st Cir. 2001) (noting that immunity applies to the UN Mission in Haiti pursuant to the Status of Forces Agreement); *see also Sadikoglu v. UN Development Programme*, No. 11-Civ-0294 (PKC), 2011 WL 4953994 at * 3 (S.D.N.Y. Oct. 14, 2011) (ruling that “because UNDP — as a subsidiary program of the UN that reports directly to the General Assembly — has not waived its immunity,” the General Convention “mandates dismissal . . . for lack of subject matter jurisdiction”).

B. Contrary To Plaintiffs’ Allegations, The UN Has Not Waived Its Immunity

Plaintiffs mistakenly assert that the UN “has repeatedly and expressly waived sovereign immunity on multiple occasions.” Plaintiffs’ Response at 8. To the contrary, the UN has asserted its own and its officials’ right to immunity. The attached May 2, 2017 letter from the UN expressly requests that “the competent United States authorities [] take appropriate action to ensure full respect for the privileges and immunities of the United Nations and its officials... .” *See* May 2, 2017 Letter at 2. Exhibit A.

Although plaintiffs allege that the UN’s failure to establish a claims commission constitutes a “violation” of the SOFA, FAC ¶ 191, and further allege that the UN committed a “violation” of the General Convention by failing to provide a mode of settlement for cholera-based claims, *id.* ¶ 192, this does not constitute a waiver of the UN’s immunity, which, as noted, must be “expressly waived” by the organization in a “particular case.” General Convention, art. II, § 2. As the Second Circuit explained in *Brzak*, “[a]lthough 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].” *Brzak*, 597 F.3d at 112

Moreover, the plaintiffs in *Georges* also argued that the UN lacked immunity because it had failed to provide a remedy for their cholera-related claims. *See, e.g.*, Reply Brief for Appellants at 3-19. 2015 WL 5693482. The Second Circuit rejected this argument, however, noting that its conclusion was consistent with its decision in *Brzak*, “in which we held that the purported inadequacies of the UN’s dispute resolution mechanism did not result in a waiver of absolute immunity from suit.” *Georges*, 834 F.3d at 97 n.48 (citing *Brzak*, 597 F.3d at 112). Clearly, then, 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.

Plaintiffs also allege that the UN waived its immunity based on 1996 and 1997 reports from the Secretary General that state that the UN is liable for damages to innocent third parties, as well as a 1998 General Assembly resolution that the UN would agree to liability for third-party claims resulting from the activities of peacekeeping operations. Plaintiffs’ Response at 8-9. According to plaintiffs, in light of these reports and the UN General Assembly resolution, the SOFA “permitted entry of U.N. troops only on condition of paying for injuries they caused.” *Id.* at 9. These various actions by the Secretary General and General Assembly do not constitute an express waiver by the UN of its immunity from legal process in United States courts in this case. *See* General Convention § 2 (the UN is immune unless “in any particular case” it expressly waives its immunity). Instead, the UN actions referred to by plaintiffs appear, at most, to express a general commitment to provide for compensation for injury to innocent third parties during the course of peacekeeping operations, which is what the SOFA itself states.

Because the UN has not expressly waived its or its component’s immunity in this case, the UN and MINUSTAH are entitled to immunity from legal process and suit.

II. THE IMMUNITY OF THE INDIVIDUAL DEFENDANTS

The UN has also asserted the immunity of the individual defendants in this case. *See* May 2, 2017 Letter at 2. Exhibit A. As the United States explains below, pursuant to the General Convention, current and former U.N. officials named as defendants enjoy immunity for any past official acts. In addition, current Under-Secretary-General Soares and Assistant Secretary-General Mulet, by virtue of their high-ranking positions, enjoy diplomatic immunity from suit pursuant to the Vienna Convention on Diplomatic Relations (“Vienna Convention”), 23 U.S.T. 3227, TIAS No. 7502, 500 UNTS 95.

Official Acts Immunity. 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. 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....” Under section 18(a), 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 such immunity to a UN official who did not enjoy diplomatic immunity). Likewise, former as well as current UN officials enjoy immunity for their official acts under the IOIA, 22 U.S.C. § 288d(b). *De Luca v. UN*, 841 F. Supp. 531, 534 (S.D.N.Y.), *aff’d*, 41 F.3d 1502 (2d Cir. 1994). Consequently, all the individual defendants enjoy immunity for their official acts under Section 18(a) of the General Convention and the IOIA.

Diplomatic Immunity. In addition to immunity for their official acts, current Under Secretary-General Soares and Assistant Secretary-General Mulet enjoy diplomatic immunity as well. Article V, Section 19 of the General Convention provides that, in addition to the immunities specified in Section 18, “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. None of these exceptions are at issue here. Accordingly, they enjoy immunity from this suit. *See Georges*, 848 F.3d at 92, 98 n.64 (affirming dismissal of Ban and Mulet on the grounds of diplomatic immunity).

III. PLAINTIFFS HAVE NOT ADEQUATELY SERVED THE DEFENDANTS

Plaintiffs do not appear to have adequately served any of the defendants. The UN’s May 2017 letter states that, notwithstanding attempts by the plaintiffs to serve it by facsimile, the UN has not waived its immunity as to service. May 2, 2017 Letter at 3. Exhibit A. As noted, the UN, in the absence of a waiver, enjoys immunity from “every form of legal process[.]” General Convention § 2, which includes service of process in a civil suit. The UN’s letter further points out that although the UN Headquarters Agreement provides for the Secretary-General to provide for conditions of service within the Headquarters District, the Secretary-General has not, in fact, done so. UN’s May 2, 2017 Letter at 3-4. Exhibit A. As a result, any attempts by plaintiffs to serve the UN and the individual defendants within the Headquarters District would be ineffectual.

The docket in this case indicates that plaintiffs attempted to serve all of the defendants by personal service on Ban in June 2014. However, former Secretary-General Ban enjoyed diplomatic immunity as of 2014, and therefore enjoyed personal inviolability, which rendered service on him ineffective. *See Tachiona v. Mugabe*, 386 F.3d. 205, 223 (2d Cir. 2004) (unless one of the three exceptions to immunity from civil suit apply, service of process on an individual enjoying diplomatic immunity is improper). Furthermore, an individual who enjoys inviolability cannot be served even as a means of serving parties who do not enjoy immunity. *See id.* at 224 (dismissing non-immune entity whom plaintiffs attempted to serve through inviolable individuals). Accordingly, to the Government’s knowledge, there has not been effective service on any of the defendants in this case.

* * * *

The United States filed a reply letter on July 7, 2017 in further support of its statement of interest filed on May 24, 2017. The July 7, 2017 submission is excerpted below and available in its entirety at <https://www.state.gov/s/l/c8183.htm>.

* * * *

Plaintiffs do not dispute that only an express waiver by the UN of its immunity can be effective. Rather, plaintiffs contend that the General Convention's requirement that waiver be express "in any particular case" does not actually require that the UN waive its immunity in connection with this specific case, provided it has issued an *a priori* waiver covering the circumstances of this suit. Mem. of Law in Opp. to the Gov't Statement of Interest ("Pl. Opp.") (ECF No. 21) at 6-8. Plaintiffs provide no citation to a case in which any court has found that the UN has submitted itself to the court's jurisdiction in a tort case under any circumstances, let alone via an advance waiver of immunity. Plaintiffs, therefore, fail to provide any support for this Court to find that the General Convention's express waiver provision includes instances where the UN somehow issues a waiver of some yet unknown future case or claim. On the contrary, courts have consistently found the UN to have retained its immunity from tort claims. *E.g.*, *Georges*, 834 F.3d at 98; *Brzak*, 597 F.3d at 112; *Bisson v. United Nations*, 2008 WL 375094 (S.D.N.Y. 2008). *See also Emmanuel v. United States*, 253 F.3d 755, 757 (1st Cir. 2001) (discussing the UN's absolute immunity to claims for torts allegedly committed in Haiti).

The Court need not reach the issue of whether the UN could validly issue an advance waiver of its immunity to tort claims, however, because plaintiffs have failed to cite any evidence that would come close to constituting an advance waiver that would satisfy the General Convention's requirement that the UN waive its immunity with respect to a particular case. *See* UN General Convention art. II, § 2. Instead, plaintiffs rely chiefly on two reports of the Secretary-General from the 1990s that expressly state that the UN is immune from suit in domestic courts, and a General Assembly resolution adopting the reports. Pl. Opp. at 9-12.

Report 389, dated September 20, 1996, sought to address "the scope of United Nations liability for activities of United Nations forces, procedures for the handling of third-party claims and limitations of liability." A/51/389 at 1. Pl. Opp., Exhibit B. The report stated that "the United Nations has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in performance of their duties." A/51/389 at 4 ¶ 7. The UN, however, did not state or intend that such claims be resolved in domestic courts. Instead, the UN intended to resolve such claims by means of a UN-created standing claims commission that would settle claims "resulting from damage caused by members of the [UN] force in the performance of their official duties and *which for reasons of immunity of the Organization and its Members could not have been submitted to local courts.*" *Id.* (emphasis added). In other words, the rationale for a standing claims commission was precisely because the UN retained its immunity from suit in domestic courts. This report, which predates the events in this case by approximately 14 years, does not remotely satisfy the General Convention's requirement for an express waiver.

The other Secretary-General report relied upon by plaintiffs, dated May 21, 1997, analyzes "the provisions of article 51 of the model status-of-forces agreement, elaborates criteria and guidelines for implementing the principles of financial and temporal limitations on the liability of the United Nations and proposes modalities for establishing these limitations in a legally binding instrument." A/51/903 at 1. Opp., Exhibit C. Like the previous report, it expressly recognized that the UN is immune from suit in domestic courts. Again, this immunity was cited as the rationale for proposing to establish a standing-claims commission, which would serve "as a mechanism for the settlement of disputes of a private law character to which the United Nations peacekeeping operation or any member thereof is a party and *over which the local courts have no jurisdiction because of the immunity of the Organization or its members.*"

A/51/903 at 4 ¶ 7 (emphasis added).

Both reports, and the 1998 General Assembly resolution (52/247) adopting them, Opp., Exhibit D, are consistent with the Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti (“MINUSTAH SOFA”), which provides both that the MINUSTAH (a component of the UN) will enjoy immunity under the General Convention (SOFA ¶ 15) and that tort claims can be brought before a standing claims commission (¶ 55). In short, none of the documents plaintiffs rely on constitute an expression that the UN would submit itself to the jurisdiction of the courts, as opposed to making voluntary payments or payments directed by standing commissions. Read as a whole, the documents cited by plaintiffs express an intention by the UN to resolve its liability for torts in fora other than courts.

While no standing-claims commission was established in Haiti, the Second Circuit in *Georges* held that the UN’s obligation to provide for an alternate forum for dispute resolution was not a condition precedent to its immunity from suit, 834 F.3d at 97, and plaintiffs forswear any intent to argue otherwise here. Pl. Opp. at 13.

In short, plaintiffs have failed to allege any plausible evidence that the UN has expressly waived its immunity from suit in this case. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (“A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.”). Instead, to the contrary, plaintiffs have provided evidence that the UN has always intended to retain its immunity in connection with torts arising out of its peacekeeping operations, and the UN has expressly asserted its immunity here via its May 2, 2017 letter. *See* SOI at 4. Under the facts presented, plaintiffs have not met their burden of establishing the Court’s jurisdiction.

With respect to the individual defendants, plaintiffs fail to advance any argument that Under-Secretary-General Serpa Soares and Assistant Secretary-General Mulet do not enjoy diplomatic immunity, or that the six individual defendants do not enjoy immunity for their official acts. Nor do they argue that the acts for which the individual defendants have been sued are not official acts. The closest plaintiffs come to a waiver argument with respect to the individual defendants is their statement that UN General Assembly resolution 52/247, which addresses tort claims against the UN, is “binding on the UN and its officials.” Opp. at 12. There are at least two clear defects with such a waiver argument. First, UNGA resolution 52/247 says nothing whatsoever about claims against, or the responsibility of, UN officials; it only addresses the “liability” of the UN itself. Second, only the Secretary-General—not the General Assembly—has the authority to waive the immunity of UN officials. General Convention art. III, § 20. No such waiver has occurred. Accordingly, even if plaintiffs are attempting to make a waiver argument with respect to the individual defendants, it is unavailing. They too are immune under the General Convention and the IOIA.

With respect to service of the summons and complaint, plaintiffs argue that their attempts at service via facsimile on the UN and personally on then-Secretary-General Ban should be deemed sufficient. Pl. Opp. at 17-19. But plaintiffs’ alleged compliance with the requirements of due diligence and due process under U.S. domestic law do not meet the United States’ international obligations. In particular, plaintiffs’ asserted attempt to serve the UN by fax, *see* Pl. Opp. at 18, is ineffectual given the inviolability of the UN headquarters district and the requirement that the Secretary-General must consent to the conditions under which any service of process might be permitted in the headquarters district. Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, June 26, 1947,

61 Stat. 3416, 11 U.N.T.S. 11 (entered into force Oct. 21, 1947), art. III, § 9(a); *see also* SOI at 7. The Secretary-General has not established any such conditions. Exhibit A to the SOI at 3-4.

As to service on then-Secretary-General Ban, plaintiffs attempt to distinguish *Tachiona v. Mugabe*, 386 F.3d 205, 223 (2d Cir. 2004), on the ground that there was no waiver of immunity in that case, as there purportedly was in this. Pl. Opp. at 19. For the reasons set forth above, plaintiffs' waiver argument—that the UN's general commitment to be liable for tort claims before UN-created standing claims commissions arising out of peacekeeping operations is tantamount to an express waiver of immunity from suit here—should not persuade the court. But in any event, a statement in the 1990s regarding the UN's potential liability for a class of tort claims did not waive a future Secretary-General's personal inviolability with respect to acceptance of service of process in this suit. *Tachiona* governs the attempt to serve Ban: service was ineffective both as to him and as to the other defendants, including the UN.

* * * *

The United States filed a further letter on July 18, 2017 in response to plaintiffs' request to file a further sur-reply. The July 18, 2017 submission is excerpted below and available in its entirety at <https://www.state.gov/s/l/c8183.htm>.

* * * *

In support of their proposed sur-reply, Plaintiffs erroneously contend that the United States does not contest that (i) the UN's acceptance of liability constitutes an agreement "to be bound under law or justice," and (ii) such an agreement could constitute an express waiver of immunity. Pls. Mot for Leave at 1. Based on this incorrect premise, Plaintiffs argue the Government has introduced a new factual dispute in its reply about "the United Nations' intent and understanding of what it means to 'accept liability.'" *Id.* These contentions are plainly groundless. First, the United States *does* contest Plaintiffs' legal theory and has repeatedly explained that it rejects their claim that the UN's potential acceptance of liability before a standing claims commission could ever amount to an *express* waiver by the UN of its immunity in a U.S. court. SOI at 5; Supp. SOI at 2-3. Such an argument would read the word "express" out of the General Convention and require embracing an implied theory of waiver that is at odds with the language of the General Convention and that has been rejected by binding Second Circuit precedent. SOI at 5 (citing *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010) (explaining that although 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]")). Second, it was not the Government but Plaintiffs who raised the issue of the UN's "intent" in their opposition, when they argued (incorrectly) that the UN materials constituted "a clear, unambiguous manifestation of the intent to waive" immunity. *See* Pl. Opp. at 5; *id.* at 13 (quoting *United States v. Chalmers*, No. S5 05 CR 59(DC), 2007 WL 624063, at *2 (S.D.N.Y. Feb. 26, 2007)). Plaintiffs have now had two briefs to set forth their arguments about the significance of the UN materials discussed above and there are no grounds for a third.

There are no also grounds for ordering discovery in this case, including Plaintiffs' request for sensitive internal deliberations from the UN leading up to public statements issued by the UN this past year about the Haiti cholera outbreak, including Secretary-General Ban's apology. Pls. Mot for Leave at 2-3 & n.7. Such internal materials are irrelevant to the question of whether the UN expressly waived its immunity. As Plaintiffs themselves assert, for the UN to expressly waive its immunity, there must be "a clear and unambiguous manifestation of the intent to waive" on the part of the U.N. Pl. Opp. at 13 (quoting *Chalmers*, 2007 WL 624063, at *2). No discovery is required to determine whether the UN has *unambiguously* and *expressly* waived its immunity from suit in this case. The materials before this Court make plain on their face that the

UN has not unambiguously and expressly waived its immunity in this particular case. On the contrary, as demonstrated by the UN's May 2, 2017 letter, the UN has unambiguously and expressly *asserted* its immunity. *See* SOI (Exhibit A). As was true in *Georges*, dismissal of Plaintiffs' complaint on immunity grounds is therefore warranted. *See Georges v. United Nations*, 834 F.3d 88, 98 (2d Cir. 2016). Plaintiffs' discovery demands are without merit and if allowed would in themselves infringe upon the UN's immunity.

In particular, any order from this Court compelling the UN to provide discovery would constitute "legal process" and thus run counter to the General Convention's grant of immunity to the UN. General Convention, art. II, § 2 (stating that UN "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity"); *see also Chalmers*, 2007 WL 624063 at *1-3 (in a case involving a subpoena *duces tecum* to the UN, denying a motion to compel the production of documents from the UN, citing the UN's immunity under the General Convention as well as the International Organizations Immunities Act ("IOIA," 22 U.S.C. §§ 288a(b))). Such an order would also infringe upon the United Nations' archival immunity. *See* General Convention Section 4 (stating that the "archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located").

Likewise an order compelling the testimony of any of the individual defendants, or other UN officials, would run counter to the United States' treaty obligations. The Government has explained that these defendants enjoy immunity, *see* SOI 5-7, and Plaintiffs have not contested this point. Under the General Convention, UN officials with the rank of Assistant Secretary-General or higher enjoy the privileges and immunities accorded to diplomatic envoys in accordance with international law. UN General Convention Section 19. These immunities include immunity from compulsory testimony. *See* Vienna Convention on Diplomatic Relations ("VCDR") art. 31(2) ("A diplomatic agent is not obliged to give evidence as a witness."). Further, former high-level UN officials, including former Secretary-General Ban, enjoy residual testimonial immunity with respect to matters within their former official capacity. *See* VCDR art. 39(2) (even after a diplomatic agent's functions have come to an end, "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"). Indeed, all officials of the UN are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity...." General Convention Section 18(a). *Accord* IOIA, 22 U.S.C. § 288d(b).

On August 24, 2017, the court dismissed the *Laventure* case for lack of subject matter jurisdiction (also denying the motion for a sur-reply). The Laventure plaintiffs have appealed to the U.S. Court of Appeals for the Second Circuit. The district court's opinion is excerpted below and available at <https://www.state.gov/s/l/c8183.htm>.

1. Immunity of UN and MINUSTAH

The Charter of the UN, which was ratified and entered into force with respect to the United States in 1945, provides that the UN “shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.” U.N. Charter art. 105 The Convention on the Privileges and Immunities of the United Nations (“CPIUN”), which was adopted in 1946 and came into force with respect to the United States in 1970, specifies that the UN “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” CPIUN art. II, § 2, 21 U.S.T. 1418; *Brzak v. United Nations*, 597 F.3d 107, 110-11 (2d Cir. 2010); *Georges*, 84 F. Supp. 3d at 248.

Thus, by its own terms, the CPIUN requires courts to recognize and to respect the UN’s “immunity from every form of legal process” unless “in any particular case” the UN “expressly” waives its immunity. CPIUN art. II, § 2; *see also, e.g., Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) ...

Here, in a letter addressed to Ambassador Nikki Haley, the UN states that it has “not waived, and indeed, expressly maintains the privileges and immunities of the United Nations and its officials in respect of this case.” UN Letter at 3. Also, the letter requests that “competent United States authorities ... take appropriate action to ensure full respect for the privileges and immunities of the United Nations and its officials.” *Id* at 2.

Plaintiffs nevertheless argue that the UN has expressly waived its immunity for harm caused by the Haitian cholera outbreak. Plaintiffs’ argument rests primarily on two related reports published by the Secretary-General in 1996 and 1997, both of which were adopted by the UN General Assembly in 1998. PL Mem. at 9-14. These two reports—namely, Report A/51/389 (published in 1996) and Report A/51/903 (published in 1997 as a supplement to Report A/51/389)—outline the manner in which the UN would accept liability for damages caused by UN peacekeeping operations, provided that such damages did not result from “operational necessity.” Report A/51/389 dated Sept. 20, 1996, Dkt. No. 21-2 (“Report 389”); Report A/51/903 dated May 21, 1997, Dkt. No. 21-3 (“Report 903”). By agreeing to accept liability for its activities, plaintiffs contend that the UN expressly waived its immunity for purposes of this lawsuit. Pl. Mem. at 8-14; Pl. OTC Response at 8-9.

As the Government notes, however, both reports contemplate that claims against the UN would be resolved by non-judicial means, including through UN-established standing claims commissions, given that domestic courts—because of the broad immunity available to the UN and its officials—would not adjudicate such claims. *See* Gov’t Reply at 2-3; Report 389 at 4 ii 7 (discussing settlement “by means of a standing claims commission claims ... which for reasons of immunity of the Organization and its Members could not have been submitted to local courts”); Report 903 at 4 ii 7 (discussing “standing claims commission as a mechanism for the settlement of disputes ... over which the local courts have no jurisdiction because of the immunity of the Organization or its members”). By agreeing to accept liability for its actions

through the channels outlined in these reports, there is no indication that the UN was waiving immunity it enjoys in domestic courts.

Plaintiffs complain that the UN failed to create a standing claims commission to address injuries caused by the cholera outbreak, while contending that the SOFA between the UN and the Haitian government required it to create one. 2d Am. Compl. ¶ 7, 60. The Second Circuit, however, has concluded that the failure to create an adequate dispute-resolution mechanism does not constitute an express waiver of immunity secured by the CPIUN. *See 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 CPIUN.”); *see also Georges*, 84 F. Supp. 3d at 249 (“[C]onstruing the UN’s failure to provide ‘appropriate modes of settlement’ for Plaintiffs’ claims as subjecting the UN to Plaintiffs’ suit would read the strict express waiver requirement out of the CPIUN.”).

Finally, plaintiffs fail to offer any plausible explanation for why these UN reports, which predate Haiti’s cholera outbreak by more than a decade, constitute an express waiver of immunity in this “particular case.” CPIUN art. II, § 2. Even if the reports had indicated that the UN was generally willing to subject itself to lawsuits in certain circumstances, the reports would still not establish that the organization had waived its immunity here. For these reasons, the Court concludes, consistent with the Government’s view, that the CPIUN immunizes the UN from this suit. ...

As a UN subsidiary, MINUSTAH enjoys the same privileges and immunities as the UN under the CPIUN. *See Georges*, 84 F. Supp. 3d at 249 (“MINUSTAH, as a subsidiary body of the UN, is also immune from suit”); *Sadikoglu v. United Nations Dev. Programme*, No. 11-CV-294 (PKC), 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011) (noting that “scope of immunity for the UN and its subsidiary bodies derives” from the “UN Charter” and “CPIUN”). Consequently, the Court lacks subject-matter jurisdiction over plaintiffs’ claims against both the UN and MINUSTAH.

2. Immunity of Individual Defendants

The CPIUN provides that UN officials “shall ... be immune from legal process in respect of ... all acts performed by them in their official capacity,” unless this immunity is waived by the Secretary-General or the Security Council. CPIUN art. V, §§ 18, 20. Thus, absent waiver, the CPIUN immunizes UN “officials sued for acts performed in their official capacities.” *D’Cruz v. Annan*, No. 05-CV-8918 (DC), 2005 WL 3527153, at *1 (S.D.N.Y. Dec. 22, 2005), *aff’d*, 223 F. App’x 42 (2d Cir. 2007) (internal quotation marks omitted). UN officials also enjoy immunity for their official acts under the International Organizations Immunities Act (“IOIA”), Pub L. No. 79-291, 59 Stat. 669, 672 (1945) (codified at 22 U.S.C. § 288 *et seq.*). Specifically, the IOIA provides that UN “officers and employees are ‘immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as ... officers ... or employees except insofar as such immunity may be waived’ by the United Nations.” *Id* (quoting 22 U.S.C. § 288d(b)).

Here, plaintiffs have sued the individual defendants in their official capacities, and there is no indication that any relevant actions of the individual defendants fell outside the scope of their official duties. Further, there is no indication that the UN, or any of its organs, waived the immunity available to the individual defendants. To the contrary, the UN has expressly maintained their right to immunity. UN Letter at 3. For these reasons, the Court concludes, consistent with the Government’s view, that the individual defendants are immune from suit

under the CPIUN and IOIA. Consequently, the Court lacks subject-matter jurisdiction over the claims against them.

* * * *

4. ***Zuza v. OHR***

As discussed in *Digest 2016* at 468-71, and *Digest 2015* at 450-53, *Zoran Zuza v. Office of the High Representative, et al.*, No. 16-7027, concerns immunities under the IOIA. The United States filed a statement of interest in the district court and an *amicus* brief in the Court of Appeals asserting immunity of the OHR and its officers and employees. On May 30, 2017, the Court of Appeals issued its decision, affirming the district court's dismissal of the case. Excerpts follow from the Court's opinion (with footnotes omitted). *****

* * * *

Zuza's challenges on appeal are many. We have fully considered each but find none persuasive. We limit our discussion to one—namely, whether Ashdown and Inzko were entitled to immunity, even if section 8(a)'s requirements were not met until August 2015 or later. We review the district court's resolution of this question of law *de novo*. *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 280 (D.C. Cir. 2014). We agree that the district court lacked subject matter jurisdiction regardless of the date Ashdown and Inzko's immunity vested.

The IOIA's text compels our conclusion. It entitles qualifying officers and employees to immunity not only from "suit" but also from "legal process." 22 U.S.C. § 288d(b). Legal process is an expansive term. It refers broadly to "[t]he proceedings in any action." BLACK'S LAW DICTIONARY 1399 (10th ed. 2014); *see* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1808 (1993) (defining process to include "the course of procedure in a judicial action or in a suit in litigation"). As we have explained, IOIA immunity, "where justly invoked, properly shields defendants not only from the consequences of litigation's results but also from the burden of defending themselves." *Tuck v. Pan Am. Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981) (internal quotation marks omitted). For these reasons, IOIA immunity does not operate only at a lawsuit's outset; it compels prompt dismissal even when it attaches mid-litigation.

This is not an anomalous conclusion. Courts have found that other forms of immunity acquired *pendente lite* mandate dismissal of a validly commenced lawsuit. *See, e.g., Abdulaziz v. Metro. Dade Cty.*, 741 F.2d 1328, 1329–30 (11th Cir. 1984) ("[D]iplomatic immunity ... serves as a defense to suits already commenced."). And that makes sense. Federal courts are tribunals of "limited jurisdiction," possessing "only that power authorized by Constitution and statute[.]" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When intervening events deprive a court of its adjudicative authority, the litigation must end. For example, an action may

***** Editor's note: On April 16, 2018, the Supreme Court denied the petition for certiorari in the case.

be dismissed upon the repeal of the jurisdictional statute under which the case was brought. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 274 (1994). Or it may end when the President exercises his lawful authority to restore a nation's previously abrogated sovereign immunity. *Republic of Iraq v. Beaty*, 556 U.S. 848, 866 (2009). Circumstances vary but the guiding principle is the same: Removing judicial power to adjudicate a case compels its dismissal.

So too here. Seagroves's letter left no doubt that Ashdown and Inzko had been "duly notified to and accepted by the Secretary of State as a representative, officer, or employee[.]" 22 U.S.C. § 288e(a). Under these circumstances, they are "immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees[.]" *Id.* §288d(b). Accordingly, we affirm the district court's judgment.

* * * *

Cross References

Alien Tort Statute and Torture Victims Protection Act, **Ch. 5.B.**

Warfaa v. Ali, **Ch. 5.B.2.d.**

UN Committee on Host Country (regarding Russian property in the U.S.), **Ch. 7.A.6.b.**

ILC's work on Immunity, **Ch. 7.C.1.**

Aviation v. United States, **Ch. 8.D.2.a.**

Russia sanctions, **Ch. 16.A.7.**

CHAPTER 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Air Transport Agreements

Information on recent U.S. air transport agreements, by country, is available at <https://www.state.gov/e/eb/rls/othr/ata/>. The United States signed new air transport agreements in 2017 with St. Vincent and the Grenadines and with the Kingdom of the Netherlands, in respect of Sint Maarten. The United States and Sri Lanka amended their 2002 air transport agreement in 2017. The United States and Jamaica also amended their 2008 air transport agreement in 2017. The United States and Namibia amended their 2000 agreement. And the United States and Tanzania amended their 2000 agreement.

On April 7, 2017, the government of the United States and the government of St. Vincent and the Grenadines signed a new air transport agreement, which entered into force at signing. The April 7, 2017 State Department media note announcing the new agreement, available at <https://www.state.gov/r/pa/prs/ps/2017/04/269567.htm>, includes the following:

The new Open Skies agreement strengthens the partnership between the two countries and deepens commercial and economic ties between the United States and St. Vincent and the Grenadines. It will provide opportunities for airlines, travelers, businesses, airports and localities by allowing increased market access for passenger and cargo to fly between our two countries and beyond. In doing so, the new agreement will facilitate future travel and commerce between the United States and St. Vincent and the Grenadines.

On July 14, 2017, the United States and the Kingdom of the Netherlands, in respect of Sint Maarten signed a new agreement. As described in the July 14, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/07/272610.htm>, the agreement

modernizes the U.S.-Sint Maarten relationship by reducing the administrative burden on carriers and governments, clarifying route rights and reaffirming mutual adherence to international safety and security standards. The Agreement will enter into force after the two countries exchange diplomatic notes to confirm they have completed all necessary domestic procedures to adopt it.

The United States concluded four amended agreements during the Tenth International Civil Aviation Organization Air Services Negotiation Event (“ICAN 2017”) in Colombo, Sri Lanka, December 4-8, 2017. The December 8, 2017 State Department media note on developments in U.S. open skies partnerships at ICAN 2017 is available at <https://www.state.gov/r/pa/prs/ps/2017/12/276374.htm>, and includes the following:

On December 4, U.S. Ambassador to Sri Lanka Atul Keshap and the Democratic Socialist Republic of Sri Lanka’s Secretary of Civil Aviation G. S. Withanage signed an agreement to amend the U.S.-Sri Lanka Open Skies Agreement of 2002 to include seventh-freedom rights for all-cargo operations, effective the date of signing. Seventh freedom rights involve flights between a second and third country without touching the airline’s home country. These rights facilitate more efficient and cost-effective movement of goods, strengthen global express delivery cargo networks, enhance connectivity and competitiveness, and facilitate economic growth and job creation.

Also on December 4, the U.S. delegation and a Jamaican delegation led by Dr. Kathy-Ann Brown, Deputy Solicitor General, agreed, *ad referendum*, on the text of an amendment to the 2008 U.S.-Jamaica Air Transport Agreement that expands coverage to include seventh-freedom route rights for all-cargo operations. The delegations intend to recommend that their aviation authorities permit operations in accordance with the terms of the agreement, pending its signing and entry into force expected in early 2018.

On December 7, the U.S. delegation and a Namibian delegation led by Cedrik Limbo, Director, Transportation Policy and Regulation, Ministry of Works and Transport, agreed, *ad referendum*, on the text of an amendment to the 2000 U.S.-Namibia bilateral Open Skies Air Transport Agreement that expands coverage to include seventh-freedom route rights for all-cargo operations and removes an obsolete provision.

Also on December 7, the U.S. delegation and a Tanzanian delegation led by Hamza Johari, Director General, Civil Aviation Authority, agreed, *ad referendum*, on the text of an amendment to the 2000 U.S.-Tanzania Open Skies Agreement to remove an obsolete provision.

2. Foreign Air Carrier Permit for Norwegian Air International and Norwegian UK

As discussed in *Digest 2016* at 479-83, the State Department provided opinions to the Department of Transportation on applying the Air Transport Agreement between the

United States of America and the European Community to pending applications for foreign air carrier permits, submitted by Norwegian Air International (“NAI”) and Norwegian UK (“NUK”). On January 12, 2017, a group, including U.S. airline pilots and flight attendants associations and unions, filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit of the Department of Transportation’s decision to grant a foreign air carrier permit to NAI. *Air Line Pilots Ass’n, et al. v. Chao*, No. 17-1012 (D.C. Cir.). On July 7, 2017, the United States filed its brief as respondent in the D.C. Circuit, arguing, first, that the petition for review should be dismissed for lack of jurisdiction due to petitioners’ failure to establish standing; and second, that granting the permit was not arbitrary, capricious, or otherwise unlawful. The oral argument was set for February 23, 2018. The U.S. brief is excerpted below.

* * * *

I. PETITIONERS HAVE FAILED TO ESTABLISH ARTICLE III STANDING.

* * * *

Petitioners’ unsupported claims of injury, causation, and redressability are too speculative and attenuated to establish Article III standing. Petitioners assert that the Department’s grant of a foreign air carrier permit to Norwegian Air will permit Norwegian Air to provide service between the United States and foreign locations, using pilots, flight attendants, and other air crew members who are paid less and provided with working conditions inferior to those of the flight crews of other carriers providing service between the United States and foreign locations. Although petitioners do not explain their theory of causation, it appears to be premised on an assumption that existing carriers that provide service between the United States and foreign locations will pay less and provide less desirable conditions of employment to their own pilots and flight crews as a result of increased competition, or conversely, that existing carriers will lose market share on existing flight routes, thus forcing pilots and other air crew members to work for Norwegian Air instead of a higher-paying competitor. Each step of this attenuated causal link is speculative, and at odds with information in the administrative record.

* * * *

II. THE DEPARTMENT OF TRANSPORTATION’S GRANT OF A FOREIGN AIR CARRIER PERMIT TO NORWEGIAN AIR WAS NOT ARBITRARY, CAPRICIOUS, OR OTHERWISE UNLAWFUL.

Petitioners’ claims also fail on the merits. The Department of Transportation’s determination that Norwegian Air satisfied the requirements for a foreign air carrier permit under 49 U.S.C. § 41302 was reasonable and based on a correct interpretation of the statute. The issuance of a foreign air carrier permit was also consistent with the provisions of the 2007 Air Transport Agreement, as amended, including Article 17 bis.

- A. The Department of Transportation Reasonably Concluded That Norwegian Air Satisfied the Requirements of 49 U.S.C. § 41302.

As noted above, 49 U.S.C. § 41302 establishes two requirements for the issuance of a foreign air carrier permit: (1) that the carrier is fit, willing, and able to provide the foreign air transportation authorized by the permit; and (2) either that the carrier has been designated by the government of its country to provide the foreign air transportation under an agreement with the United States government, or that issuing the permit is otherwise in the public interest. The Department of Transportation's conclusion that Norwegian Air satisfied the requirements for a foreign air carrier permit under 49 U.S.C. § 41302 was not arbitrary or capricious.

The Department of Transportation concluded, and petitioners do not contest, that Norwegian Air is fit, willing, and able to provide the foreign air transportation described in its permit and to comply with Title 49, Part A, of the U.S. Code, and regulations of the Secretary of Transportation. JA 422, 573. The requirements of 49 U.S.C. § 41302(1) were thus satisfied.

In addition, the Department of Transportation found, and petitioners do not contest, that Norwegian Air is qualified, and has been designated by Ireland, the country of its incorporation, to provide foreign air transportation under an agreement with the United States. JA 420-22, 573. Thus, 49 U.S.C. § 41302(2) was satisfied. Norwegian Air established that it is a "Community airline," as that term is used in the 2007 Air Transport Agreement, as amended; that substantial ownership and effective control are vested in nationals of a European Union Member State (which per the 2011 Air Transport Agreement is extended to include Norway and Iceland); and that it is licensed as a Community airline by Ireland and has its principal place of business in Ireland, thereby satisfying the requirements of Article 4(b) of the 2007 Air Transport Agreement, as amended. The United States was thus obligated under Article 4 to "grant appropriate authorizations and permissions with minimum procedural delay," provided it determined that the requirements of "Article 8 (Safety) and Article 9 (Security) are being maintained and administered." 2007 Air Transport Agreement, art. 4(d), Add. 17.

Furthermore, under Article 6 bis of the 2007 Air Transport Agreement, as amended, "upon receipt of an application for operating authorization pursuant to Article 4," the United States was obligated to "recognise any fitness and/or citizenship determination made by the aeronautical authorities of [Ireland] with respect to [Norwegian Air] as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters," unless it had "specific reason for concern" about Norwegian Air's qualifications to operate. Add. 87-88. The Department of Transportation acted in accordance with those international obligations in recognizing, and giving reciprocal effect to, Ireland's determinations of fitness and citizenship, in the course of granting a foreign air carrier permit to Norwegian Air. See 49 U.S.C. § 40105(b)(1)(A) (requiring Secretary to "act consistently with obligations of the United States Government under an international agreement").

Petitioners argue that the Department of Transportation did not properly apply 49 U.S.C. § 41302 because it did not make a determination pursuant to § 41302(2)(B) that the grant of a permit to Norwegian Air would be "in the public interest." Pet. Br. 25-28. By its plain terms, however, that statutory requirement did not apply. The statute requires either that (A) an air carrier "is qualified, and has been designated by the government of its country, to provide the foreign air transportation under an agreement with the United States Government, or (B) the foreign air transportation to be provided under the permit will be in the public interest." 49 U.S.C. § 41302(2) (emphasis added). Having found that (A) was satisfied, the Department was not required to determine that (B) was also satisfied. JA 421, 464.

Petitioners nevertheless contend that the “or” in 49 U.S.C. § 41302(2) should be read to mean “and,” suggesting that that construction is supported by legislative history. Pet. Br. 25-27. That legislative history, however, confirms that the Department’s interpretation of the plain language of the statute is correct. Indeed, the basic purpose of the section of the bill adding the provision codified at § 41302(2) was to provide the Department an alternative to the “public interest” standard.

In the 1979 Senate committee hearings, the Civil Aeronautics Board submitted a section-by-section analysis of the proposed bill that explained that the provision that was ultimately enacted without material changes as 49 U.S.C. § 41302 would

authorize the issuance of a foreign air carrier permit to a fit applicant *either* [1] upon a finding that the applicant is qualified, and has been designated by its government, to perform such foreign air transportation under the terms of an agreement with the United States, *or* (2) upon a finding that such transportation will be in the public interest. Currently the latter is the only criterion.

International Air Transportation Competition Act of 1979: Hearings on S. 1300 Before the Subcomm. on Aviation of the S. Comm. on Commerce, Sci. & Transp., 29 96th Cong. 67 (1979) (“1979 Hearings”) (emphasis added). The Board explained that “[t]he negotiation of a bilateral agreement itself represents a determination by the Government of the United States that the grant of route authority provided for under the bilateral is in the ‘public interest,’” and that the new provision “would avoid an unnecessary relitigation of the public interest question.” *Id.*

Although the Civil Aeronautics Board noted that the statute permitted but did not require issuance of a permit, and that the Board “would still retain the power to withhold a permit where issuance would not be in the public interest,” the example it provided was where “the foreign government was not complying with its obligations under an international agreement.” 1979 Hearings 67. Nothing in that statement suggests that the Board must make a separate determination that issuance of the permit is in the public interest in cases in which § 41301(2)(A) is satisfied. To the contrary, the Civil Aeronautics Board explicitly disagreed with a proposal by the Air Transport Association of America to amend the statute “to include a public interest criteria for grant of permits where the carrier is designated under a bilateral agreement.” *Id.* at 80.

The State Department’s section-by-section analysis of the bill also explained that the change would allow the Civil Aeronautics Board to “act consistently with our international agreements” and “enable the United States to provide firm assurances to foreign governments,” by “eliminating a dilemma previously faced on occasion where a service by a foreign carrier was authorized by a bilateral agreement but nevertheless attacked before the [Board] as not being in the ‘public interest.’” 1979 Hearings 101. The State Department explained that the provision, “in effect, creates a conclusive presumption that a service authorized by a bilateral agreement is in the public interest.” *Id.* Thus, although noncompliance with a bilateral agreement might provide a basis for the government to decline to issue a foreign air carrier permit, there is no statutory requirement that the Department of Transportation make a determination that issuance of a permit authorized under a bilateral agreement is in the public interest.

Petitioners also claim that the Department of Transportation “has consistently and historically interpreted the ‘or’ between [§ 41302](2)(A) and (2)(B) to be an ‘and.’” Pet. Br. 25; see also Pet. Br. 28-30. That assertion is incorrect. Petitioners cite to the Department of

Transportation's Foreign Air Carrier Information Packet, but that guidance notes that, in deciding foreign air carrier applications, the Department considers "whether the authority is covered by a bilateral agreement, and whether the applicant has been designated by its homeland." U.S. Dep't of Transp., Foreign Air Carrier Information Packet 5 (Sept. 2000), available at <https://cms.dot.gov/office-policy/aviation-policy/foreign-air-carrier-information-packet>. Furthermore, the Department's guidance on "Application Procedures for Foreign Air Carriers of the European Union" explains that the Department "uses determinations made by aeronautical authorities of Member States on the fitness and citizenship of their air carriers, rather than basing these findings on detailed evidentiary submissions" filed under 14 C.F.R. Part 211, as would presumably be the case if the Department needed to make a public interest assessment. U.S. Dep't of Transp., Appl. Procedures for Foreign Air Carriers of the European Union, Appl. Procedures for EU Carriers (Feb. 19, 2009), available at <https://cms.dot.gov/policy/aviation-policy/application-procedures-foreign-air-carriers-european-union>. And although the Department of Transportation has previously stated, in tentatively concluding that it would grant a foreign air carrier permit under 49 U.S.C. § 41301 and an exemption from the permit requirement under 49 U.S.C. § 40109(c), that the public interest supported its decision (a finding that is required under § 40109(c)), nothing in those decisions suggests that the Department believed it was required to make that determination as a condition of issuing a foreign air carrier permit under 49 U.S.C. § 41302(1) and (2)(A).

Finally, petitioners argue that the Department of Transportation's interpretation of 49 U.S.C. § 41302(2) will bar the agency from taking action under other statutory provisions setting forth a "public interest" standard. Pet. Br. 30-31. That is erroneous. The Department remains authorized to take steps as necessary to protect the public interest in connection with the statutes cited by petitioners, where applicable. Under the circumstances of this case, the Department decided to issue Norwegian Air a foreign air carrier permit because the carrier had satisfied the conditions of § 41302(1) and (2)(A). The Department's construction simply means that it need not conduct a separate analysis of the public interest under § 41302(2)(B) before issuing a foreign air carrier permit. Should the public interest warrant taking action under the other statutes petitioners cite, the Department has ample authority to do so.

Petitioners also contend that, even if the Department of Transportation did not deny Norwegian Air's application outright, it was arbitrary and capricious in not imposing conditions on the foreign air carrier permit under 49 U.S.C. § 41305(b), which provides that the Secretary of Transportation "may" (but is not required to) "impose terms for providing foreign air transportation under the permit that the Secretary finds may be required in the public interest." Pet. Br. 11, 13. Although the Department of Transportation did not expressly address petitioners' request to place conditions on Norwegian Air's foreign air carrier permit, the Department's reasoning that "[t]he existence of an air service agreement demonstrates that granting operating authority to a foreign carrier is per se in the public interest" is dispositive of that assertion. JA 421; accord JA 572. It would make little sense to find that grant of a permit is per se in the public interest and yet to impose permit conditions based on the theory that in their absence a grant would not be in the public interest.

- B. The Department of Transportation's Grant of a Foreign Air Carrier Permit to Norwegian Air Did Not Contravene Article 17 bis of the 2007 Air Transport Agreement, as Amended.

Petitioners also erroneously contend that the Department of Transportation's grant of a foreign air carrier permit to Norwegian Air was inconsistent with Article 17 bis of the 2007 Air Transport Agreement, as amended. Pet. Br. 16-19, 31-32.

1. In interpreting the meaning of the 2007 Air Transport Agreement, as amended, including Article 17 bis, this Court "begin[s] with the text of the treaty and the context in which the written words are used." *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1508-09 (2017).

As noted above, Article 4 of the 2007 Air Transport Agreement, as amended, obligated the United States to grant Norwegian Air "appropriate authorizations and permissions with minimum procedural delay," provided it determined that the ownership requirements of Article 4(b) were met, the fitness provision of Article 4(c) was satisfied, and requirements of Article 8 (Safety) and Article 9 (Security) were being maintained and administered, Art. 4(d). Add. 16. Furthermore, under Article 6 bis, upon receipt of an application for operating authorization pursuant to Article 4, the United States was obligated to "recognise any fitness and/or citizenship determination made by the aeronautical authorities of [Ireland] with respect to [Norwegian Air] as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters," unless it had "specific reason for concern" about Norwegian Air's qualifications to operate. Add. 87-88. Under the plain language of the 2007 Air Transport Agreement, as amended, those are the exclusive criterion required for a grant of operating authority.

Against this backdrop, Article 17 bis, entitled "Social Dimension," provides in paragraph 1 that [t]he Parties recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards. The opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties' respective laws. Add. 92. That subsection imposes no obligations, and does not require the parties to take any particular action. It is a statement of principle, rather than a binding obligation.

Petitioner contends that the Department of Transportation failed to comply with paragraph 2 of Article 17 bis, which provides that

The principles in paragraph 1 shall guide the Parties as they implement the Agreement, including regular consideration by the Joint Committee, pursuant to Article 18, of the social effects of the Agreement and the development of appropriate responses to concerns found to be legitimate.

Add. 93. But that paragraph also fails to impose any binding obligation that the Department of Transportation violated in issuing a foreign air carrier permit to Norwegian Air. The requirement that the principles in paragraph 1 "shall guide the Parties as they implement the Agreement" does not compel or prohibit any specific conduct by a party to the Agreement. Nor does it set out any specific standards to govern implementation of the Agreement.

Paragraph 2 of Article 17 bis does provide for consideration by the Joint Committee of the social effects of the Agreement, pursuant to Article 18, and Paragraph 4(b) of Article 18 directs the Joint Committee to "consider[] the social effects of the Agreement as it is implemented and develop[] appropriate responses to concerns found to be legitimate." Add. 93. But neither Article 17 bis nor Paragraph 4(b) of Article 18 provide for a party to deny reciprocal recognition of fitness under Article 6 bis or operating authorization under Article 4.

In contrast, Article 4 sets out a mandatory requirement for a party to grant authorization and permission to an air carrier from another party provided that the stated conditions are satisfied. Add. 16-17. Although Article 4 conditions the grant of authority on a finding that the safety and security provisions in Articles 8 and 9 “are maintained and administered,” Add. 17, it has no similar requirement for the “social dimension” principles set forth in Article 17 bis. The plain language of Article 4 supports the interpretation that Article 17 bis does not provide an independent basis to refuse to comply with Article 4’s mandatory terms, nor justify withholding the authorization, as would a failure to meet the requirements of Article 8 (safety) or Article 9 (security).

Similarly, Article 6 bis, which was added at the same time as Article 17 bis in the 2010 Protocol, provides that in connection with applications by airlines under Article 4, a party shall “recognize any fitness and/or citizenship determination made by the aeronautical authorities” of the other party “as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters,” unless the party has a specific reason for concern that the applicant does not satisfy “the conditions prescribed in Article 4.” Add. 87-88. Like Article 4 itself, Article 6 bis does not condition recognition on satisfaction of Article 17 bis. Rather, Paragraph 1(a) of Article 6 bis refers exclusively to “the conditions prescribed in Article 4 of this Agreement for the grant of appropriate authorisations or permissions, Add. 87, thus confirming that the drafters did not intend for the “Social Dimension” principles in Article 17 bis to be an independent ground on which to deny recognition.

Petitioners nevertheless argue that Article 17 bis’s paragraph 2 imposes a relevant mandatory obligation through its use of the phrase “[t]he principles in paragraph 1 shall guide the Parties as they implement the Agreement.” Pet. Br. 17- 18. But the assertion that the “principles” in paragraph 1 dictate a particular outcome in an individual case is not supported by the plain language of Article 17 bis. In Paragraph 1 of Article 17 bis, the parties “recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards,” and note that the “opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties’ respective laws.” Add. 92. That language can hardly be characterized as directive or imposing an affirmative obligation on the parties to the Agreement. It merely advises that the opportunities created by the Agreement are not intended to undermine certain labor standards or labor-related rights and principles. Had the parties intended for labor standards or labor-related rights to be a basis for denial of operating authorization under Article 4, they would have said so directly. See *Water Splash*, 137 S. Ct. at 1510. Petitioner’s argument is inconsistent with the plain text of the agreement.

Article 17 bis should also be interpreted in light of the object and purpose of the 2007 Air Transport Agreement, as amended. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (“An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.”) (quoting Restatement (Third) of Foreign Relations Law § 325(1) (1987)). The central purpose of the 2007 Air Transport Agreement, as amended, was to increase opportunities to provide air services between the parties; in particular, the preamble expresses the desire to allow airlines to offer “competitive prices and services in open markets.” 2007 Air Transport Agreement, preamble, Add. 7. That purpose would be defeated by allowing States to point to generalized labor concerns to deny authorization to foreign carriers that meet the specific requirements set forth in Article 4 and Article 6 bis.

Furthermore, it is well established that the views of the Executive Branch regarding the meaning of an international agreement are entitled to “great weight,” *Abbott v. Abbott*, 560 U.S. 1, 15 (2010), particularly where, as is the case here, the Department of State led negotiations of the agreement. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). Here, the Department of State, the Department of Transportation, and the Department of Justice all concur that Article 17 bis does not provide an independent basis to deny authorization to an air carrier that is otherwise qualified to receive it under Article 4. ...

Finally, it is notable that aviation officials from the European Commission, which led the negotiation of the 2007, 2010, and 2011 agreements for the European Union and its Member States, share the Executive Branch’s view about the meaning of Article 17 bis. The administrative proceeding before the Department of Transportation reflects the following views from the European Commission’s Directorate General for Mobility and Transport, as expressed by the Director of Aviation and International Transport Affairs: “Article 17 bis does not provide a legal basis for unilaterally denying an application under Article 4 because (1) Article 4 makes no reference to Article 17 bis and (2) Article 17 bis itself does not formulate a legal rule that can be applied unilaterally by one party.” JA 338. As the Director explained, “[P]aragraph 1 of Article 17 bis sets out the parties’ views on the ‘importance of the social dimension’ of the Agreement and the ‘intentions’ underlying the opportunities it creates. It does not provide for legal consequences to be drawn from these views.” JA 338. Furthermore, the implementation of the Agreement referred to in Article 17 bis paragraph 2 “is referred to as a matter to be dealt with by ‘the parties,’ not any one single party.” JA 338. “[A]ny unilateral decision to deny an application using Article 17 bis runs against the letter and spirit of the Agreement.” JA 339.

In sum, the Department of Transportation’s issuance of a foreign air carrier permit to Norwegian Air was fully consistent with Article 17 bis.

2. Furthermore, even if petitioners were correct that Article 17 bis required the Department of Transportation to consider the social effects of granting a foreign air carrier permit to Norwegian Air—and the Department has explained why this interpretation of Article 17 bis is erroneous—the Department satisfied any such requirement.

As the Department explained in its final order, in deciding to grant Norwegian Air’s application for a foreign air carrier permit, the Department considered “significant concerns” raised by the parties opposing the application regarding Norwegian Air’s “potential hiring and employment practices affecting its operations in U.S. markets.” JA 572. In response, the Chief Executive Officer of Norwegian Air voluntarily committed to take steps “designed to address these concerns.” JA 572. The Department of Transportation’s final order expressly notes that, in deciding to grant the application, the Department took “into account the totality of the record regarding [Norwegian Air’s] application, including those changes to its hiring and employment practices that it has offered as a direct result of the difficult issues that have been raised during the course of this proceeding.” JA 573. Thus, even if Article 17 bis required the Department to consider the “Social Dimension” of granting a foreign carrier authorization to fly, the Department did so.

* * * *

3. Investigation of the Downing of Malaysia Airlines Flight MH17 in Ukraine

On July 6, 2017, the State Department issued a press statement on the Joint Investigative Team (“JIT”) report on the downing of Malaysian Airlines flight MH17 in Ukraine. The press statement, available at <https://www.state.gov/r/pa/prs/ps/2017/07/272398.htm>, welcomes the decision of the JIT to support prosecution of those responsible in Dutch courts. The press statement further states:

The United States will continue to work with the Joint Investigation Team in its investigation. We call on other states that are in a position to assist to cooperate fully so those responsible are held accountable. We again urge all states to take steps to ensure full compliance with UN Security Council Resolution 2166, which called for a “full, thorough and independent international investigation into the incident.”

4. International Civil Aviation Organization: Dispute with Brazil under Article 84 of the Chicago Convention

On December 2, 2016, the Brazilian Government filed an Application against the United States at the International Civil Aviation Organization (“ICAO”), under Article 84, Settlement of Disputes, of the Convention on International Civil Aviation (“Chicago Convention”). Brazil’s Application alleged that the United States violated Article 12, Rules of the Air, of the Chicago Convention in relation to a midair collision that occurred over Brazil on September 29, 2006.

On March 27, 2017, the U.S. Government filed a Preliminary Objection. In a closed session on June 21, 2017, the ICAO Council considered the U.S. Preliminary Objection. While the ICAO Council did not accept the U.S. Preliminary Objection and dismiss the case, it agreed that the arguments put forward by the United States could be joined to the merits of the case going forward. The Council also set the time limit for the United States to submit its Counter-Memorial, which was timely filed on August 31, 2017. In addition, the Council encouraged the parties to seek a settlement through negotiations. Both the United States and Brazil have expressed their intent to do so.

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS

1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement

Article 1128 of NAFTA allows NAFTA Parties who are not parties to a particular dispute to make submissions to a Tribunal hearing that dispute on questions of interpretation of NAFTA. The United States made Article 1128 submissions in several cases in 2017. U.S. submissions under Article 1128 are available at <https://www.state.gov/s/l/c3439.htm>.

a. Resolute v. Canada

On June 13, 2017, the United States made an Article 1128 submission in *Resolute Forest Products, Inc. v. Canada*. The claim in this case relates to measures allegedly adopted by Nova Scotia and Canada in support of a paper mill located in Nova Scotia. The Claimant alleges Canada violated Article 1102 (“National Treatment”), Article 1105 (“Minimum Standard of Treatment”), and Article 1110 (“Expropriation and Compensation”). Excerpts follow (with footnotes omitted) from the U.S. submission.

* * * *

1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. The United States does not take a position in this submission on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

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

2. Without a NAFTA Party’s consent to an investor-State arbitration brought pursuant to Chapter Eleven, a tribunal lacks jurisdiction over that investment dispute. Under Article 1122, the scope of a NAFTA Party’s consent to arbitrate an investment dispute is limited by the procedural conditions set out in Chapter Eleven. Those procedures include, *inter alia*, the requirements of Articles 1116 and 1117. Thus, a tribunal must find that a claim satisfies the requirements of Articles 1116 and/or 1117 in order to establish a Party’s consent to (and therefore the tribunal’s jurisdiction over) the claim.

3. Articles 1116(2) and 1117(2) prohibit an investor from making, and the Tribunal from hearing, “a claim if more than three years have elapsed from the date on which the investor first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.” These Articles thus impose a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute.

4. The NAFTA Parties consistently raise, and tribunals generally address, the time bar defense as a jurisdictional objection. For example, in *Glamis Gold*, the tribunal found that “an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for purposes of Article 21(4)” of the UNCITRAL Arbitration Rules (1976). In *Apotex I & II*, the parties treated the United States’ time-bar objection as a jurisdictional issue, and the tribunal expressly found that Article 1116(2) deprived it of “jurisdiction *ratione temporis*” with respect to one of the claimant’s alleged breaches. Interpreting an identical limitations period provision under the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA”), the *Spence* tribunal likewise addressed the time-bar defense as a jurisdictional issue.

5. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Eleven, a claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.

6. The limitations period set out in Articles 1116(2) and 1117(2) requires a claimant to submit a claim to arbitration within three years of the “date on which the” investor or enterprise “first acquired, or should have first acquired, knowledge” of (i) the alleged breach, and (ii) loss

or damage incurred by the investor or enterprise. This limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.”

7. An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Articles 1116(2) and 1117(2), knowledge is acquired as of a particular “date.” Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized, a continuing course of conduct by the host State does not renew the limitations period under Articles 1116(2) and 1117(2), once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. Accordingly, once a claimant *first* acquires (or should have first acquired) knowledge of breach and loss, subsequent transgressions by the NAFTA Party arising from a continuing course of conduct do not renew the limitations period under Articles 1116(2) or Article 1117(2).

8. With regard to knowledge of “incurred loss or damage” under Articles 1116(2) and 1117(2), the term “incur” broadly means to “to become liable or subject to.” Therefore, an investor may “incur” loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate. As the *Grand River* tribunal correctly reasoned:

In many sources, the verb [“incur”] is regularly taken to mean “become liable to.” Judicial dicta likewise suggest that one incurs a loss when liability accrues; a person may “incur” expenses before he or she actually dispenses any funds. In the Tribunal’s view, this interpretation corresponds most closely to the ordinary meaning of the term. The verb “to incur” in ordinary usage is often used to describe situations where there is no immediate outlay of funds by the affected party. A party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party’s interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.

9. In *Pope & Talbot*, the tribunal interpreted Articles 1116(2) and 1117(2) as requiring that “the loss has occurred” rather than “could or would occur.” This interpretation is not incompatible with the holding in *Grand River*, as a loss occurs when it is incurred, rather than when the financial impact of the loss is realized. Moreover, an unduly restrictive reading of the *Pope & Talbot* tribunal’s interpretation is unwarranted by its findings. The tribunal did not find that the claimant in that case must have actually purchased, or paid the higher prices for, the wood chips before it had incurred loss or damage. Rather, the tribunal’s findings indicated that the date on which the “necessity to purchase” the more expensive wood chips arose determined when the loss or damage was incurred.

10. With regard to knowledge of the “alleged breach” under Articles 1116(2) and 1117(2), a “breach” of an international obligation exists “when an act of th[e] State is not in conformity with what is required of it by that obligation.” In the context of Article 1110, a breach is manifest where a NAFTA Party (1) takes a measure (or measures) that effects a direct or indirect expropriation and (2) fails to do so in conformity with at least one of the four criteria set forth in subparagraphs (a) through (d) of Article 1110(1). In order to establish the first point, the claimant must demonstrate that the government measure(s) at issue destroyed all, or virtually

all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as “to support a conclusion that the property has been ‘taken’ from the owner.”

11. Thus, with respect to an expropriation claim, a claimant has actual or constructive knowledge of the “alleged breach” once it has (or should have had) knowledge of all elements required to make a claim under Article 1110—including that the destruction of, or interference with, the economic value of the investment is sufficient to constitute a taking. That date, however, need not coincide with the last of the government measures that are alleged to have harmed the claimant’s investment. For example, a claimant may have actual or constructive knowledge that previous measures in the series already expropriated its investment. Similarly, a claimant may have actual or constructive knowledge that the interference with the economic value of its investment is sufficient to constitute a taking before that investment has lost all of its value. Rather, as noted above and in paragraph 7, the operative date is the date on which the claimant first acquired actual or constructive notice of facts sufficient to make a claim under Article 1110.

Article 1101(1) (“Relating to” Requirement)

12. Article 1101(1) requires that the challenged measures adopted or maintained by a NAFTA Party “relate to” an investor of another NAFTA party, or to that investor’s investments. The “relating to” requirement cannot be satisfied by the mere, or incidental, effect that a challenged measure had on a claimant. Rather, there must have been a legally significant connection between the measure and the investor or its investment. Otherwise, untold numbers of domestic measures that simply have an economic impact on a foreign investor or its investment would pass through the Article 1101(1) threshold. As the *Methanex* tribunal aptly observed, “[a] threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all.”

13. Whether a challenged measure bears a “legally significant connection” to a foreign investor or investment depends on the facts of a given case. Negative impact of a challenged measure on a claimant, without more, does not satisfy the standard. Rather, a “legally significant connection” requires a more direct connection between the challenged measure and the foreign investor or investment.

14. Thus, for example, the *S.D. Myers* tribunal found that “the requirement that the import ban be ‘in relation’ to SDMI and its investment in Canada is easily satisfied,” given that the measure “was raised to address specifically the operations of SDMI and its investment.” In *Bilcon*, the tribunal found a legally significant connection where the challenged measure was the rejection by Nova Scotia and the Canadian federal government of a quarry project that was to be developed and operated pursuant to an agreement between the claimants and their Canadian joint-venture partner. The *Cargill* tribunal found that the import permit requirement at issue “directly affected” and “constituted a legal impediment to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico.” And while the *Methanex* tribunal held that the facts in that case did not meet the “legally significant connection” standard, it found that the claimant’s allegation that the Governor of California *intended* to penalize foreign producers of methanol (such as the claimant) through measures directed at MTBE producers could, if proven, satisfy the legally significant connection standard.

Article 1102(3) (National Treatment by States/Provinces)

15. As a general matter, the national treatment obligation under Article 1102 does not prohibit a NAFTA Party from adopting or maintaining measures that apply to or affect only a part of its national territory. Rather, the obligation prohibits nationality-based discrimination

between domestic and foreign investors (or investments of foreign and domestic investors) that are “in like circumstances.” Any suggestion to the contrary misconstrues the obligation as one to provide nationally uniform treatment. The Parties, all of whom are geographically, politically and economically diverse nations, did not intend such a result.

16. Article 1102(3) pertains to state and provincial measures only, and thus serves to determine what “treatment” by a state or province is the relevant reference point. The provision recognizes that states and provinces may have different standards for in-state (or in-province) and domestic out-of-state (or out-of-province) investors or their investments. Where a state or province accords different treatment to in-state (or in-province) investors or their investments and domestic out-of-state (or out-of-province) investors or their investments, investors from another NAFTA Party in like circumstances, or their investments, are entitled to receive the better of the treatment accorded by the state or province.

17. However, Article 1102(3) should not be construed as preventing a state or province from adopting or maintaining measures that apply only to investors or their investments operating (or seeking to operate) in that state or province. An investor cannot rest its claim under Article 1102(3) on the fact that a domestic enterprise operating in another state or province receives a different or greater benefit or is subject to a different or lesser burden unless it is “in like circumstances” with that enterprise. Whether such measures constitute less favorable “treatment” accorded to the foreign investor (or its investment) in “like circumstances” on the basis of nationality is a fact-specific inquiry at the merits phase.

Article 2103 (Taxation Measures)

18. NAFTA Article 2103(1) generally excludes taxation measures from the NAFTA’s provisions: “Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.” Article 2103 includes, however, several exceptions to this general exclusion. For example, Article 2103(4)(b) specifically subjects certain taxation measures to the national treatment and most-favored-nation treatment requirements of Articles 1102 and 1103, and Article 2103(6) specifically subjects, in certain circumstances, taxation measures to the provisions of Article 1110 relating to expropriation. By implication, taxation measures are not subject to any Chapter Eleven obligations, including those embodied in Article 1105, that are not expressly identified as exceptions to the Article 2103(1) general exclusion of taxation measures from the NAFTA.

19. Article 2103 applies to all “taxation measures.” NAFTA Article 201 defines a “measure” as “any law, regulation, procedure, requirement or practice.” A “practice” in this context includes the application of, or failure to apply (or the enforcement of or failure to enforce) a tax. Accordingly, with respect to a claim under Article 1110 alleging that an expropriation has occurred, Article 2103 does not create a distinction between a taxation measure imposed on a foreign investor or investment as a means of allegedly expropriating its investment, and a taxation measure that advantages a domestic investor or investment as a means of allegedly expropriating the foreign investor’s investment.

20. Article 2103(6) states that Article 1110 “shall apply to taxation measures except no investor may invoke that Article as a basis for a claim” to arbitration where the appropriate competent taxation authorities have determined that the challenged taxation measure “is not an expropriation.” In order to ensure that the appropriate taxation authorities can make this determination, the provision imposes a jurisdictional requirement that, before submitting a claim for expropriation challenging a taxation measure, a claimant must “refer the issue of whether the taxation measure is not an expropriation for determination to the competent authorities.”

Moreover, a claimant may only submit an Article 1110 claim involving this issue to arbitration under Article 1120 if, within the period of six months, “the competent authorities do not agree to consider the issue, or having considered it, fail to agree that the measure is not an expropriation.”

* * * *

b. Lone Pine, Inc. v. Canada

The United States submitted a non-disputing Party submission in *Lone Pine, Inc. v. Canada*, on August 16, 2017, providing U.S. interpretive views on Article 1139 (the definition of “investment”), Article 1101 (the scope of the Investment chapter), Article 1105 (the minimum standard of treatment) and Article 1110 (expropriation). Lone Pine brought the claim in connection with Quebec’s revocation of permits to mine for gas and oil resources under the St. Lawrence River. The tribunal held a hearing on the claim in October in Toronto. Excerpts follow (with footnotes omitted) from the U.S. submission.

* * * *

Article 1139 (Definition of “Investment”)

2. Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven. As the *Grand River* tribunal recognized, “on jurisdictional aspects, NAFTA awards are more relevant and appropriate than decisions in non-NAFTA investment cases.”

Article 1139(g)

3. Article 1139(g) defines “investment” as “real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes[.]” In this connection, Chapter Eleven tribunals have consistently declined to recognize as “property” mere contingent “interests.” Moreover, it is appropriate to look to the law of the host State for a determination of the definition and scope of the “property right” at issue.

Article 1139(h)

4. Article 1139(h) defines “investment” as “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise[.]”

5. To qualify as investment under Article 1139(h), more than the mere commitment of funds is required. An investor must also have a cognizable “interest” that arises from the commitment of those resources. Specifically, Article 1139(h)(i) states that such interests might arise from, for example, turnkey or construction contracts or concessions. Similar interests might arise, according to Article 1139(h)(ii), from “contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.” Not every economic interest that comes into existence as a result of a contract, however, constitutes an “interest” as used in Article 1139(h). For example, Article 1139(h) does not recognize as “investments” claims to money that

arise solely from commercial contracts for the sale of goods or services. Article 1139(i) specifically excludes from the definition of “investment” such interests.

* * * *

Article 1110 (Expropriation and Compensation)

8. Article 1110(1) provides that “[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment” unless specified conditions are satisfied.

9. As a threshold matter, the *Glamis* tribunal recognized that the term “expropriation” in Article 1110(1) “incorporates by reference the customary international law regarding that subject.” In this connection, it is a principle of customary international law that in order for there to have been an expropriation, a property right or property interest must have been taken. International courts have rejected claims that a customer base, or goodwill, by themselves, are property that can be the subject of an expropriation. For instance, in the *Oscar Chinn* case before the Permanent Court of International Justice, the Court denied an expropriation claim for failure to identify a property right. In that case, a British river carrier operator claimed that the Belgian Congo had expropriated its property when it increased government funding for a state-owned competitor which resulted in that competitor being granted a *de facto* monopoly. In denying the claim, the Court held that it was “unable to see in [claimant’s] original position—which was characterized by the possession of customers... anything in the nature of a genuine vested right.” The Court reasoned that “[f]avourable business conditions and goodwill are transient circumstances, subject to inevitable changes.”

10. As such, and given that Article 1110(1) protects “investments” from expropriation, the first step in any expropriation analysis must begin with an examination of whether there is an investment capable of being expropriated. Again, it is appropriate to look to the law of the host State for a determination of the definition and scope of the property right or property interest at issue, including any applicable limitations.

11. Article 1110 provides for protections from two types of expropriations, direct and indirect. A direct expropriation occurs “where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.”

12. An indirect expropriation occurs “where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.” Determining whether an indirect expropriation has occurred requires a case-by-case fact based inquiry that considers, among other factors: (i) the economic impact of the governmental action; (ii) the extent to which that action interferes with distinct, reasonable-investment-backed expectations; and (iii) the character of the government action.

13. With respect to the first factor, for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as “to support a conclusion that the property has been ‘taken’ from the owner.”

14. The second factor requires an objective inquiry of the reasonableness of the claimant’s expectations, which “depend in part on the nature and extent of governmental regulation in the relevant sector.”

15. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (i.e., whether “it arises from some public program adjusting the benefits and burdens of economic life to promote the common good”).

16. Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory. This principle in public international law is not an exception that applies after an expropriation has been found but, rather, is a recognition that certain actions, by their nature, do not engage State responsibility.

17. Where a State proclaims that it is enacting a non-discriminatory statute or regulation for a *bona fide* public purpose, courts and tribunals rarely question that characterization. The Restatement (Third) of Foreign Relations, for instance, notes that the public purpose requirement “has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective reexamination by other states.” In sum, the concept of a “public purpose” is a broad one, and it is not appropriate to search for a State’s alleged ulterior motives when a State has articulated plausible reasons for enacting the measures in question.

* * * *

c. Mobil v. Canada

On October 24, 2017, the United States filed an Article 1128 submission in the arbitration under NAFTA Chapter 11 between Mobil Investments Canada, Inc., a U.S. corporation, and the Government of Canada regarding two oil fields located off the coast of Newfoundland and Labrador. Claimants allege that the damages sought arise from the same regulatory measures that were found by an earlier tribunal (*Mobil Investments Inc. & Murphy Oil Corp. v. Government of Canada*) to violate Article 1106 of the NAFTA. Excerpts follow (with footnotes omitted) from the submission.

* * * *

1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below. Consistent with the Tribunal’s communication of October 2, 2017, the United States addresses in this submission the following question: “Is a breach of the obligation to perform in good faith a breach of an obligation under the NAFTA?”

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.

3. The principle that “every treaty in force is binding on the parties to it and must be performed by them in good faith” is established in customary international law, not in Section A of NAFTA Chapter Eleven. As such, claims alleging breach of the good faith principle do not fall within the limited jurisdictional grant afforded in Section B.

4. Furthermore, 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.” As such, customary international law does not impose a free-standing, substantive obligation of “good faith” that, if breached, can result in State liability.

5. Accordingly, a claimant “may not justifiably rely upon the principle of good faith” to support a claim, absent a specific treaty obligation. There is no specific treaty obligation under the NAFTA to repeal or cease enforcement of a measure in response to an adverse arbitral award or decision. Article 1135(1), which governs the types of remedies a tribunal may award, provides that a tribunal may award “only” monetary damages and interest (or restitution of property with an option to pay monetary damages instead). Article 1134, which governs a tribunal’s authority to issue interim measures of protection, provides that “[a] tribunal may not ... enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117.” In either case, NAFTA tribunals have no authority to change domestic law or to require a NAFTA Party or any state or local government to change its laws or decisions.

* * * *

d. Clayton/Bilcon v. Canada

On December 29, 2017, the United States made an Article 1128 submission in the damages phase in a case brought by U.S. investors—members of the Clayton family and the Bilcon corporation they control—against the Government of Canada. Claimants prevailed in the merits phase on their claims that the environmental assessment undertaken with respect to the White Point Quarry and/or Marine Terminal Project, violated NAFTA Article 1102 (national treatment) and Article 1105 (minimum standard of treatment). Excerpts follow (with most footnotes omitted) from the U.S. submission made in the damages phase of the proceedings. See *Digest 2013* at 316-18 for a discussion of the previous U.S. Article 1128 submission in the case.

* * * *

Limitations on Claims for Loss or Damage under Articles 1116(1) and 1117(1)

2. Each claim by an investor must fall within either NAFTA Article 1116 or NAFTA Article 1117 and is limited to the type of loss or damage available under the Article invoked. Article 1116(1) permits an investor to present a claim for loss or damage incurred by the investor itself:

An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the *investor* has incurred loss or damage by reason of, or arising out of, that breach. (emphasis added).

3. Article 1117(1), in contrast, permits an investor to present a claim on behalf of an enterprise that it owns or controls for loss or damage incurred by that enterprise:

An investor of a Party, *on behalf of an enterprise* of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the *enterprise* has incurred loss or damage by reason of, or arising out of, that breach. (emphasis added).

4. Where the investor seeks to recover loss or damage that it incurred directly, it may bring a claim under Article 1116. However, where the alleged loss or damage is only to an enterprise that the investor owns or controls, the investor's injury is only *indirect*,³ and therefore, the investor must bring a derivative claim under Article 1117.

5. The United States' position on the interpretation and functions of Articles 1116(1) and 1117(1) is long-standing and consistent. The United States therefore agrees with Canada and Mexico that investors must allege direct damage to recover under Article 1116 and that indirect damage to an investor, based on injury to an enterprise the investor owns or controls, may only be claimed through Article 1117. Pursuant to Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, this subsequent agreement or subsequent practice of the NAFTA Parties "shall be taken into account" in interpreting Articles 1116 and 1117.

6. This distinction between Articles 1116 and 1117 was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. This is so because, as recently reaffirmed by the International Court of Justice in *Diallo*, "international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders." As the *Diallo* Court further reaffirmed, quoting *Barcelona Traction*: "a wrong done to the company frequently causes prejudice to its shareholders." Nonetheless, "whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed." Thus, only direct loss or damage suffered by shareholders is cognizable under international law.

7. How a claim for loss or damage is characterized is therefore not determinative of whether the injury is direct or indirect. Rather, as *Diallo* and *Barcelona Traction* have found, what is determinative is whether the right that has been infringed belongs to the shareholder or the corporation.

³ The disputing parties use the term "reflective loss" to describe the damages the claimants are seeking in this case. For the purposes of this submission, the United States treats "indirect" loss or damage as synonymous with "reflective" loss or damage.

8. Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, or to share in the residual assets of the enterprise upon dissolution. Another example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests—whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole.

9. The second principle of customary international law against which Articles 1116 and 1117 were drafted is that no international claim may be asserted against a State on behalf of the State's own nationals.

10. Under these background principles, a common situation is left without a remedy under customary international law. Investors often choose to make an investment through a separate enterprise, such as a corporation, incorporated in the host State. If the host State were to injure that enterprise in a manner that does not directly injure the investor/shareholders, no remedy would ordinarily be available under customary international law. In such a case, the loss or damage is only directly suffered by the enterprise. As the investor has not suffered a direct loss or damage, it cannot bring an international claim. Nor may the enterprise maintain an international claim against the State of which it is a national under the principle of non-responsibility.

11. Article 1117(1) addresses this issue by creating a right to present a claim not found in customary international law. Where the investment is an enterprise of another Party, an investor of a Party that owns or controls the enterprise may submit a claim on behalf of the enterprise for loss or damage incurred by the enterprise. However, minority shareholders who do not own or control the enterprise may not bring a claim for loss or damage under Article 1117, thereby reducing the risk of multiple actions with respect to the same disputed measures.

12. Article 1116, in contrast, adheres to the principle of customary international law that shareholders may assert claims only for *direct* injuries to their rights. Were shareholders to be permitted to claim under Article 1116 for indirect injury, Article 1117's limited carve out from customary international law would be superfluous. Moreover, it is well-recognized that an international agreement should not be held to have tacitly dispensed with an important principle of international law "in the absence of words making clear an intention to do so." Nothing in the text of Article 1116 suggests that the NAFTA Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims.

13. Similarly, Article 1121(1)(b)'s reference to an investor's "interest in an enterprise" cannot be read to allow an investor to claim for indirect loss or damage for injuries suffered by the enterprise. In defining an "investment", Article 1139 uses the term "interest in an enterprise" to refer to legal entitlements or rights belonging to the investor (not the enterprise). For example, Article 1139(e) includes within the definition of "investment" "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise," while Article 1139(f) includes within this definition "an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution." Thus, such "interest in an enterprise" under Article 1121(1)(b) contemplates the kinds of *direct* loss or damage sustained by a shareholder mentioned above.

14. The approach taken by other tribunals allowing shareholders to claim indirect loss is inapposite in the context of the NAFTA, as those cases typically involved investment treaties that do not address the limitations of shareholder claims under customary international law and reference "shares" only in the context of the definition of an investment. NAFTA, in contrast, creates an explicit regime, which must be treated as *lex specialis*.

15. The above conclusions on the distinction between Articles 1116(1) and 1117(1) are reinforced in several complementary NAFTA provisions, all of which serve to recognize relevant principles of domestic law aimed at preserving the separate legal identity of a corporation, promoting judicial economy, and protecting the rights of creditors and other shareholders.

16. For example, Article 1117(3) provides that claims brought on behalf of an investor under Article 1116(1) and an enterprise under Article 1117(1) that arise from the same events should be heard together by the same arbitral tribunal. This provision promotes judicial economy by providing for the consolidation of claims, thereby reducing the risk of double recovery and inconsistent awards when the claims are based on the same events. Article 1117(3) also makes clear that nothing prevents an investor that owns or controls an enterprise, in an appropriate case, from submitting claims under both Articles 1116 and 1117. This allowance would be unnecessary if the controlling investor could claim for indirect loss under Article 1116(1).

17. Article 1117(4) is aimed at further reducing the possibility of multiple actions by preventing the investment, which includes an enterprise under NAFTA Article 1139, from bringing a claim on its own behalf.

18. Articles 1121(1)(b) and 1121(2)(b) also reinforce the distinction between Articles 1116 and 1117, respectively, in order to reduce the likelihood of multiple actions and double recovery. Regardless of whether an investor submits a claim for injury to its own interest under Article 1116, or to the interest of an enterprise that the investor owns or controls under Article 1117, the enterprise must waive its right to seek available remedies under domestic law for the same injury. Otherwise, a NAFTA Party could be forced to defend against such claims in concurrent or consecutive proceedings, risking duplicative and potentially inconsistent decisions for the same loss or damage arising from the same breach.

19. Finally, under Article 1135(2)(a) and (b), where a claim is made under Article 1117(1), the award must provide that any restitution be made, or monetary damages be paid, to the enterprise. This requirement—which follows the practice of many domestic legal systems with respect to shareholder derivative actions—is aimed at preventing the investor from effectively stripping away a corporate asset (the claim) to the detriment of others with a legitimate interest in that asset, such as the enterprise’s creditors. Instead, any award in the claimant’s favor will make the enterprise whole and the value of the shares and assets will be restored. This goal is reflected in Article 1135(2)(c), which provides that where a claim is made under Article 1117(1), the award must provide that it is made without prejudice to any person’s right (under applicable domestic law) in the relief.

20. Allowing an investor to claim for any indirect loss under Article 1116(1) would render the above framework ineffective. For example, if an investor had the right to bring its own claim for loss or damage suffered by an enterprise, that investor might choose to make a claim under Article 1116(1) rather than Article 1117(1) in order to protect the award from creditors or other shareholders. Under such circumstances, the provisions of Article 1135—designed to ensure any award based on injury to an enterprise is paid to the enterprise in order to protect the interests of creditors and other shareholders—would be rendered meaningless.

21. Against this backdrop, no NAFTA tribunal that has considered the distinction between Article 1116 and 1117 has ever awarded damages for indirect loss under Article 1116. Rather, two NAFTA tribunals that have considered the implications of allowing for indirect loss under Article 1116 instead recognized the importance of the distinction between Article 1116 and 1117 and the policies that this distinction is intended to promote. In *Mondev*, the tribunal found that “[h]aving regard to the distinctions drawn between claims brought under Articles

1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor.” It further cautioned future claimants to “consider carefully whether to bring proceedings under Articles 1116 and 1117, either concurrently or in the alternative, and that they fully comply with the procedural requirements under Articles 1117 and 1121 if they are suing on behalf of an enterprise.” In *GAMI*, the tribunal, in addressing the claimant’s expropriation claim under Article 1116, considered at length “difficulties attributable to the derivative nature” of the claim, including the dangers of inconsistent judgments and double recovery.

22. A tribunal cannot simply overlook an investor’s error in claiming indirect losses under Article 1116(1). Under Article 1122, the scope of a NAFTA Party’s consent to arbitrate an investment dispute is conditioned on compliance with the procedural requirements of Chapter Eleven. Those procedures include, inter alia, the requirements of Articles 1116. The disputing Party’s consent is limited to a claim for loss or damage available under the specific article(s) pled—NAFTA Article 1116(1) or Article 1117(1) or both—and an investor’s recovery of loss or damage must accordingly be limited to that available under the specific article(s). In addition, how an investor pleads a claim for loss or damage (i.e., under which article) can have implications on a disputing Party’s litigation strategy. For example, whether a claim for loss or damage has been brought pursuant to Article 1116 or 1117 can impact a disputing Party’s ability to assess the potential scope of claimed damages both with respect to any settlement negotiations regarding the dispute and with respect to its defense against such claims. Indeed, the difference in the scope of damages available to an investor under Article 1116 and to the investor’s enterprise under Article 1117 can be quite substantial.

Causation under Articles 1116 and 1117

23. Articles 1116 and 1117 allow an investor to recover loss or damage incurred “by reason of, or arising out of” a breach of an obligation under NAFTA Chapter Eleven, Section A.

24. The ordinary meaning of these terms requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage. In this connection, it is well-established that “causality in fact is a necessary but not a sufficient condition for reparation.” The standard for factual causation is known as the “but-for” or “*sine qua non*” test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. This test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations. As the International Court of Justice found in the *Bosnian Genocide Case*:

The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent’s breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so.

25. The ordinary meaning of the term “by reason of, or arising out of” also requires an investor to demonstrate proximate causation. All three NAFTA Parties agree. Indeed, proximate causation is an “applicable rule[] of international law” that under Article 1131(1) must be taken

into account in fixing the appropriate amount of monetary damages. Articles 1116 and 1117 contain no indication that the NAFTA Parties intended to vary from this established rule.

26. NAFTA tribunals have consistently imposed a requirement of proximate causation under Articles 1116 and 1117. The *S.D. Myers* tribunal held that damages may only be awarded to the extent that there is a “sufficient causal link” between the breach of a specific NAFTA provision and the loss sustained by the investor, and then subsequently clarified that “[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.”] In *Pope & Talbot*, the tribunal held that under Article 1116 the claimant bears the burden to “prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of.” The *ADM* tribunal required “a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such an injury.”

27. Accordingly, any loss or damage cannot be based on an assessment of acts, events or circumstances not attributable to the alleged breach. Events that develop subsequent to the alleged breach may increase or decrease the amount of damages suffered by a claimant. At the same time, injuries that are not sufficiently “direct”, “foreseeable”, or “proximate” may not, consistent with applicable rules of international law, be considered when calculating a damage award.⁵⁵ Valuing damages as of the date of an award, rather than as of the time of breach, could fail to appropriately exclude injuries resulting from events subsequent to the date of breach that lack sufficient causal connection to the breach. Tribunals should exercise caution also because compensation for such injuries may, depending on the circumstances, also be construed as intending to deter or punish the conduct of the disputing State, contrary to Article 1135(3).⁵⁷

Restrictions on Parallel Proceedings under Article 1121

28. The relevance or applicability of domestic judicial review of a challenged measure should be considered both in the context of the claim made and NAFTA Article 1121.

29. Article 1121(1)(b) allows an investor to choose to take its claim to arbitration rather than to the courts of the NAFTA Party that allegedly breached its NAFTA obligations. Once an investor has chosen this option, 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 explained, the phrase “with respect to” in Article 1121(1)(b) should be interpreted broadly. This construction of the phrase is consistent with the purpose of this 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

⁵⁵ As the commentary to the ILC Draft Articles explains, causality in fact is a necessary but not sufficient condition for reparation: “There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may be used, in others “foreseeability” or “proximity” The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act[.]” ILC Draft Articles, art. 31, comment 10 (footnotes omitted).

⁵⁷ Article 1135(3) expressly provides that “[a] Tribunal may not order a Party to pay punitive damages.” See also ILC Draft Articles, art. 36, comment 4 (“[A]rticle 36 is purely compensatory, as its title indicates. . . . It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.”) (citing the *Velásquez Rodríguez*, *Compensatory Damages* case, where “the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989))”).

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.”

30. 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 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, as set forth in the preceding paragraph.

* * * *

2. Non-Disputing Party Submissions under other Trade Agreements

a. Bridgestone v. Panama

Chapter Ten of the United States-Panama Trade Promotion Agreement (“U.S.-Panama TPA”) contains provisions designed to protect foreign investors and their investments and to facilitate the settlement of investment disputes. Article 10.20.2 of the U.S.-Panama TPA, like Article 1128 of NAFTA, allows for non-disputing Party submissions. The United States filed two such submissions in 2017 in an arbitration initiated by Bridgestone Licensing Services, Inc., and Bridgestone Americas, Inc. (“Bridgestone”). Bridgestone claimed that a decision by the Supreme Court of Panama related to trademark proceedings violated the following provisions of the TPA: Article 10.3 (National Treatment), Article 10.5 (Minimum Standard of Treatment) and Article 10.7 (Expropriation and Compensation). The first submission, submitted on August 28, 2017, is excerpted below (with footnotes omitted). The first and second submissions, in their entirety, are available at <https://www.state.gov/s/l/c77391.htm>.

* * * *

Expedited Review Mechanisms in U.S. International Investment Agreements

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.” 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.

Articles 10.20.4 and 10.20.5 of the U.S.-Panama TPA

4. The U.S.-Panama TPA contains such expedited review mechanisms in Articles 10.20.4 and 10.20.5, which provide, in relevant part:

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, 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).

...

(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.

....

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. Additionally, the provisions leave in place any mechanism that may be provided by the relevant arbitral rules to address other objections as a preliminary question. As such, the Agreement, like other agreements incorporating this language, "draws a clear distinction between three different categories of procedures for dealing with preliminary objections."

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 under Article 10.26. 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," including those with respect to a tribunal's competence.

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 (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.

9. Paragraph 5 provides an expedited procedure for deciding 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.

10. As noted, paragraph 5 of Article 10.20 of the Agreement provides that 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*” (emphasis supplied), emphasizing that objections asserted under paragraph 4 are distinct from objections to the tribunal’s competence. As correctly noted by the tribunal in *The Renco Group*, when discussing this language in paragraph 5 of the Trade Promotion Agreement between the United States and Peru, “this sentence provides additional and cogent confirmation that the Treaty drafters intended to draw a clear demarcation between Article 10.20.4 objections and objections to competence, and that the latter do not fall within the scope of the Article 10.20.4 objections.” That tribunal further stated that “the underlying scheme established by the provisions and the plain language found in the text make it clear that competence objections were not intended to come within the scope of the Article 10.20.4 objections”

11. The distinction drawn in paragraph 5 between an “objection under paragraph 4” and an objection as to the tribunal’s competence demonstrates that the requirements in paragraph 4 are not incorporated into the paragraph 5 mechanism when it is being used to address the latter. As such, when a respondent invokes paragraph 5 to address objections to competence, there is no requirement that a tribunal “assume to be true claimant’s factual allegations.” To the contrary, there is nothing in paragraph 5 that removes a tribunal’s authority to hear evidence and resolve disputed facts. Moreover, paragraph 5 provides that a tribunal “*shall* . . . issue a decision or award” on the preliminary objections. Paragraph 5 provides for extensions of time as may be necessary to accommodate this result.

12. In this connection, nothing in the text of paragraph 5 alters the normal rules of burden of proof. In the context of an objection to competence, the burden is on a claimant to prove the necessary and relevant facts to establish that a tribunal is competent to hear a claim. It is well-established that where “jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.” A tribunal may not assume facts in order to establish its jurisdiction when those facts are in dispute.

Articles 10.29 (Definition of “Investment”)

13. Article 10.29 states, in pertinent part, that “investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

14. As the chapeau makes clear, the definition of “investment” encompasses “every asset” that an investor owns or controls, directly or indirectly, that has the characteristics of an investment. The “[f]orms that an investment may take include” the categories listed in the subparagraphs, which are illustrative and non-exhaustive. In determining whether an asset falls within the definition, the analysis should be guided by whether it has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

15. Subparagraph (e) of the definition lists, among forms that an investment may take, “turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts.” Ordinary commercial contracts for the sale of goods or services typically do not fall within the list in subparagraph (e).

16. The definition of “investment” explicitly excludes claims to payment that arise from commercial contracts for the sale of goods or services and that are not immediately due.

Article 10.12.2 (Denial of Benefits)

17. Chapter Ten of the Agreement provides that a Party shall provide protection for “investors” of the other Party, which are defined to include a broad class of “enterprise[s],” including those that are “constituted or organized under the law of a Party.” At the same time, however, Article 10.12.2 of the Agreement provides that a Party “may deny the benefits” of Chapter Ten to an enterprise of the other Party that has “no substantial business activities in the territory” of the other Party and is owned or controlled by a person from the denying Party or from a non-Party:

Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.

Thus Parties to the Agreement may deny Chapter Ten benefits under these specified circumstances.

18. Article 10.12.2 imposes two substantive requirements that must be met before the provision can be invoked by a Party to the Agreement; specifically, an enterprise must (1) have no substantial business activities in the territory of the non-denying Party, and (2) be owned or controlled by persons of a non-Party or of the denying Party. Article 10.12.2 does not impose any requirement, however, with respect to when a respondent may invoke the denial of benefits provision. Neither this Article nor any other provision of the Agreement precludes a Party from invoking the denial of benefits provision at an appropriate time, including as part of a jurisdictional objection (expedited or otherwise) after a claim has been submitted to arbitration, to deny a claimant enterprise benefits under the Agreement.

19. Requiring the respondent to invoke the denial of benefits provision before a claim is filed would place an untenable burden on that Party. It would require the respondent, in effect, to monitor the ever-changing business activities of all enterprises in the territory of the other Party that attempt to make, are making, or have made investments in the territory of the respondent. This would include conducting, on a continuing basis, factual research, for all such enterprises, on their respective corporate structures and the extent of their business activities in the other Party. To be effective, such monitoring would in many cases require foreign investors to provide business confidential and other types of non-public information for review. Requiring the Parties to conduct this kind of continuous oversight in order to be able to invoke the denial of benefits provision under Article 10.12.2 before a claim is submitted to arbitration would undermine the purpose of the provision.

20. Similarly, there is no basis in the plain language of the Agreement to suggest that a respondent is required to invoke Article 10.12.2 between the submission of a claimant's notice of intent and notice of arbitration. Article 10.16.2, for example, requires that a notice of intent include a claimant's "name and address," but Article 10.16.2 does not require a claimant to disclose the extent of the claimant's business activities in the territory of the other Party to the Agreement or the names of any persons or entities that own or control the claimant enterprise.

21. In sum, for the above reasons, Article 10.12.2 does not impose any requirement with respect to when a respondent may invoke the denial of benefits provision.

Article 20.4 (Consultations)

22. Article 20.4.1 provides:

Either Party may request in writing consultations with the other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.

23. Where a Party seeks to deny the benefits of Chapter Ten of the Agreement to an investor of the other Party, either Party *may*—but is not required to—request consultations. A request for consultations pursuant to Article 20.4.1 is wholly discretionary, and there is no basis in the Agreement to draw any inference from a Party's decision not to request consultations. Moreover, the right to request consultations belongs to the Parties to the Agreement.

* * * *

b. Italba v. Uruguay

Italba Corporation ("Italba") alleges Uruguay violated provisions of the U.S.-Uruguay Bilateral Investment Treaty ("BIT") in its telecommunications regulation of Italba's local subsidiary. On September 11, 2017, the United States filed a submission pursuant to Article 28.2 of the U.S.-Uruguay BIT, which is excerpted below and available in full at <https://www.state.gov/s/l/c77386.htm>.

* * * *

Article 1 (Definition of “Investment”)*Licenses and Authorizations as “Investments”*

2. Article 1 of the Treaty defines “investment” to mean “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” It adds that the “[f]orms that an investment may take include: ... (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law” Footnote 3 is appended to subparagraph (g), and states:

Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

3. The footnote refers to licenses, authorizations, permits, and similar instruments that “do not create any rights protected under domestic law” as being “among” those that “do not have the characteristics of an investment.” A license revocable at will by the State—which generally does not confer any protected rights—would exemplify the kind of license that is unlikely to constitute an investment. The determination as to whether a particular instrument has the characteristics of an investment is a case-by-case inquiry, involving examination of the nature and extent of any rights conferred under the State’s domestic law.

Meaning of “Control”

4. The Article 1 “investment” definition refers to “every asset that an investor owns *or controls*, directly or indirectly, that has the characteristics of an investment.” The term “control” is not defined in the Treaty. The omission of a definition for “control” accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.

Article 17 (Denial of Benefits)

5. The Treaty provides that a Party shall provide protections for “investors” of another Party, which are defined in Article 1 to include a broad class of “enterprise[s],” namely those that are “constituted or organized under the law of a Party.” At the same time, however, Article 17(2) provides:

A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control⁶ the enterprise.

6. This treaty right is consistent with a long-standing U.S. policy to include a denial of benefits provision in investment agreements to safeguard against the potential problem of “free rider” investors, *i.e.*, third-party entities that may only as a matter of formality be entitled to the benefits of a particular agreement. While it has long been U.S. practice to omit a precise

definition of the term “substantial business activities,” in order that the existence of such activities may be evaluated on a case-by-case basis, the United States has indicated in, for example, its Statement of Administrative Action on the NAFTA that “shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established.”

Article 26 (Limitations Period)

7. Article 26(1) of the Treaty provides:

No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage.

8. Pursuant to Article 24(4), a claim is “deemed submitted to arbitration under this Section when the claimant’s notice of or request for arbitration” is (for cases under the auspices of the ICSID Convention) “received by the Secretary-General [of ICSID].” Hence, the critical date for purposes of the limitations period is, in an ICSID case, the date falling three years prior to the Secretary-General’s receipt of the claimant’s request for arbitration.

9. Article 26(1) thus prohibits an investor from making, and the Tribunal from hearing, claims where the claimant “first acquired, or should have first acquired, knowledge of the breach” as well as “knowledge that the claimant ... or the enterprise ... has incurred loss or damage” more than three years prior to the date of submission to arbitration. The Article imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute. And because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction, a claimant must prove the necessary and relevant facts to establish that each of its claims fall within the three-year limitations period.

10. The limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.” An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Article 26, knowledge is acquired as of a particular “date.” Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized, a continuing course of conduct by the host State does not renew the limitations period (there under Articles 1116(2) and 1117(2) of the NAFTA, functionally identical to the time-bar limitation set out in Article 26(1) of this Treaty), once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. Thus, where a “series of similar and related actions by a respondent state” is at issue, an investor cannot evade the limitations period by basing its claim on “the most recent transgression in that series.” To allow an investor to do so would “render the limitations provisions ineffective[.]” An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties.

11. A legally distinct injury, by contrast, can give rise to a separate limitations period under the Treaty. In the case of a challenge to a measure adopted or maintained by a Party, the exhaustion of local remedies will not give rise to a legally distinct injury, unless the institutions to whom appeal has been made commit some new breach of the applicable standard.

12. With regard to knowledge of the “breach” under Article 26, a “breach” of an international obligation exists “when an act of th[e] State is not in conformity with what is required of it by that obligation.” Thus, with respect to a claim under a given Treaty article, a claimant has actual or constructive knowledge of the alleged “breach” once it has (or should have had) knowledge of all elements required to make a claim under the article in question. In other words, the operative date is the date on which the claimant first acquired actual or constructive notice of facts sufficient to make a claim under the article.

Articles 3 and 4 (National Treatment and Most-Favored-Nation Treatment)

13. Article 3 (“National Treatment”) provides that each Party shall accord to investors or covered investments of the other Party “treatment no less favorable than that it accords, in like circumstances,” to its own investors and their investments “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.” Article 4 (“Most-Favored-Nation Treatment”) provides that each Party shall accord to investors or covered investments of the other Party “treatment no less favorable than that it accords, in like circumstances,” to investors and investments of a non-Party (i.e., a third State) in its territory “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.” These obligations thus prohibit nationality-based discrimination between domestic and foreign investors (or investments of foreign and domestic investors) that are “in like circumstances.”

14. To establish a breach of Article 3, a claimant has the burden of proving that it or its investments: (1) were accorded “treatment”; (2) were in “like circumstances” with domestic investors or investments; and (3) received treatment “less favorable” than that accorded to domestic investors or investments.” As the *UPS v. Canada* tribunal noted (with respect to the functionally identical provisions of the NAFTA), “[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts” In this vein, Paragraph 2 of the Protocol to the present Treaty explicitly confirms the Parties’ shared understanding consistent with general principles of law applicable to international arbitration that “when a claimant submits a claim to arbitration under Section B, it has the burden of proving all elements of its claim.”

15. Establishing a violation of Article 4 is the same as establishing a violation of Article 3, except that the applicable comparator in step two above is an investor or investments of a third State.

16. As indicated above, the appropriate comparison is between the treatment accorded to the Party’s investment or investor and a national or third-State investment or investor *in like circumstances*. As one tribunal has observed, “[i]t goes without saying that the meaning of the term [‘in like circumstances’] will vary according to the facts of a given case. By their very nature, ‘circumstances’ are context dependent and have no unalterable meaning across the spectrum of fact situations.” The United States understands the term “circumstances” to denote conditions or facts that *accompany* treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the “in like circumstances” analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. Simply being in the same sector, or selling the same product, is not alone sufficient to demonstrate like circumstances. When determining whether the claimant was in like circumstances with alleged comparators, the Party’s investor or investment should be compared to a national or third-State investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, whether treatment is accorded in “like circumstances” under Articles 3 or 4 depends

on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 5 (Minimum Standard of Treatment)

17. Article 5(1) of the Treaty requires that each Party “accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.” Article 5(2) specifies that:

For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

Article 5(2) then goes on to state that

The obligation in paragraph 1 to provide:

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
- (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

Rules that have crystallized into the minimum standard

18. The above provisions demonstrate the Parties’ express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law. The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”

19. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 5(2), concerns the obligation to provide “fair and equitable treatment,” which includes “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” A denial of justice arises, for example, when a State’s judiciary administers justice to aliens in a “notoriously unjust” or “egregious” manner “which offends a sense of judicial propriety.” Denial of justice is linked by the terms of Article 5(1) to its meaning under customary international law, and in its historical and “customary sense” denotes “misconduct or inaction of the judicial branch of the government” and involves “some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.” In certain instances, a denial of justice under customary international law may be effected, in the context of “adjudicatory proceedings,” where the State authorities responsible for the enforcement phase of such proceedings refuse to execute a final judgment rendered by the judiciary.

20. Finally, there can be no denial of justice based on a judicial act without a final decision of a State’s highest judicial authority, unless recourse to further domestic remedies would be obviously futile or manifestly ineffective. This rule applies to claims of denial of

justice brought under treaties, such as this one, that permit claimants to pursue domestic remedies prior to arbitration but require claimants to waive their rights to pursue such claims before other fora in order to submit a claim to arbitration.

21. Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 6, and the obligation to provide “full protection and security,” which, as expressly stated in Article 5(2)(b), “requires each Party to provide the level of police protection required under customary international law.”

Methodology for determining the content of customary international law

22. Annex A to the Treaty addresses the methodology for interpreting customary international law rules covered by the agreement. The annex expresses the treaty Parties’ “shared understanding that ‘customary international law’ generally and as specifically referenced in Article 5 ... results from a general and consistent practice of States that they follow from a sense of legal obligation.” This two-element approach—State practice and *opinio juris*—is “widely endorsed in the literature” and “generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice.”

23. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate that a rule of customary international law exists, most recently in its decision on *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*. In that case, the ICJ emphasized that “[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States,” and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.

Obligations that have not crystallized into the minimum standard

24. Neither the concepts of “good faith” nor “legitimate expectations” are component elements of “fair and equitable treatment” under customary international law that give rise to an independent host State obligation. Indeed, while good faith is “one of the basic principles governing the creation and performance of legal obligations,” it is well established that “it is not in itself a source of obligation where none would otherwise exist.” As such, customary international law does not impose a free-standing, substantive obligation of “good faith” that can support a claim or, if breached, result in State liability.

25. Similarly, an investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors’ expectations; instead, something more is required, such as a complete repudiation of a contract.

26. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of “fair and equitable treatment” and “full protection and security” beyond that required by customary international law. The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 5, in which “fair and equitable treatment” and “full protection and security” are expressly tied to the customary international law minimum standard of treatment. Thus, arbitral decisions interpreting “autonomous” fair and equitable treatment and full protection and security provisions in other

treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 5.43 Likewise, decisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law are not themselves instances of “State practice” for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice. A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris*, fails to establish a rule of customary international law as incorporated by Article 5(1).

Conclusions on the application of Article 5

27. Thus, the Treaty Parties expressly intended Article 5 to afford the minimum standard of treatment to covered investments, as that standard has crystallized into customary international law through general and consistent State practice and *opinio juris*. For alleged standards that are not specified in the treaty, a claimant must demonstrate that such a standard has crystallized into an obligation under customary international law.

28. To do so, the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. “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.” 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.

29. Once a rule of customary international law has been established, the claimant must then show that the State has engaged in conduct that violates 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.”

30. Finally, Article 5(3) makes clear a “determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of” the minimum standard of treatment. Each obligation must be determined under its own relevant standard. For example, a violation of Article 6 does not *per se* constitute a separate violation of Article 5.

Article 6 (Expropriation)

31. Article 6 of the Treaty provides that no Party may expropriate or nationalize property (directly or indirectly) except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate and effective compensation; and in accordance with due process of law. Compensation must be “prompt,” in that it must be “paid without delay”; “adequate,” in that it must be made at the fair market value as of the date of expropriation, undiminished by any

change in value that occurred because the expropriatory action became known earlier; and “effective,” in that it must be fully realizable and freely transferable.

32. If an expropriation does not conform to each of the specific conditions set forth in Article 6(1), paragraphs (a) through (d), it constitutes a breach of Article 6. Where, at the time of the expropriation, a host State does not compensate or make provision for the prompt determination of compensation, the breach occurs at the time of the taking. In contrast, “when a State provides a process for fixing adequate compensation, but then ultimately fails to promptly determine and pay such compensation,” a breach of the compensation obligation may occur later, subsequent to the time of the taking.

33. As explained in paragraph 4(a) of Annex B to the Treaty, determining whether an indirect expropriation has occurred “requires a case-by-case, fact-based inquiry” that considers, among other factors: (i) the economic impact of the government action; (ii) the extent to which that action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action. With respect to the first factor, an adverse economic impact “standing alone, does not establish that an indirect expropriation has occurred.” It is a fundamental principle of international law that, for an expropriation claim to succeed the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as “to support a conclusion that the property has been ‘taken’ from the owner.” Moreover, to constitute an expropriation, a deprivation must be more than merely “ephemeral.”

34. The second factor requires an objective inquiry of the reasonableness of the claimant’s expectations, which may depend on the regulatory climate existing at the time the property was acquired in the particular sector in which the investment was made. For example, where a sector is “already highly regulated, reasonable extensions of those regulations are foreseeable.”

35. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (*i.e.*, whether “it arises from some public program adjusting the benefits and burdens of economic life to promote the common good”).

Article 34 (Awards)

36. Article 34(1) provides that an arbitral tribunal constituted under Section B of the Treaty “may award, separately or in combination, only” (a) monetary damages, with any applicable interest, and (b) “restitution of property,” but that if the latter is ordered then the award must provide the respondent Party the option of paying monetary damages in place of restitution. The tribunal is therefore disallowed from ordering the respondent Party to restore the property in question without providing damages as an alternative, ensuring that the Party always has the option of remedying a breach by payment of damages alone.

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C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

The following discussion of developments in select WTO dispute settlement proceedings involving the United States in 2017 is drawn largely from Chapter V “The World Trade Organization” of the 2017 Annual Report of the President of the United States on the

Trade Agreements Program (“2017 Annual Report”), available at <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017>. WTO legal texts referred to below are available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

a. Disputes brought by the United States

(1) China — Subsidies to Producers of Primary Aluminum

As discussed in the 2017 Annual Report at 144, on January 12, 2017, the United States requested consultations with China concerning bank loans and low-priced inputs (coal, electricity, and alumina) that China provides to producers of primary aluminum in China. The United States is concerned that these subsidies prejudice the United States and are inconsistent with China’s obligations under Articles 5(c), 6.3(a), 6.3(b), 6.3(c) and 6.3(d) of the *Subsidies and Countervailing Measures* (SCM Agreement) and Article XVI:1 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994).

(2) Indonesia – Import Restrictions on Horticultural Products, Animals, and Animal Products (DS455, DS465 and DS478)

See *Digest 2016* at 495 regarding the panel decision that Indonesia’s measures to restrict imports of horticultural and animal products are inconsistent with the GATT and not justified under any general exceptions. As discussed in the 2017 Annual Report at 152-53, Indonesia appealed the panel’s report on February 17, 2017. An appellate report was issued on November 9, 2017. The appellate report affirmed the finding of the panel that all of Indonesia’s measures are inconsistent with Article XI:1 of the GATT 1994 and, as Indonesia did not establish an affirmative defense with respect to any measure, with Indonesia’s WTO obligations. The DSB adopted the appellate report and the panel report, as modified by the appellate report, on November 22, 2017. On December 18, 2017, Indonesia circulated a letter pursuant to Article 21.3(c) of the DSU stating that it would need a reasonable period of time to implement the DSB’s recommendations and rulings in this dispute.

(3) Canada — Measures Governing the Sale of Wine in Grocery Stores (Second Complaint) (DS531)

As discussed in the 2017 Annual Report at 154-55, the United States requested and held two separate consultations with Canada in 2017 regarding measures maintained by the Canadian province of British Columbia (“BC”) governing the sale of wine in grocery stores. As explained in the Annual Report:

The BC wine measures ... provide advantages to BC wine through the granting of exclusive access to a retail channel of selling wine on grocery store shelves...while imported wine may be sold in grocery stores only through a so-called “store within a store.” These measures are inconsistent with Canada’s obligations pursuant to Article III:4 of the GATT 1994, because they are laws, regulations, or requirements affecting the internal sale, offering for sale, purchase, or distribution of wine and fail to accord products imported into Canada treatment no less favorable than that accorded to like products of Canadian origin.

b. Disputes brought against the United States

(1) Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (Mexico) (DS381)

As discussed in *Digest 2011* at 375-76, *Digest 2012* at 378-79, *Digest 2013* at 320, *Digest 2015* at 478-79, and *Digest 2016* at 496, Mexico challenged U.S. dolphin-safe labeling requirements for tuna and tuna products. The 2017 Annual Report summarizes developments in 2017 at page 165:

The Panels met with the parties on January 24-25, 2017. The Panels issued their reports on October 26, 2017. The Panels agreed with the United States that, while the dolphin safe labeling measure, as amended ..., results in a detrimental impact on Mexican tuna product, it does not unjustifiably discriminate against Mexican tuna product because its labeling requirements are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the oceans. Consequently, the Panels found that the measure is consistent with Article 2.1 of the TBT Agreement and, although inconsistent with Articles I:1 and III:4 of the GATT 1994, is justified under Article XX because it is preliminarily justified under subparagraph (g) and applied consistently with the chapeau. Thus, the Panels found that the U.S. measure was consistent with the relevant U.S. WTO obligations.

Mexico appealed aspects of the compliance Panels’ reports on December 1, 2017. The United States filed an appellee submission on December 19, 2017. The Appellate Body is expected to issue a report in 2018.

(2) Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China (DS471)

See *Digest 2016* at 497-98 regarding the 2016 panel report in this case, which was appealed by China. Developments in 2017 are summarized in the 2017 Annual Report at 176:

...The Appellate Body held a hearing in Geneva on February 27-28, 2017, and issued a report on May 11, 2017. The Appellate Body rejected virtually all of China's claims on appeal and did not make any additional findings of inconsistency against the United States.

On May 22, 2017, the DSB adopted the panel and Appellate Body reports. On June 19, 2017, the United States stated that it intends to implement the recommendations of the DSB in this dispute in a manner that respects U.S. WTO obligations, and that it will need a reasonable period of time ("RPT") in which to do so. On October 17, 2017, China requested that an Article 21.3(c) arbitrator determine the RPT for implementation. The award of the arbitrator is expected in early 2018.

(3) *Conditional Tax Incentives for Large Civil Aircraft (DS487)*

See *Digest 2016* at 498 regarding the 2016 panel report on the EU's claim regarding tax incentives offered by the State of Washington to aircraft companies, which was appealed by both the United States and the EU. As discussed in the 2017 Annual Report at 177, the Appellate Body held a hearing on June 6, 2017 and circulated its report on September 4, 2017. The Appellate Body found that the challenged programs were not prohibited import-substitution subsidies and the United States had no compliance obligations.

(4) *Anti-Dumping Measures on Oil Country Tubular Goods from Korea (DS488)*

As discussed in the 2017 Annual Report at 177-78, Korea requested the establishment of a panel to consider antidumping duties imposed on oil country tubular goods from Korea. The panel established by the DSB in 2015 met with the parties in 2016 and circulated its report on November 14, 2017. As summarized in the Annual Report:

The panel found that the United States had acted inconsistently with the chapeau of Article 2.2.2 of the Antidumping Agreement because Commerce did not determine profit for constructed value based on actual data pertaining to sales of the like product in the home market. The panel also found that the United States had acted inconsistently with Articles 2.2.2(i) and (iii) because Commerce relied on a narrow definition of the "same general category of products" in concluding it could not determine profit under Article 2.2.2(i) and in concluding it could not calculate a profit cap under Article 2.2.2(iii). The panel further found that the United States had acted inconsistently with Article 2.2.2(iii) because Commerce failed to calculate and apply a profit cap. The panel exercised judicial economy with respect to Korea's claims that the United States acted inconsistently with the chapeau of Article 2.2.2 because Commerce did not determine profit for constructed value based on actual data pertaining to sales of the like product in third-country markets and with respect to Articles 1 and 9.3

as a consequence of substantive violations of Articles 2.2.2, 2.2.2(i), and 2.2.2(iii). Finally, the panel found two of Korea's claims with respect to profit for constructed value to be outside its terms of reference, specifically its claim that the United States had violated Article 2.2.2(iii) because Commerce had determined the profit rate based on a certain company's financial statements and its claim that the United States had violated Article X.3(a) of the GATT 1994, because Commerce had purportedly acted contrary to its agency practice of determining profit.

The panel otherwise rejected the remaining claims asserted by Korea with respect to the investigation at issue, including claims regarding the use of constructed export price and the selection of costs for calculation of constructed normal value; found such claims to be outside its terms of reference; or exercised judicial discretion. For example, the panel specifically found that Korea failed to demonstrate that the United States acted inconsistently with Articles 6.10 and 6.10.2 of the Antidumping Agreement in its selection of mandatory respondents. The panel also specifically rejected Korea's claims that Commerce's methodology for disregarding a respondent's exports to third-country markets was inconsistent "as such" and "as applied" in the investigation with Article 2.2 of the Antidumping Agreement. Finally, the panel exercised judicial economy with respect to Korea's claim that the United States had acted inconsistently with Article 2.4.

(5) *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia (DS491)*

As discussed in the 2017 Annual Report at 178-79, Indonesia requested consultations in connection with antidumping and countervailing duty measures on certain coated paper suitable for high-quality print graphics using sheet-fed presses in March of 2015 and a panel was established later that year to consider Indonesia's challenge. The panel met with the parties on December 6-7, 2016, and again on March 28-29, 2017. The panel rejected all of Indonesia's claims. The panel circulated its report on December 6, 2017. Indonesia did not appeal, and the DSB adopted the panel report.

2. Outcomes of the WTO 2017 Ministerial Conference

At the WTO's Eleventh Ministerial Conference in Buenos Aires in December 2017, Members agreed to a decision on fisheries subsidies; a work program on electronic commerce; and the creation of a working party on accession for South Sudan. See 2017 Annual Report at 85.

D. TRADE AGREEMENTS**1. Trans-Pacific Partnership**

As discussed in *Digest 2015* at 481-83, negotiations of the Trans-Pacific Partnership (“TPP”) agreement concluded in 2015. By Presidential Memorandum of January 23, 2017 to the United States Trade Representative (“USTR”), the United States announced its withdrawal from the TPP. 82 Fed. Reg. 8497 (Jan. 25, 2017). The Memorandum directs USTR to pursue bilateral trade negotiations wherever possible, “to promote American industry, protect American workers, and raise American wages.”

2. NAFTA

In May 2017, U.S. Trade Representative Robert Lighthizer notified Congress that the President intends to renegotiate the North American Free Trade Agreement (“NAFTA”). USTR press release, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces>. The letters to Congress from Ambassador Lighthizer are available at <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTA%20Notification.pdf>.

On July 17, 2017, USTR released a public statement of the objectives of the renegotiation of NAFTA, available at <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAOBJECTIVES.pdf>. In the ensuing months, administration officials held numerous consultations with Congress the private sector, labor representatives, ranchers, farmers, and leaders of the NGO community. In November 2017, USTR released updated negotiation objectives. The updated summary of objectives for the renegotiation of NAFTA is available at <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf>.

E. OTHER ISSUES**1. FATCA**

As discussed in *Digest 2015* at 487-88 and *Digest 2016* at 503-04, the district court dismissed claims challenging the Foreign Account Tax Compliance Act (“FATCA”) and the international agreements implementing FATCA (“IGAs”) in 2016. *Crawford et al. v. U.S. Dep’t. of the Treasury et al.*, No. 3:15-cv-250 (S.D. Ohio). On August 18, 2017, the U.S. Court of Appeals for the Sixth Circuit affirmed the lower court’s decision that the plaintiffs lacked standing. *Crawford*, 868 F.3d 438 (6th Cir. 2017). Rehearing en banc was denied on September 26, 2017. Plaintiffs filed a petition for certiorari in the U.S. Supreme Court on December 21, 2017.*

* Editor’s note: On April 2, 2018, the U.S. Supreme Court denied the petition for certiorari in the case. No. 17-911.

2. Loan Guarantees

On January 5, 2017, Iraq signed a \$1 billion loan guarantee agreement with the United States. See January 5, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/01/266544.htm>. Provisions in the agreement encourage economic and institutional reforms. On January 18, 2017, the Government of Iraq issued a \$1 billion sovereign bond guaranteed by the United States. See media note available at <https://www.state.gov/r/pa/prs/ps/2017/01/267111.htm>.

3. Transatlantic Commercial Data Transfers

The EU-U.S. and Swiss-U.S. Privacy Shield Frameworks were designed by the U.S. Department of Commerce, and the European Commission and Swiss Administration, respectively, to provide companies on both sides of the Atlantic with a mechanism to comply with data protection requirements when transferring personal data from the European Union and Switzerland to the United States in support of transatlantic commerce. On July 12, 2016, the European Commission deemed the EU-U.S. Privacy Shield Framework adequate to enable data transfers under EU law. On January 12, 2017, the Swiss Government announced the approval of the Swiss-U.S. Privacy Shield Framework as a valid legal mechanism to comply with Swiss requirements when transferring personal data from Switzerland to the United States.

The Under Secretary of State for Economic Growth, Energy, and the Environment serves as the Privacy Shield Ombudsperson, a position dedicated to facilitating the processing of requests from EU and Swiss individuals relating to national security access to data transmitted from the European Union or Switzerland to the United States. Applicable data transfers include those conducted pursuant to the Privacy Shield Frameworks, standard contractual clauses ("SCCs"), binding corporate rules ("BCRs"), and "Derogations" or "Possible Future Derogations." This role builds on the Under Secretary's position under Presidential Policy Directive 28 as the Senior Coordinator for International Information Technology Diplomacy, which includes serving as a point of contact for foreign governments to raise concerns regarding signals intelligence activities conducted by the United States.

The Under Secretary reports directly to the Secretary of State and is independent from the Intelligence Community. To carry out the Ombudsperson duties, the Under Secretary works closely with other United States government officials, including independent oversight bodies such as inspectors general and the Privacy and Civil Liberties Oversight Board, as appropriate, to ensure that completed requests are processed and resolved in accordance with applicable laws and policies.

4. 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. USTR provides information about the Special

301 Report on its website at <https://ustr.gov/issue-areas/intellectual-property/Special-301>.

USTR issued the 2017 Special 301 Report in April 2017. The Report is available at <https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF>. The 2017 Report lists the following countries on the Priority Watch List: Algeria; Argentina; Chile; China; India; Indonesia; Kuwait; Russia; Thailand; Ukraine; and Venezuela. It lists the following on the Watch List: Barbados; Bolivia; Brazil; Bulgaria; Canada; Colombia; Costa Rica; Dominican Republic; Ecuador; Egypt; Greece; Guatemala; Jamaica; Lebanon; Mexico; Pakistan; Peru; Romania; Switzerland; Turkey; Turkmenistan; Uzbekistan; and Vietnam. See *Digest 2007* at 605–7 for additional background on the watch lists.

5. Presidential Permits

a. Keystone XL pipeline

As discussed in *Digest 2015* at 502, the Secretary of State denied the application for a permit for the proposed Keystone XL pipeline in November 2015.

On January 24, 2017, a Presidential Memorandum invited resubmission of the application to the State Department for a permit for the construction of the Keystone XL Pipeline and directed the Secretary of State to make a national interest determination and reach a final permitting decision with respect to the application within 60 days of its submission. On January 26, 2017, TransCanada resubmitted its permit application. On March 23, 2017, Under Secretary of State for Political Affairs Thomas A. Shannon, Jr., acting under delegated Presidential authority, issued a permit to TransCanada for the Keystone XL pipeline. As explained in the State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/03/269074.htm>:

The Department of State reviewed TransCanada’s application in accordance with Executive Order 13337 (April 30, 2004) and the January 24, 2017 Presidential Memorandum Regarding Construction of the Keystone XL Pipeline. In making his determination that issuance of this permit would serve the national interest, the Under Secretary considered a range of factors, including but not limited to foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy.

The Federal Register Notice of the issuance of the permit includes the permit’s full text. 82 Fed. Reg. 15,467 (Apr. 4, 2017). Additional information concerning the Keystone XL pipeline facilities and documents related to the Department of State’s review of the application for a Presidential permit can be found at <https://keystonepipeline-xl.state.gov/>.

Several environmental and indigenous groups have filed a legal challenge to the Presidential permit in federal court for the District of Montana under the Administrative Procedure Act, the National Environmental Policy Act, and related statutes. Litigation

relating to the prior denial of the application for a permit was dismissed in 2017. See *Digest 2016* at 509-11 regarding litigation in federal court and an arbitration claim under the NAFTA.

b. *NuStar Logistics pipelines*

On June 29, 2017, the State Department announced that Acting Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs Judith G. Garber, acting under delegated Presidential authority, had issued Presidential permits for three NuStar Logistics, L.P. pipelines. As detailed in a June 29, 2017 media note, available at <https://www.state.gov/r/pa/prs/ps/2017/06/272288.htm>:

The permit for the New Burgos Pipeline authorizes construction, connection, operation, and maintenance of a new pipeline that has the capacity to deliver up to 108,000 barrels per day of certain refined petroleum products. It will cross the U.S.-Mexico border near Peñitas, Texas. New permits for the existing Dos Laredos and existing Burgos pipelines, which cross the border in Texas near Laredo and Peñitas, respectively, reflect a change in the name of the permit holder and authorize transport of a broader range of petroleum products than under the previous Presidential permits.

The Department of State reviewed NuStar Logistics, L.P.'s applications in accordance with Executive Order 13337 (April 30, 2004). As a matter of policy, the Department's reviews were conducted in a manner consistent with the National Environmental Policy Act and the Department determined with respect to each application that implementation of the proposed project would have no significant direct, indirect, or cumulative effects on the quality of the natural or human environment.

In making her determination with respect to each application that issuance of the respective permit would serve the national interest, the Acting Assistant Secretary considered a range of factors, including but not limited to foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy. Among other considerations, the Acting Assistant Secretary found that issuance of each of the three Presidential permits would strengthen the bilateral relationship with Mexico and advance the economic and foreign policy interests of the United States.

The text of the permits is available in the Federal Register. 82 Fed. Reg. 32,039 & 32,041 (July 11, 2017).

c. *Enbridge Energy pipeline*

On August 11, 2017, the State Department published the Final Supplemental Environmental Impact Statement (“Final Supplemental EIS”) for the proposed expansion of Enbridge Energy’s line 67 pipeline. The State Department media note of August 11, 2017, available at <https://www.state.gov/r/pa/prs/ps/2017/08/273378.htm>, explains that the Final Supplemental EIS is part of the Department review of the Presidential permit application submitted by Enbridge, providing a technical assessment of potential environmental impacts without reaching a decision to approve or deny the permit. The media note further explains:

The Secretary of State (or his delegate), based on Presidentially-delegated authorities under Executive Order 13337, will now conduct a careful review to determine whether issuance of a new permit to Enbridge would be in the national interest. To make this determination, the Secretary of State (or his delegate) considers many factors, including but not limited to, foreign policy; energy security; environmental, cultural and economic impacts; and compliance with applicable law and policy. The Department will also consult with the heads of certain other agencies pursuant to Executive Order 13337.

On October 13, 2017, the Acting Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, acting under delegated Presidential authority, issued a Presidential permit to Enbridge, authorizing Enbridge to operate and maintain pipeline facilities at the U.S.–Canada border in Pembina County, North Dakota for the transportation of crude oil and other hydrocarbons. 82 Fed. Reg. 53,553 (Nov. 16, 2017). In accordance with E.O. 13337, the Acting Assistant Secretary determined that issuance of this permit would serve the national interest. The decision took into account the environmental effects of the proposed action consistent with the National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. 4321 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1536), and other statutes relating to environmental concerns; the National Historic Preservation Act of 1966 (80 Stat. 917, 16 U.S.C. 470f *et seq.*); and the views of members of the public, various federal and state agencies, and various Indian tribes. *Id.*

d. *New Procedures for Transfer of Ownership or Control, or Name Change of Permit Holder*

On September 7, 2017, the State Department published Public Notice 10111, Procedures With Respect to Presidential Permits Where There Has Been a Transfer of Ownership or Control of a Cross-Border Facility, Bridge, or Border Crossing for Land Transportation, as Well as for Name Change of a Permit Holder. 82 Fed. Reg. 42,410 (Sept. 7, 2017). As the notice explains:

The Department is issuing this notice to describe the procedures it intends to follow with respect to transfers of ownership or control over cross-border facilities subject to Executive Order 11423, as amended, and Executive Order 13337, as well as changes of name of an entity holding a Presidential permit. This notice supersedes a previous notice, Public Notice 5092 (Procedures for Issuance of a Presidential Permit Where There Has Been a Transfer of the Underlying Facility, Bridge or Border Crossing for Land Transportation, 70 FR 30990, May 31, 2005), in its entirety.

...

In order to expedite the processing of transfers of infrastructure projects authorized under existing Presidential permits, including those that are a high priority for the Nation, as well as to provide Presidential permit holders and potential transferees with increased transparency regarding the procedures that the Department intends to follow with respect to such requests, the Department is issuing this public notice This notice also clarifies that a request by an existing permit holder limited to changing the name of the entity holding the permit can be processed by the Department in a more expedited manner. The Department reserves the right to deviate from these procedures in particular cases.

6. Corporate Responsibility Regimes

a. Kimberley Process

The Kimberley Process (“KP”) is an international, multi-stakeholder initiative created to increase transparency and oversight in the diamond industry in order to eliminate trade in conflict diamonds, or rough diamonds sold by rebel groups or their allies to fund conflict against legitimate governments. See State Department Conflict Diamonds webpage, <https://www.state.gov/e/eb/tfs/tfc/diamonds/index.htm>. For background on U.S. participation in the KP, see *Digest 2016* at 511-12; *Digest 2014* at 506-07; *Digest 2013* at 183; *Digest 2004* at 653-54; *Digest 2003* at 704-709; and *Digest 2002* at 728-29.

Effective April 26, 2017, the Department of State updated the list of Participants eligible for trade in rough diamonds under the Clean Diamond Trade Act of 2003, Public Law 108–19 (the “Act”). 82 Fed. Reg. 19,309 (Apr. 26, 2017). The update to the list reflects the reinstatement as Participants of the Central African Republic and Venezuela.

b. Extractive Industry Transparency Initiative (“EITI”)

The United States announced in 2017 that it would no longer be domestically implementing the EITI. See *Digest 2014* at 505-06 regarding acceptance of the United States as an EITI Candidate Country; *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.

7. Fiscal Transparency Report

The Department of State issued its 2017 Fiscal Transparency Report pursuant to section 7031(b)(3) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Div. K, P.L.114-113) (“the Act”). The report, available at <https://www.state.gov/e/eb/ifa/oma/fiscaltransparency/273700.htm>, reviews governments that receive U.S. government assistance for their compliance with defined minimum requirements of fiscal transparency and their progress toward meeting the requirements during the period of January 1 – December 31, 2016. Of the 68 governments identified as not meeting the minimum requirements of fiscal transparency, 11 were found to have made significant progress in 2017 toward meeting those requirements. The report provides government-by-government assessments of all governments that were reviewed (140 pursuant to the Act, plus Equatorial Guinea).

8. Committee on Foreign Investments in the United States

On September 13, 2017, President Trump signed an order “Regarding the Proposed Acquisition of Lattice Semiconductor Corporation by China Venture Capital Fund Corporation Limited.” 82 Fed. Reg. 42,665 (Sep. 18, 2017). A September 13, 2018 White House press statement, available at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-president-donald-j-trumps-decision-regarding-lattice-semiconductor-corporation/>, summarizes the basis for the order prohibiting the proposed acquisition:

President Donald J. Trump issued an order prohibiting the acquisition of Lattice Semiconductor Corporation (Lattice) by, among others, China Venture Capital Fund Corporation Limited (CVCF). CVCF is a Chinese corporation owned by Chinese state-owned entities that manages industrial investments and venture capital.

The President made the decision to issue this order under section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007. [50 U.S.C. § 4565] Under the Defense Production Act, the President is authorized to suspend or prohibit certain acquisitions that result in foreign control of a United States business if he concludes, among other things, that there is credible evidence that the foreign interest exercising control might take action that threatens to impair the national security of the United States. The President reached this decision upon consideration of the appropriate factors set forth in section 721 of the Defense Production Act and a review of a recommendation from the Committee on Foreign Investment in the United States. The national-security risk posed by the transaction relates to, among other things, the potential transfer of intellectual property to the foreign acquirer, the Chinese government’s role in supporting this transaction, the

importance of semiconductor supply chain integrity to the United States Government, and the use of Lattice products by the United States Government.

A statement issued the same date by Secretary of the Treasury Stephen T. Mnuchin, as chair of the Committee on Foreign Investment in the United States (“CFIUS”), is available at <https://www.treasury.gov/press-center/press-releases/Pages/sm0157.aspx>, and excerpted below.

* * * *

CVCF is a Chinese corporation owned by Chinese state-owned entities that manages industrial investments and venture capital. Lattice is a publicly traded company headquartered in Oregon that manufactures semiconductors for the consumer, communications, and industrial markets. Lattice’s primary semiconductor product lines are programmable logic devices, which are general purpose semiconductors that customers can program to provide functionality similar to chips that are designed and produced for specific applications.

The President took this action pursuant to section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (Section 721). Section 721 authorizes the President to suspend or prohibit certain acquisitions of U.S. businesses by foreign persons where he finds that there is credible evidence that the foreign interest exercising control might take action that threatens to impair national security, and where provisions of law other than Section 721 and the International Emergency Economic Powers Act do not provide adequate and appropriate authority to protect national security in the matter under review.

The President’s decision took into consideration the factors described in Section 721’s subsection (f), as appropriate, and the recommendation by CFIUS that he issue an order prohibiting this transaction. CFIUS and the President assess that the transaction poses a risk to the national security of the United States that cannot be resolved through mitigation. The national security risk posed by the transaction relates to, among other things, the potential transfer of intellectual property to the foreign acquirer, the Chinese government’s role in supporting this transaction, the importance of semiconductor supply chain integrity to the U.S. government, and the use of Lattice products by the U.S. government.

CFIUS is an interagency committee whose purpose is to review transactions that could result in the control of a U.S. business by a foreign person, in order to determine the effect of such transactions on the national security of the United States. CFIUS’s detailed analysis of the proposed transaction took into account all relevant national security factors, as enumerated in Section 721. CFIUS also received a thorough analysis of the threat posed by this transaction from the Office of the Director of National Intelligence, as required by Section 721.

Consistent with the longstanding, bi-partisan U.S. commitment to open investment, the CFIUS process focuses exclusively on identifying and addressing national security concerns. This focused mandate reinforces our commitment to welcoming foreign investment, while at the same time reinforcing our commitment to protecting national security.

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Cross References

Detroit International Bridge, **Ch. 5.A.3.**

Business and Human Rights, **Ch. 6.G.**

Aviation v. United States (*takings claim*), **Ch. 8.D.2.a.**

Alimanestianu (*takings claim*), **Ch. 8.D.2.b.**

Application of the FSIA in Enforcement of ICSID Arbitration Awards, **Ch. 10.A.1.**

Expropriation Exception to Immunity, **Ch. 10.A.3.**

DA Terra Siderurgica LTDA v. American Metals Int'l. (*enforcement of arbitral award*), **Ch. 15.C.2.**

CHAPTER 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. UN Convention on the Law of the Sea

Meeting of States Parties to the Law of the Sea Convention

The United States participated as an observer to the 27th meeting of States Parties to the Law of the Sea Convention (“SPLOS”) at the United Nations. Mark Simonoff, Minister Counselor for the U.S. Mission to the UN, delivered the U.S. statement at the 27th meeting of SPLOS on June 15, 2017. His statement follows.

* * * *

The United States would like to thank the Secretary-General for his report on oceans and the law of the sea. We would also like to thank the Secretary-General of the International Seabed Authority, the President of the International Tribunal for the Law of the Sea, and the Chair of the Commission on the Limits of the Continental Shelf for the reports and information provided by them to this meeting. And we would like to express our appreciation to DOALOS [Division for Ocean Affairs and the Law of the Sea] for supporting the important work of the Commission on the Limits of the Continental Shelf, including its consistent efforts to help address the challenges facing the Commission and to assist coastal States in making their submissions to the Commission. I would also like to warmly congratulate the judges of the Tribunal and the members of the Commission on their election.

As we have stated in previous Meetings of States Parties, the role of the Meeting is not as if it were a Conference of Parties with broader authority. Article 319 is not intended to, and does not, empower the Meeting of States Parties to perform general or broad reviews of general topics of interest, or to engage in interpretation of the provisions of the Law of the Sea

Convention. Proposals to that effect did not garner sufficient support during the Third Conference, and there is no supporting text to that effect in the Convention. Rather, the role of the Meetings of States Parties is prescribed in the Convention: to conduct elections for the Tribunal and the Commission, and to determine the Tribunal's budget. In addition, the Meeting receives the report of the Secretary-General on oceans and the law of the sea, reports from the Commission and the Tribunal, and information from the International Seabed Authority. Members have the opportunity to comment on these reports and the reports are then simply noted.

Finally, Madam President, the United States does not believe that the "State of Palestine" qualifies as a sovereign State and does not recognize it as such. The United States believes that the "State of Palestine" is not qualified to accede to the Law of the Sea Convention, or to serve as a Party to the Convention on any bodies of this SPLOS meeting.

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2. South China Sea and East China Sea

On August 17, 2017, the State Department released as a media note the text of a joint statement by the governments of the United States and Japan coming out of their Security Consultative Committee meeting. The portions of the statement relating to the South China Sea and the East China Sea follow. The joint statement in its entirety is available at <https://www.state.gov/r/pa/prs/ps/2017/08/273504.htm>. Remarks to the press from Secretary Tillerson, Secretary of Defense James Mattis and their Japanese counterparts are available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/08/273513.htm>.

* * * *

The Ministers expressed continuing concerns about the security environment in the East China Sea. They also recalled the situation in early August 2016. The Ministers reaffirmed the importance of working together to safeguard the peace and stability of the East China Sea and reconfirmed that Article 5 of the U.S.-Japan Security Treaty applies to the Senkaku Islands and that the United States and Japan oppose any unilateral action that seeks to undermine Japan's administration of these islands.

The Ministers expressed serious concern about the situation in the South China Sea and reaffirmed their opposition to unilateral coercive actions by claimants, including the reclamation and militarization of disputed features, that alter the status quo and increase tensions. They reiterated the importance of the peaceful settlement of maritime disputes through full respect for legal and diplomatic processes, including arbitration. They also emphasized the importance of compliance with the international law of the sea, as reflected in the United Nations Convention on the Law of the Sea, including respect for freedom of navigation and overflight and other lawful uses of the sea. In this regard, the Ministers recalled the award rendered by the Arbitral

Tribunal on July 12, 2016. The Ministers acknowledged the adoption of the framework of the Code of Conduct in the South China Sea (COC) and look forward to the conclusion of a meaningful, effective and legally binding COC. The Ministers underlined the significance of continued engagement in the South China Sea, including through respective activities to support freedom of navigation, bilateral and multilateral training and exercises, and coordinated capacity building assistance.

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3. Freedoms of Navigation, Overflight, and Maritime Claims

a. China

On March 13, 2017, the State Department provided U.S. comments on China’s draft proposal to amend its 1984 Maritime Traffic Safety Law. The U.S. comments identify aspects of the proposed new law that are contrary to international law, including provisions that may assert excessive maritime jurisdiction or contravene or deny the rights and freedoms enjoyed by all states under customary international law as reflected in the Law of the Sea Convention. The comments, which follow, were delivered to appropriate government officials in China.

* * * *

The United States has taken note of the draft “Law of the People’s Republic of China on Maritime Traffic Safety Law (Revised Draft),” (Draft Law). The United States welcomes actions by China to adopt domestic legislation that brings its maritime claims and practices into conformance with the customary international law of the sea as reflected in the Law of the Sea Convention (the Convention), and with obligations assumed under instruments adopted under the auspices of the International Maritime Organization. The Draft Law raises a number of concerns for the United States and other States with interests in upholding international law. The listing below is non-exhaustive and is without prejudice to other U.S. positions concerning the Draft Law. The United States welcomes the opportunity to share these concerns, and other concerns when appropriate, with the State Council and other elements of the government of the People’s Republic of China.

Before discussing the articles of the Draft Law in detail, the United States offers three overarching concerns:

- First, the Draft Law should ensure that the “military vessels of foreign nationality” exemption in Article 131 includes not just foreign military vessels, but also all foreign sovereign immune vessels (including naval auxiliaries and other vessels owned or operated by a State and used for the time being only on government non-commercial service) in order to be consistent with international law, as reflected in the Convention.
- Second, the geographic scope of the Draft Law and its various provisions needs to be adjusted and clarified. Most important, Article 2 of the Draft Law refers to “other” sea areas under the jurisdiction of the People’s Republic of China beyond those areas set forth in

international law as reflected in the Convention. Under international law as reflected in the Convention, there are no other sea areas over which a coastal State can claim jurisdiction besides those listed. (Provisions referring to “sea areas under the jurisdiction of the People’s Republic of China,” e.g. Articles 92, 93, 100, and 101, would also be of concern to the extent they are intended to apply within such “other” sea areas unlawfully claimed). Many other provisions are ambiguous or silent as to where they apply, even though they concern activities over which a coastal State would not have jurisdiction in all offshore areas.

- Third, the provisions of the Draft Law should clarify the scope of vessels to which various Articles apply. In many cases, for example, where China would not have jurisdiction as a coastal State, it should be clarified that the proposed provisions apply only to Chinese-flagged vessels as an exercise of China’s jurisdiction as a flag State (for example, Article 8 and other provisions in Chapters II and III of the Draft Law).

Additional comments on specific Articles in the Draft Law include:

As noted above, Article 2 of the Draft Law refers to “other” sea areas under the jurisdiction of the People’s Republic of China in addition to internal waters, the territorial sea, the contiguous zone, the exclusive economic zone, and the continental shelf. Under international law as reflected in the Convention, there are no other sea areas over which a coastal State can claim jurisdiction besides those listed, and so the proposed reference to “other sea areas under the jurisdiction of the People’s Republic of China” implies a maritime claim that is contrary to international law.

The scope of Article 21 of the Draft Law, in particular paragraph four, is unclear. If the purpose is to delineate the process for creating and announcing temporary warning areas, the United States recommends including the word “temporary” to remain consistent with international law. The United States notes that ships and aircraft of other nations are not required to remain outside of declared warning areas, but are obliged to refrain from interfering with lawful activities therein.

Article 24 of the Draft Law appears to relate to a vessel traffic service, but it is unclear whether this service is intended to be used by foreign ships on a mandatory or voluntary basis.

Article 34 of the Draft Law pertains to mandatory pilotage. It is unclear if this Article applies to ships exercising the right of innocent passage, which would be inconsistent with international law as reflected in the Convention. Taking into account the language of Article 34 and Article 131, it is also apparent that these provisions contemplate restrictions on foreign military vessels, and, possibly, other sovereign immune vessels, contrary to international law, including unlawful requirements for prior approval and mandatory pilotage for these vessels exercising their lawful right of innocent passage thorough the territorial sea.

Article 37 of the Draft Law pertains to a ship being seaworthy. The article states a vessel “shall not sail under risk(s).” The word “risk” is not defined and, thus, its application is unclear.

Articles 42, 53, 54, and 118 of the Draft Law establish mandatory reporting requirements and associated penalties for foreign ships exercising the right of innocent passage in the territorial sea. These requirements and penalties are inconsistent with the right of innocent passage as reflected in the Convention (and insofar as straits are involved, as in Article 42, the right of transit passage). For passing vessels, the provision in Article 54 requiring that they accept coastal State direction and supervision raises similar concerns. In this and other provisions, the Draft Law should ensure respect for innocent passage and transit passage of foreign-flagged ships.

Article 43 imposes administrative requirements on vessels that conduct towing or carrying operations. It is unclear what facilities or other objects are covered by this Article, including, for example, whether Article 43 is meant to apply to array sonars towed from sovereign immune vessels, or to sovereign immune unmanned vehicles. This provision could also be read to limit military survey operations beyond the territorial sea, contrary to international law.

The United States recommends clarifying the scope and applicability of Article 50, to include a specific exemption for foreign military unmanned underwater vehicles. Any attempt to capture, salvage, or remove such vehicles from the water without consent beyond the territorial sea would violate that State's freedom of navigation and the principle of sovereign immunity.

Article 51 suggests forbidding navigation or regulating a range of activities that are vaguely defined, and in many cases, depending on the location, beyond the jurisdiction of any coastal State under international law. This includes, for example, areas of "military activities or other major important activities."

Article 52 of the Draft Law appears to unlawfully assert authority to restrict the right of innocent passage by foreign vessels in the territorial sea, based on subjective determinations of nonspecific threats to maritime traffic safety or order. This would be inconsistent with Article 19 of the Convention, which contains an exhaustive list of objective criteria used to determine if passage is non-innocent. Foreign military vessels and other government vessels operated for non-commercial purposes have the same right to exercise innocent passage as commercial vessels.

Article 55 states that the Chinese maritime administrative agency "shall not permit" any entry by a vessel of foreign nationality "which might cause threat to the safety or good order" of the ports or internal waters. Perhaps this phrase is purposely vague so as to allow broad port state control authority depending on the circumstances, but greater clarity would help the regulated community.

Article 66 of the Draft Law could implicate replenishment at sea operations by foreign military warships and their naval auxiliaries. Moreover, this article determines some of its applicability by proximity to "nearby military targets or important civilian targets," which for foreign ships beyond the territorial sea is inconsistent with the rights, freedoms, and lawful uses of the sea as reflected in the Convention.

Articles 84 and 121 of the Draft Law establish mandatory reporting requirements, investigations and associated penalties for all vessels involved in a maritime transport accident. It should be clarified that the law would not extend beyond China's jurisdiction to address foreign vessels regarding incidents occurring outside China's territorial seas.

Article 100 of the Draft Law relates to the concept of hot pursuit. It is important that this Article align with Article 111 of the Convention.

Article 131 of the Draft Law appears to exempt foreign military vessels from the provisions of the Draft Law, as would be consistent with international law (except with respect to the treatment of such vessels in Article 34). However, to be fully consistent with international law as reflected in the Convention, this exemption must be expanded to include all foreign sovereign immune vessels, including naval auxiliaries and other vessels owned or operated by a State and used for the time being on only government, non-commercial service. The exemption also must apply to all articles in the Draft Law. Similarly, paragraph 3 of Article 132 would benefit from clarification that the regulation contemplated therein would not apply to foreign military vessels (and we encourage China to submit those regulations for public comments as well).

The United States generally welcomes Article 133, which appears to assert that in the event of any conflict between this law and the provisions of treaties to which China is a party, such as the Convention, the treaty provisions prevail. However, the United States notes its serious concern with exception in Article 133 for treaty provisions that the PRC Government “does not choose for application,” to the extent that such provisions are mandatory under the relevant treaties concerned. This phrase should be omitted or rephrased as “or, to the extent consistent, does not choose for application.”

These comments do not attempt to highlight every aspect of the Draft Law for which adjustments would be helpful to ensure consistency with international law as reflected in the Convention and to be clear about what vessels it applies to, as well as the locations and circumstances of application.

The United States appreciates the opportunity to provide these comments on the Draft Law and requests that they be considered as the Draft Law is further developed. The United States also encourages China to submit any future drafts for public comment, and looks forward to providing any additional comments.

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b. Ecuador

In May 2017, the United States responded to Ecuador’s objection to a U.S. military aircraft overflight and also asked Ecuador to clarify the declaration that accompanied its accession in 2012 to the Law of the Sea Convention (“Convention”). Ecuador delivered a diplomatic note in April 2017, objecting to a U.S. military aircraft overflight of Ecuador’s exclusive economic zone (“EEZ”) without permission from or notification to authorities in Ecuador. Ecuador’s 2012 accession to the Convention included a declaration making assertions that created uncertainty about Ecuador’s compliance with international law as reflected in the Convention, particularly with regard to Ecuador’s historic claim of a territorial sea of 200 nautical miles (“nm”) and authority over aircraft operating beyond a lawful 12 nm territorial sea. In its May 2017 diplomatic note responding to Ecuador, the United States refers to the Law of the Sea Bulletin from the Division for Ocean Affairs and the Law of the Sea within the UN Office of Legal Affairs that records the statements of other countries in reaction to Ecuador’s accession declaration. That Law of the Sea Bulletin is available at

http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin83e.pdf. Excerpts follow from the U.S. note to Ecuador in May 2017.

* * * *

With regard to the matters contained in the Note of April 11, 2017, the United States notes that, as a matter of international law, a coastal State only maintains sovereignty over airspace above its land territory and its territorial sea. International law guarantees that all aircraft, including military aircraft, enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms beyond the territorial seas of any coastal State (i.e., in international airspace, beyond the sovereignty of any State). This includes the airspace over the high seas and exclusive economic zone.

In this connection, the United States recalls Note Number MRECI-DRBAN-2013-0014-N of June 4, 2013, in which the Foreign Ministry appeared to confirm a similar understanding, stating:

THE MINISTRY OF FOREIGN AFFAIRS, COMMERCE AND INTEGRATION, the Undersecretariat for North America and Europe ratifies that in the exclusive economic zone of Ecuador there is freedom of navigation and overflight for ships and aircrafts of other States, in accordance with the provisions of the UNCLOS and the statement made by Ecuador when it adhered to the Convention in October 2012. At the same time, appropriate arrangements with the Ministry of Defense have been made in order to comply with the provisions of the UN Convention on the Law of the Sea, UNCLOS.

The U.S. military aircraft at issue in the Note of April 11, 2017 was in international airspace and did not enter the national airspace of Ecuador. Therefore, the U.S. military aircraft did not require notification to or permission from Ecuador to exercise its rights and freedoms under international law. Further, as a state aircraft, air traffic control requirements in accordance with the Convention on International Civil Aviation did not apply. The U.S. aircraft did, consistent with international law and U.S. policy, operate with due regard for the safety of navigation of civil aircraft. (Article 39, paragraph 3 of the Convention, which is cited in Ecuador's note of April 11, 2017, similarly contemplates that state aircraft will at all times operate with due regard for the safety of navigation, though that Article concerns transit passage over international straits and is thus not directly relevant to the present situation.)

With regard to the statements contained in Ecuador's declaration on accession to the Convention of September 24, 2012, the United States wishes to recall that, although the United States is not yet a Party to the Convention, it has long regarded the Convention as reflecting customary international law with respect to traditional uses of the ocean. Since 1983, the United States has acted in accordance with the Convention's balance of interests, including with respect to its exercise of navigation and overflight rights and lawful uses of the sea on a worldwide basis.

The United States wishes to recall concerns about the declaration that were raised by other Parties to the Convention and which are reflected in "Law of the Sea Bulletin Number 83," issued by the Division for Ocean Affairs and the Law of the Sea in the Office of Legal Affairs of the United Nations, on pages 14 through 19 of that publication. The United States shares all of those concerns among others, including with respect to: reservations or exceptions to the Convention; freedom of navigation and overflight; the establishment of maritime zones and the exercise of sovereignty, sovereign rights, and jurisdiction within them; claimed residual rights; the use of straight baselines; the historic bay claim that the United States does not recognize; and obligations in relation to the marine environment. For example, Ecuador's declaration, including Paragraph XVIII of the declaration, does not affect in the exclusive economic zone the enjoyment by the United States and other States of the freedoms of navigation and overflight,

and other internationally lawful uses of the sea related to those freedoms, without requirement to provide prior notification to or obtain prior permission from the coastal State. The United States incorporates herein the statements of concerns of those Parties as contained in the Law of the Sea Bulletin Number 83, reserves its rights and those of its nationals with regard to the matters addressed in the aforementioned declaration, and seeks assurances that Ecuador's declaration of September 24, 2012, will not exclude or modify the legal effect of the provisions of the Convention.

The United States further notes its interest in arranging for experts in Washington to consult with your experts to further our understanding of this reference in the note and, more broadly, of Ecuador's 2012 declaration on accession to the Convention.

* * * *

c. Mexico

On June 2, 2017, the U.S. Embassy in Mexico City delivered a note to the Secretariat of Foreign Relations of Mexico regarding a special use airspace warning area to the west of the Pacific Coast of the United States and Mexico. The Secretariat's diplomatic notes dated March 27, 2014 and April 10, 2015, as well as a previous U.S. diplomatic note dated February 9, 2017, relate to Warning Area 291 ("W-291"), established in 1949, when coastal States under international law could not claim a territorial sea more than three nautical miles in breadth. The June 2, 2017 diplomatic note explains: "W-291 is a necessary tool that alerts aircraft in the area to potential military operations occurring around them. It facilitates the timely exchange of information about the operating environment so that aircraft can operate safely and avoid incident."

The diplomatic note proceeds to list the coordinates of W-291, which were amended "so that W-291 begins seaward of what is believed ...to be the limits of Mexico's territorial sea," consistent with international law as reflected in the 1982 Law of the Sea Convention (under which a coastal State may claim a territorial sea of up to 12 nautical miles in breadth). The amended coordinates were published in the National Flight Data Digest ("NFDD") on April 21, 2017 and took effect June 22, 2017, replacing the original coordinates.

d. Canada

On November 16, 2017, the Embassy of Canada informed the State Department by diplomatic note that the State of Alaska's notice of sale of gas and oil lease blocks included an area of the Beaufort Sea subject to Canada's claims. The United States delivered the following response to Canadian officials on December 22, 2017.

The United States Government does not accept that areas referred to in the proposed lease sales are within Canadian waters or that the lease sales in any way infringe upon Canadian sovereignty, sovereign rights, or jurisdiction under international law. The United States does not share the Canadian view that the

location of the maritime boundary in this area follows the 141st meridian of longitude. The United States on many occasions has informed Canada of the proper location of the maritime boundary in this area, which has been followed in the case of the State of Alaska's announcement of the lease sale. The United States rejects any purported exercise of jurisdiction or sovereignty by the Government of Canada, or any of its provinces or territories, in the United States part of the Beaufort Sea east of the 141st meridian.

4. Other Boundary or Territorial Issues

a. Cuba maritime boundary

On January 18, 2017, in Washington, D.C., the United States signed a bilateral treaty with Cuba to delimit their maritime boundary on the basis of equidistance in the eastern Gulf of Mexico. The January 18, 2017 media note, available at <https://www.state.gov/r/pa/prs/ps/2017/01/267117.htm>, explains:

The treaty delimits the only part of the U.S.-Cuba maritime boundary that had not previously been agreed, and covers an area of continental shelf in the eastern Gulf of Mexico that is more than 200 nautical miles from any country's shore. The treaty is consistent with the longstanding U.S. goals to resolve our outstanding maritime boundaries and promote maritime safety and protection of the marine environment. Before entry into force, the treaty will warrant the advice and consent of the U.S. Senate.

The same date, the United States and Cuba agreed via exchange of diplomatic notes to provisionally apply the 2017 maritime boundary treaty for a three-year period, automatically renewing provisional application for successive three-year periods unless either party provides written notice, at least two months prior to the end of a given period, that it wishes to terminate provisional application.

The United States and Cuba also agreed by a separate exchange of diplomatic notes to provisionally apply their 1977 maritime boundary agreement, and to do so, beginning on January 18, 2017, on the same terms and schedule of successive three-year periods as the 2017 maritime boundary agreement. The 1977 maritime boundary agreement had been provisionally applied from January 1, 1978 for successive two-year periods, most recently by an exchange of notes dated November 24, 2015 and December 31, 2015. The U.S. note dated December 19, 2017 proposed that the 1977 maritime boundary agreement continue to apply provisionally through January 17, 2020 (*i.e.*, to synchronize with the provisional application schedule for the 2017 maritime boundary agreement), and thereafter for successive three-year periods unless two months prior notice is given to terminate provisional application or until the agreement enters into force. The Government of the Republic of Cuba replied with a diplomatic note dated December 26, 2017, accepting this U.S. proposal for provisional application. The exchange of notes is available at <https://www.state.gov/s/l/c8183.htm>.

b. *Mexico maritime boundary*

Also on January 18, 2017, in Washington, D.C., the United States signed a bilateral treaty with Mexico to delimit their maritime boundary on the basis of equidistance in the eastern Gulf of Mexico. The 2017 U.S.-Mexico maritime boundary agreement is not being provisionally applied at this time.

5. Maritime Security and Law Enforcement

a. *Cuba Search and Rescue Agreement*

On January 18, 2017, the United State and Cuba signed a bilateral search and rescue (“SAR”) agreement. As described in the January 18, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/01/267107.htm>:

The agreement aims to enhance effectiveness and efficiency in assisting persons in distress and to act in furtherance of obligations under international law.

The agreement provides for cooperation and coordination between the United States and Cuba in assisting persons in distress at sea, subject to each country’s respective domestic laws.

Chargé d’Affaires of the U.S. Embassy in Havana, Jeffrey DeLaurentis, signed the agreement on behalf of the United States, and Deputy Minister of Transportation Marta Oramas Rivero signed for the Republic of Cuba.

b. *Portugal Search and Rescue Agreement*

On January 19, 2017, the United States and Portugal signed a SAR agreement. SAR agreements are aimed at strengthening cooperation in assisting persons in distress at sea, in furtherance of obligations under international law. The United States-Portugal SAR agreement provides a basis for future cooperation and coordination in the conduct of joint SAR operations. The United States and Portugal share a 1,363 nautical mile aeronautical SAR region line of delimitation and a 1,865 nautical mile maritime SAR region line of delimitation, the largest SAR region of any of the twenty countries that are adjacent to the United States SAR regions in either the Atlantic or Pacific Oceans. The United States-Portugal SAR agreement also identifies which agencies are responsible for coordinating SAR operations within their respective SAR regions.

B. OUTER SPACE

1. The Outer Space Treaty: Potential Legal Models for Activities in Space

On March 28, 2017, Gabriel Swiney, Attorney-Adviser, U.S. Department of State, and Head of Delegation to the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space (“COPUOS”), delivered a statement on potential legal models for activities in exploration, exploitation, and utilization of space resources. Mr. Swiney referred to the 2016 remarks on the Outer Space Treaty by Brian Egan, then-State Department Legal Adviser, which were excerpted in *Digest 2016* at 530-35.

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Thank you, Madame Chair; we look forward to a productive and collegial session.

...The United States appreciates the opportunity to present its views on activities in exploration, exploitation, and utilization of space resources. We found the symposium on this issue to be very interesting, and we want again thank the organizers for putting together such a stimulating discussion. We look forward to continuing that conversation here today. In my general remarks at the beginning of this session, I commended to your attention a recent speech by Brian Egan, then-Legal Adviser at the U.S. Department of State. In that speech, he went into detail regarding U.S. legal views relating to space resources. I will be drawing on Mr. Egan’s words today.

I want to start by making an observation. During the symposium yesterday, and in the discussion of this issue today, we have heard the phrases “global commons,” “common heritage of mankind,” and “*res communis*” in relation to outer space. Although these may be important concepts in international law, they are not part of the Outer Space Treaty. Likewise, we have heard repeated reference to the Moon Agreement. As we all know, that Agreement is not widely ratified, and its provisions do not reflect, and have not been incorporated into, customary international law. Reference to those legal concepts, and to the Moon Agreement, may well be more distracting than helpful as we consider this issue.

The exploitation of space-based resources—either on the moon, asteroids, or elsewhere—is critical to the long-term viability of space activities. Truly substantial increases in human and robotic presence in the solar system will require utilizing resources already located outside of Earth’s gravity well. That is a matter of physics, and the reality of the universe. For these reasons, the United States understands the great interest this topic continues to receive from the international legal community.

At the same time, it is important to remember that humanity is in the earliest days of space resource exploration, exploitation, and utilization. Space resources are not currently being exploited, and commercial attempts to do so remain focused on technical development, demonstration, and testing. We need to keep this reality in mind as we discuss legal questions surrounding space resources.

Whether in the press, academic literature, or the United Nations, legal discussions about space resource utilization are often accompanied by spirited debate about the consistency of these activities with the Outer Space Treaty. In an effort to offer legal certainty to U.S. firms that may invest in space resource utilization activities, the U.S. Congress enacted the Space Resource Exploration and Utilization Act of 2015. Those of you who have read this law know that it is not very detailed, but instead aims to provide some basic legal foundations necessary for the further development of this field. Nevertheless, this law seems to have generated some confusion and controversy, and I would like to clarify what it does and does not do.

We have heard concerns from some foreign partners, for example, that the law attempts to abrogate or otherwise displace the United States' obligations under the Outer Space Treaty. In fact, it is just the opposite. The Act affirms that space resource utilization activities are subject to the United States' international obligations. By its terms, the Act sanctions space resource utilization only "in manners consistent with the international obligations of the United States." Similarly, the Act only recognizes rights in resources "obtained in accordance with applicable law, including the international obligations of the United States." The Act also recognizes that non-governmental space resource utilization activities are "subject to authorization and continuing supervision by the Federal Government."

The Act is also consistent with the United States' longstanding position that the Outer Space Treaty shapes the manner in which space resource utilization activities may be carried out, but does not broadly preclude such activities. Our predecessors who negotiated the Outer Space Treaty could have easily included language forbidding, or providing a detailed regime, regarding the utilization of space resources. They did not do so, and the idea that the existing legal regime includes such prohibitions or restrictions presupposes ideas that are simply not in the text of the Outer Space Treaty.

The United States' position on the issue of space resource utilization dates back several decades. For example, in 1979, Secretary of State Cyrus Vance articulated what was already at that point a longstanding U.S. interpretation of Articles I and II of the Treaty. Secretary Vance said that, under Article II of the Treaty, "Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." He went on to explain that, "this 'non-appropriation' principle applies to the natural resources of celestial bodies only when such resources are 'in place.'" The prohibition on national appropriation does not, however, limit "ownership to be exercised by States or private entities over those natural resources which have been removed from their 'place' on or below the surface of the moon or other celestial bodies." Such removal, Secretary Vance further explained, is permitted by Article I of the Outer Space Treaty, which provides that "outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States..."

In 1980 testimony before the Senate, State Department Legal Adviser Roberts Owen reiterated that "the United States has long taken the position that Article I of the Treaty... recognizes the right of exploitation." He acknowledged that this view is not shared by all States or commentators, and this remains true today. Notwithstanding the variety of States' political positions on space resource utilization, the United States remains confident that its interpretation of Articles I and II over many decades and many administrations represents the better reading of the Treaty.

The Outer Space Treaty does shape the manner in which space utilization activities may be conducted. For example, space resource utilization activities may not be structured around rights in celestial bodies or their resources in place, since Article II of the Treaty prohibits the creation of any such rights. On the other hand, Article VIII clarifies that launching an object into outer space, including to the Moon and other celestial bodies, does not affect that object's ownership. Entities engaged in space resource utilization activities will therefore retain ownership interests in their equipment, including whatever non-interference rights flow from those ownership interests, even though they will not acquire ownership interests in the ground beneath their equipment.

To say that the Treaty does not preclude private ownership of resources extracted from a celestial body is not to suggest that the Treaty provides a comprehensive international regime for space resource utilization activities. At this stage, the United States sees neither a need nor a practical basis to create such a regime. As I mentioned earlier, we are in the very early days, and initial technology demonstration missions will be required long before widespread space resource utilization activities occur. The four core space treaties provide a basic legal framework within which interested States can assure their interests are protected for such initial missions.

In sum, passage of the Space Resource Utilization Act has not altered the United States' consistent approach to the Outer Space Treaty for the past half-century. Taking into account the nascent stage of space resource activities, this legislation is not only consistent with our international obligations, but is also a prudent way to provide necessary predictability for an emerging industry, while maintaining flexibility as that industry develops.

Finally, some speakers and delegates have raised important questions about whether utilization of outer space resources would be for the benefit and in the interest of all countries. Yesterday, we heard how the utilization of space resources will lower costs and increase the capabilities of all humanity. To that idea I would add only this: the solution to these valid concerns is not to strangle this industry in its infancy. The solution is to join in this endeavor, through cooperative activities, joint ventures, national activities, partnerships, or the simple expansion of this industry. There is room out there for us all.

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2. UN First Committee

a. Discussion on disarmament aspects of outer space

On October 17, 2017, Jeffrey L. Eberhardt delivered the statement for the United States at the UN First Committee's thematic discussion on the disarmament aspects of outer space. Mr. Eberhardt's remarks are excerpted below and available at <https://www.state.gov/t/avc/rls/274864.htm>.

* * * *

...I am pleased to have this opportunity to address the First Committee's Thematic Discussion on Outer Space. The United States remains committed to strengthening the sustainability, stability, and security of space. We are encouraged by the growing international recognition of the security, economic and scientific benefits derived from the use of space for peaceful purposes. How we address these challenges remains an important question for discussion within the UN General Assembly's First Committee as well as other parts of the United Nations system. In this regard, we note the informative discussion at last week's joint meeting of the UN First and Fourth Committees on possible challenges to space security and sustainability.

However, we remain very concerned about some countries' commitment to the development of anti-satellite capabilities to challenge perceived adversaries, while those same countries profess a desire for the "non-weaponization of space" through a political commitment to "no first placement" of weapons in space that the international community cannot confirm. It is clear that these efforts will not enhance stability in space when they fail to address one of the most pressing threats: terrestrially based anti-satellite weapons.

The United States continues to advocate an approach of pursuing bilateral and multilateral transparency and confidence-building measures (TCBMs) to encourage responsible actions in, and the peaceful use of, space. In 2013, the consensus report of the UN Group of Governmental Experts (GGE) on TCBMs in Outer Space Activities concluded "the world's growing dependence on space-based systems and technologies and the information they provide requires collaborative efforts to address threats to the sustainability and security of outer space activities." As a member of the GGE since 2013, the United States has co-sponsored with Russia and China UN General Assembly Resolutions 68/50, 69/38, 70/53, and 71/42, as well as this year's TCBM resolution. These resolutions have encouraged the international community to review and implement, to the greatest extent practicable, the GGE report's recommendations. The United States is pleased to note that formal and informal discussions of the GGE report's recommendations have been held in three UN bodies: the Conference on Disarmament, the Disarmament Commission (UNDC), and the Committee on the Peaceful Uses of Outer Space. We hope to see the UNDC add this topic as an agenda item to its 2018-2020 agenda soon.

Mr. Chairman, I would like to conclude by reiterating that the growing dependence of all nations on space-based systems and the information they provide necessitates collaborative efforts to enhance stability and address real threats to the right of nations to use outer space for peaceful purposes. The international community should consider voluntary, near-term measures that will help sustain the outer space environment for future generations, rather than by continuing to engage in pointless and hypocritical posturing that fails to address the international community's actual concerns.

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b. Resolution on preventing an arms race in outer space

On October 20, 2017, Ambassador Robert Wood, U.S. Permanent Representative to the Conference on Disarmament, delivered the explanation of vote for the United States and the United Kingdom at the UN First Committee on the resolution on "Further Practical Measures for the Prevention of an Arms Race in Outer Space ["PAROS"]."

Ambassador Wood's statement is excerpted below and available at <https://usun.state.gov/remarks/8085>.

* * * *

Mr. Chairman, our delegations will vote “No” on draft resolution L.54. This resolution seeks to establish a UN Group of Governmental Experts (GGE) to “consider and make recommendations on substantial elements of an international legally-binding instrument on PAROS, including, inter alia, on the prevention of placement of weapons in outer space.” We have a number of substantive and procedural concerns which lead us to our “No” votes.

First, it would appear that the authors of this resolution intend to use the Russian and Chinese draft “Treaty on the Prevention of Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects” (PPWT) as the foundation for the GGE’s review. We have long opposed negotiating a legally-binding agreement based on the PPWT at the Conference on Disarmament because of our fundamental concerns with the PPWT. These concerns are as follows:

The draft PPWT would not effectively prohibit the development of the most pressing threat to outer space systems today, namely terrestrially-based anti-satellite weapons; The draft PPWT fails to resolve definitional problems of what constitutes a “weapon in outer space,” given the dual-use nature of many space technologies; Furthermore, the draft PPWT fails to address the challenge of creating an effective verification regime.

The resolution acknowledges the “deep regret” over lack of progress in the Conference on Disarmament, which our countries share. Furthermore, we have said many times that we are prepared to engage in substantive discussions on space security as part of a CD consensus program of work. However, the explicit linkage in the resolution’s Operative Paragraph 2 to “the immediate commencement of negotiations on an international legally-binding instrument on PAROS,” as part of a “balanced and comprehensive program of work” would not achieve consensus on an already contentious topic. Furthermore, the inclusion of “legally binding” implies no discussion of transparency and confidence-building measures (TCBMs), which are not legally binding. Finally, it is unlikely that a legally binding instrument would constrain or inhibit others from developing counterspace capabilities to challenge perceived adversaries in outer space, while publicly promoting non-weaponization of space and “no first placement” of weapons in outer space.

Second, outer space TCBMs will likely be on the agenda for the UN Disarmament Commission’s 2018-2020 session. Our countries want to ensure that a PAROS GGE does not distract from that process.

Third, because the UN 2018-2019 biennium budget has already been negotiated, any new GGE would require the allocation of additional resources, which our countries oppose in principle.

It is also worth noting that this resolution offers an example of China’s attempts to impose its national view of multilateralism and world geopolitics on the international system. Our countries cannot agree to this language, but look forward to working with China and others

in the months and years ahead to sustain and strengthen the international norms on which the global system is based.

For these and other reasons, our countries do not support this resolution. We will vote “No” and urge others to vote “No” as well.

Our countries aim to prevent conflict from extending into space. We believe that political commitments and legally binding agreements that cannot be confirmed or verified by the international community are not the answer.

The United Kingdom and United States look forward to continuing to engage constructively and pragmatically with other UN Member States in order to strengthen the safety, stability, security, and sustainability of outer space activities.

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c. Resolution on no first placement of weapons in outer space

On October 30, 2017, Ambassador Wood delivered the explanation of vote for the United States at the UN First Committee on the resolution entitled “No First Placement of Weapons in Outer Space.” Ambassador Wood’s statement is excerpted below and available at <https://usun.state.gov/remarks/8084>.

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Mr. Chairman, my delegation will vote “No” on draft resolution L.54, “No first placement of weapons in outer space,” or “NFP.” The United States finds that Russia’s NFP initiative continues to contain a number of significant problems, and so our longstanding reasons for voting “No” have not changed. First, the NFP initiative does not adequately define what constitutes a “weapon in outer space.” Second, the NFP initiative contains no features that would make it possible to effectively confirm a State’s political commitment “not to be the first to place weapons in outer space.” Third, the NFP initiative is silent with regard to terrestrially-based anti-satellite weapons, which constitute a significant threat to outer space systems.

While Russia has said that it considers the NFP initiative to be a transparency and confidence-building measure (TCBM), the United States has found that the NFP initiative does not meet the criteria for a TCBM as established in the consensus report of the UN Group of Governmental Experts (GGE) study on TCBMs for outer space activities (A/68/189)—a group that Russia chaired. That study was later endorsed by the full General Assembly in Resolutions 68/50, 69/38, 70/53, and 71/42, all of which the United States co-sponsored with Russia and China, as well as a resolution under consideration this year in the First Committee. As the GGE report stated, 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.

Given the lack of effective confirmation features, exploitable loopholes caused by the inability to reach consensus on the definition of a “weapon in outer space,” and the failure to address the near-term threat of terrestrially-based anti-satellite weapons, the United States has determined that the NFP initiative is inconsistent with consensually agreed criteria, and does not enhance U.S. national security interests.

It is also worth noting that this resolution offers an example of China’s attempts to impose its own view of multilateralism and world geopolitics on the international system. The United States cannot agree to this language, but looks forward to working with China and others in the months and years ahead to sustain and strengthen the international norms on which the global system is based.

Therefore, as we have done for the past three years, the United States will again vote “No” on this First Committee resolution and intends to vote “No” again in the full General Assembly.

Mr. Chairman, the United States looks forward to continuing to engage constructively and pragmatically with other UN Member States in order to strengthen the safety, stability, security, and sustainability of outer space activities.

The NFP initiative is not the answer.

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3. Galloway Space Law Symposium

On December 13, 2017, Dr. Scott Pace, Executive Secretary of the National Space Council, delivered the keynote speech on “Space Development, Law, and Values” at the 12th annual Eilene Galloway Symposium on Critical Issues of Space Law, held in Washington, D.C.

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This year marks the fiftieth anniversary of the ... Outer Space Treaty. This treaty provides the legal foundation for a range of subsequent outer space agreements, and has served the United States and the international community well over a half-century. There is no doubt that it is in our national interest to continue our space activities within the international legal framework that the Treaty provides.

Not all space agreements have been similarly beneficial. The very first space policy debate I was ever involved with centered on the grassroots campaign to ensure that the United States would not sign or ratify the 1979 Moon Agreement. I found it astounding that representatives of our government would even consider an agreement that would subordinate U.S. private sector activities on the moon to an unelected international authority. In effect, that agreement would have created a set of rules for the moon and other celestial bodies that, in some ways, would have been more restrictive than the laws we have here in the United States. This

was an example of an agreement that was contrary to American interests; it was never approved by the Senate or ratified by the President.

In the years since the Outer Space Treaty entered into force in 1967, many things have changed. First, we are no longer in a bipolar Cold War world comprised of two primary space actors, the United States and the Soviet Union. Today, there are many more nations and intergovernmental organizations involved in outer space, and hundreds of non-state actors such as commercial companies, and scientific and academic entities that own, operate, or benefit from space systems and space-derived information. The globalization and democratization of space have increased interest in issues of space governance and the potential role of space law to manage new challenges.

Secondly, in today's world, technology and entrepreneurship threaten to outpace the legal and domestic regulatory mechanisms intended to enable and manage space activities. When technological generations occur every 18 months or so, it would appear to outside observers that the pace of international space discussions at the United Nations is, by comparison, glacial. As many of you know, the development of voluntary "best practices" for the long-term sustainability (LTS) of outer space activities at the UN Committee on the Peaceful Uses of Outer Space is expected to be finalized next year after years of cooperative, but sometimes contentious, efforts. In the intervening time since LTS discussions began, we have seen many new developments, from new space start-ups, reusable rockets, and proposals for mega-constellations, alongside more traditional governmental space activities.

On the other hand, the LTS discussions, and the earlier effort to create international guidelines for the mitigation of orbital debris, were successful in creating an international consensus in support of best practices based on real world experience. Similarly, non-binding UN principles on remote sensing reached consensus in 1986. In contrast, efforts to negotiate an international code of conduct for outer space activities are in abeyance, the Conference on Disarmament has not agreed on a program of work for decades, and no new international space treaties have been negotiated since the Moon Agreement of 1979, which was of course only ratified by a handful of states.

So how do we go about shaping international activities in outer space to ensure that the United States, its allies and partners, and other established and emerging spacefaring nations can continue to use space for peaceful purposes? How can the United States, as an order-building power since World War II, take a leadership role in promoting the rule of law and American interests in a domain that presents unique challenges in traditional international relations?

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Let me describe some of the core elements of this Administration's policy approach to space development, law and ...bringing American values to space.

First, the United States will support those activities that will advance U.S. national interests internationally. ... America first does not mean American alone. To the contrary, prioritizing America's interests means we will secure the benefits of space, not only for ourselves but for and with our friends and allies.

Second, the United States should strive to be the most attractive jurisdiction in the world for private sector investment and innovation in outer space. This requires a transparent, efficient, and minimally burdensome domestic regulatory mechanism for U.S. companies conducting space activities. This Administration embraces meeting U.S. international obligations through a

“light-touch” regulatory approach that maximizes industry’s ability to innovate and national freedom of action.

Third, the U.S. Government, working with its space partners and the private sector, should use legal and diplomatic means to create a stable, peaceful environment not only for governmental activities, but also for commercial ones. These legal and diplomatic means include efforts to minimize and mitigate harmful interference to our space systems, whether from terrestrial actors or from space actors. In addition to the UN Charter and other applicable law, such as the right of self-defense, several provisions of the Outer Space Treaty provide legal principles that would be applied toward these ends.

Fourth, the U.S. private sector must have confidence that it will be able to profit from capital investments made to develop and utilize in-situ resources, commercial infrastructure, and facilities in outer space. Furthermore, certain types of rights and obligations typically associated with exclusive use and private property are needed. In 2015, the United States took an important step with the enactment of the *Commercial Space Launch Competitiveness Act*. This Act provides that U.S. citizens are entitled to own, as private property, asteroid and space resources they have obtained in accordance with applicable law, including our international obligations. I commend to you last year’s Galloway speech by Brian Egan, then-Legal Adviser at the U.S. State Department, which sets out a detailed articulation of U.S. views on this subject.

Fifth, we need to respond to questions about how we register space objects, as well as the responsibilities of space object ownership and operation. We need to engage with the international community to shape ambiguities that remain in the Outer Space Treaty and the existing international legal regime. As a launching State, the United States takes its jurisdictional responsibility very seriously and conducts a comprehensive payload review to assure compliance with existing legal obligations for commercial and foreign payloads launched from U.S. space launch vehicles. The United States, in turn, expects other States also to adhere to their international legal obligations and responsibilities. Another issue that we’re facing is Article VI of the Outer Space Treaty, which as you know requires ways to modernize its regulatory system to carry out this international obligation for new and evolving private space activities.

Sixth, the Administration seeks to develop non-binding international norms that are complementary to the existing legal regime through both “bottom-up” best practices developed cooperatively with other space actors, and “top-down” non-legally binding confidence-building measures. Neither of these approaches necessitates the negotiation of new outer space treaties or international arms control agreements. In a rapidly changing environment of nanosats, “mega constellations,” and commercially available on-orbit servicing or rendezvous and proximity operations, creating new legally binding agreements is unlikely to be timely or successful. On the other hand, non-legally binding guidelines, based on international consensus, can be reflected in national law and regulation. In this way, we can address rapid technical changes without subordinating U.S. activities to new trans-national authorities.

Finally, many of you have heard me say this before, but it bears repeating: outer space is not a “global commons,” not the “common heritage of mankind,” not “*res communis*,” nor is it a public good. These concepts are not part of the Outer Space Treaty, and the United States has consistently taken the position that these ideas do not describe the legal status of outer space. To quote again from a U.S. statement at the 2017 COPUOS Legal Subcommittee, reference to these concepts is more distracting than it is helpful. To unlock the promise of space, to expand the economic sphere of human activity beyond the Earth, requires that we not constrain ourselves with legal constructs that do not apply to space.

While working in a school of international affairs, I participated in discussions over areas beyond traditional definitions of sovereignty, such as the high seas, international air space, the polar regions, space, and cyberspace. These are today's legal and diplomatic frontiers, and are thus areas of potential conflict among state and non-state entities that impact U.S. interests. As with past frontiers, it is those who show up, not those who stay home, who create the rules and establish the norms in new areas of human activity.

Pascal Lamy is a former director of the World Trade Organization and someone with long experience with the role of law in international relations. He makes an analogy with the states of matter—solid, liquid, and gaseous—in which sovereign nations represent the solid elements of international order, international law and practice are in the gaseous state, and transnational organizations such as the European Union and the European Space Agency are in a fluid, liquid state. I find this analogy helpful in thinking about the role of law in space.

In a world in which space capabilities are increasingly global, no one state will be in a position to impose rules unilaterally for the exploration and development of space. Similarly, the diversity of competing national interests in space make it unlikely that a single international space authority or even a new space treaty will emerge anytime soon. Thus, the task for the United States, if it wishes to influence how space is developed and utilized, is to create attractive projects and frameworks in which other nations choose to align themselves and their space activities with us, as opposed to others. Just as the United States shaped the post-war world with a range of international institutions to protect its values, so we should look to the creation of new “liquid” arrangements to advance our interests, values and freedoms in space.

U.S. leadership requires active engagement in interpreting and implementing existing space agreements and other international law, while pursuing non-binding “best practices” and confidence-building measures with our allies, security partners, and potential adversaries to meet today's space challenges. It necessitates enacting transparent, effective, and minimally burdensome domestic legislation and regulatory mechanisms to enable U.S. companies to benefit from technology development and new commercial opportunities.

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In conclusion, the development of space will depend on the development of laws, regulations, and institutions that will support and enable the expansion of human activity into this new domain. In doing so, we should bear in mind that it is not just our machines that we send into space, or even our astronauts, but rather, U.S. space activity represents our values as well. What we *do* in space and *how* we do it reflect our values and not just our technologies. We should seek to ensure that our space activities reflect those values: democracy, liberty, free enterprise, and respect for domestic and international law in a peaceful international order. There will be many nations, and many cultures, on the space frontier; we should work to ensure that our nation and our values lead this next greatest adventure.

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Cross References

Maritime Boundary Treaties with Kiribati and the Federated States of Micronesia, **Ch 4.A.1.**

Schermerhorn et al. v. Israel (U.S.-flagged ships and FSIA's torts exception), **Ch. 10.A.4.**

Negotiation of instrument under UNCLOS on BBNJ, **Ch. 13.B.6.**

CHAPTER 13

Environment and Other Transnational Scientific Issues

A. LAND AND AIR POLLUTION AND RELATED ISSUES

1. Climate Change

As discussed in *Digest 2015* at 553-60, and *Digest 2016* at 542-51, the Paris Agreement was adopted at the 21st session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (“UNFCCC”) in 2015 and entered into force in 2016. On June 1, 2017, President Trump announced that “the United States will withdraw from the Paris Climate Accord ... but begin negotiations to reenter either the Paris Accord or a really entirely new transaction on terms that are fair to the United States, its businesses, its workers, its people, its taxpayers.” His full remarks are available at <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord>.

Following the President’s announcement, the G20 Leaders’ Declaration, adopted at the G20 Summit held July 7-8, 2017, in Hamburg, Germany, noted the U.S. decision. The Declaration is excerpted below and can be found at [http://europa.eu/rapid/press-release STATEMENT-17-1960 en.htm](http://europa.eu/rapid/press-release_STATEMENT-17-1960_en.htm).

We take note of the decision of the United States of America to withdraw from the Paris Agreement. The United States of America announced it will immediately cease the implementation of its current nationally-determined contribution and affirms its strong commitment to an approach that lowers emissions while supporting economic growth and improving energy security needs. The United States of America states it will endeavour to work closely with other countries to help them access and use fossil fuels more cleanly and efficiently and help deploy renewable and other clean energy sources, given the importance of energy access and security in their nationally-determined contributions.

On August 4, 2017, the United States notified the UN Secretary General, in his capacity as depositary for the Paris Agreement, of its intent to withdraw from the Paris Agreement. See August 4, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm>. The text of the August 4, 2017 communication from Ambassador Nikki R. Haley, U.S. Permanent Representative to the UN, regarding U.S. withdrawal from the Paris Agreement follows and is available at <https://treaties.un.org/doc/Publication/CN/2017/CN.464.2017-Eng.pdf>.

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The Representative of the United States of America to the United Nations presents her compliments to the Secretary-General of the United Nations.

This is to inform the Secretary-General, in connection with the Paris Agreement, adopted at Paris on December 12, 2015 (“the Agreement”), that the United States intends to exercise its right to withdraw from the Agreement. Unless the United States identifies suitable terms for reengagement, the United States will submit to the Secretary-General, in accordance with Article 28, paragraph 1 of the Agreement, formal written notification of its withdrawal as soon as it is eligible to do so. Pending the submission of that notification, in the interest of transparency for parties to the Agreement, the United States requests that the Secretary-General inform the parties to the Agreement and the States entitled to become parties to the Agreement of this communication relating to the Agreement.

The Representative of the United States of America to the United Nations avails herself of the opportunity to renew to the Secretary-General the assurances of her highest consideration.

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The United States continued to participate in international climate change negotiations and meetings, including the 23rd session of the Conference of the Parties (“COP-23”) to the UN Framework Convention on Climate Change. Judith G. Garber, Acting Assistant Secretary of State for the Bureau of Oceans and International Environmental and Scientific Affairs, delivered the U.S. national statement at COP-23 in Bonn, Germany, on November 16, 2017. Her remarks are excerpted below and available at <https://www.state.gov/e/oes/rls/remarks/2017/275693.htm>.

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Irrespective of our views on the Paris Agreement, the United States will continue to be a leader in clean energy and innovation, and we understand the need for transforming energy systems.

President Trump made this clear when the United States joined other G-20 countries in the G-20 Leaders’ Declaration in stating that we remain collectively committed to mitigating

greenhouse gas emissions through, among other things, increased innovation on sustainable energy and energy efficiency, and working towards low greenhouse gas emissions energy systems.

Our guiding principles are universal access to affordable and reliable energy, and open, competitive markets that promote efficiency and energy security, not only for the United States but around the globe.

The United States will continue supporting a balanced approach to climate mitigation, economic development, and energy security that takes into consideration the realities of the global energy mix.

Over the past 10 years, the United States has shown that it can reduce emissions while growing the economy and promoting energy security. Since 2005, the United States' net greenhouse gas emissions have decreased 11.5 percent while the U.S. economy has grown 15 percent, adjusted for inflation.

A large portion of these reductions have come as a result of the adoption by the private sector of innovative energy technologies—fostered by early stage innovation by the public sector.

Collaborative U.S. public and private efforts over the past ten years have resulted in dramatic decreases in the cost of low-emissions technologies and fuels, including natural gas, solar, wind, energy storage, and energy efficiency. Natural gas prices have dropped to about a third of what they were in 2007 and the cost of utility-scale solar PV has dropped by more than 64 percent.

We want to work with other countries to continue advancing the development and deployment of a broad array of technologies that will ultimately enable us to achieve our climate and energy security goals.

Already, the United States is working bilaterally with countries such as China and India to advance power sector transformation and smart grid technologies, energy efficiency, and Carbon Capture, Utilization and Storage.

We are also engaged in many multilateral initiatives.

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Of course, we know that each country will need to determine the appropriate energy mix based on its particular circumstances, taking into account the need for energy security, promotion of economic growth and environmental protection.

In that context, we want to support the cleanest, most efficient power generation, regardless of source.

Beyond energy, the United States will continue to help our partner countries reduce emissions from forests and other lands, to adapt to the impacts of climate change, and to respond to natural disasters.

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In sum, the United States intends to remain engaged with our many partners and allies around the world on these issues, here in the U.N. Framework Convention and everywhere else.

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2. Ozone Depletion

As discussed in *Digest 2016* at 554-59, the Parties to the Montreal Protocol agreed to the Kigali Amendment to phase down the use and production of potent greenhouse gases known as hydrofluorocarbons (“HFCs”) in 2016. In 2017, the meeting of the parties marked the 30th anniversary of the Montreal Protocol. On November 23, 2017, Judith G. Garber, Principal Deputy Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, delivered remarks at the 29th Meeting of the Parties. The remarks are excerpted below and available at <https://www.state.gov/e/oes/rls/remarks/2017/275874.htm>.

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Thank you, Mr. President. It is wonderful to celebrate the 30th anniversary of the Montreal Protocol in its namesake city. ...

The United States is proud of its long track record of leadership in this body. The United States was among the first countries to ratify the Montreal Protocol, which was approved by the United States Senate without a single dissenting vote. And U.S. industry has led the way, at every stage, innovating to develop new generations of technology that has allowed Parties to meet their Montreal Protocol obligations even while the use of air conditioning and refrigeration has grown rapidly around the world.

The United States views the Montreal Protocol as one of the world’s most successful multilateral environmental agreements. When he signed the Montreal Protocol, President Reagan said, and I quote: “The Montreal Protocol is a model of cooperation. It is a product of the recognition and international consensus that ozone depletion is a global problem, both in terms of its causes and its effects. The Protocol is the result of an extraordinary process of scientific study, negotiations among representatives of the business and environmental communities, and international diplomacy. It is a monumental achievement.” It is to the credit of everyone in this room that this statement is as true today as it was 30 years ago.

This extraordinary body and the people implementing it have already and will continue to see huge benefits for the environment and the health of people all over the world.

Full implementation of the Montreal Protocol is expected to result in the avoidance of more than 280 million cases of skin cancer, approximately 1.6 million skin cancer deaths, and more than 45 million cases of cataracts in the United States alone, with even greater benefits worldwide.

Truly few institutions in history can boast such a large positive impact. Another characteristic of this body is tenacity and perseverance to see through long-term commitment. Thirty years ago, we courageously took action on CFCs, which represented the largest and most immediate threat to the ozone layer.

But we didn’t stop there. We knew that while HCFCs were less harmful to the ozone layer than CFCs, we could not adequately protect the ozone layer without action on HCFCs as well. So we agreed to phase out HCFCs.

Each transition has brought us to better, more energy efficient technologies that continue to meet the modern needs of populations in every country, and at the same time improve environmental and health outcomes for all.

And, most recently, we came together again to address the environmental impact of the primary replacements for ozone-depleting substances—HFCs—and adopted the Kigali Amendment.

The United States believes the Kigali Amendment represents a pragmatic and balanced approach to phasing down the production and consumption of HFCs, and therefore we support the goals and approach of the Amendment.

There are a number of steps in our domestic process that we would need to complete before reaching a final decision on transmittal of the Kigali Amendment to the U.S. Senate for its advice and consent.

There is no timeline currently determined for these steps, but we have initiated the process to consider U.S. ratification of the Amendment.

We have enjoyed working with all of you for the past 30 years and look forward to continuing our cooperation. We have much work ahead of us, but we can rely on a strong foundation built by decades of Ozone Heroes. We can, and will, continue that incredible legacy.

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3. Minamata Convention

On May 18, 2017, the Minamata Convention on Mercury surpassed the requirement of 50 Parties for entry into force when the EU and seven of its member States deposited their instruments of ratification at UN Headquarters in New York, bringing to 52 the number of Parties. The agreement entered into force on August 16, and the first Conference of the Parties (“COP-1”) was held in September 2017 in Geneva. As discussed in *Digest 2013* at 391-92, the Minamata Convention was concluded in 2013. The United States joined on November 6, 2013 when it deposited its instrument of acceptance.

One of the key issues at the first COP was resolving how regional economic integration organizations (“REIOs”), such as the EU, would be counted for purposes of voting (on procedural matters) and quorum. The U.S. statement upon adoption of the rules of procedure for COP-1 includes the following:

Thank you, Mr. President. The United States welcomes the adoption of the rules of procedure by the COP. We would like to take this opportunity to underscore our understanding that, in the event of any vote or calculation of quorum, these rules provide that a regional economic integration organization (REIO) would be counted as the number of its member states that are parties to the Convention and are otherwise eligible to vote and present in the meeting room at the time of the vote or quorum count. Our understanding is that this is how these rules have been operationalized in the Stockholm and Rotterdam Conventions, and that this is how these rules would be implemented in Minamata as well.

Acting Assistant Secretary Garber led the U.S. delegation to COP-1. See September 26, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/09/274429.htm>. The media note describes the significance of the Convention for the United States:

The Convention requires countries to apply best available techniques and best environmental practices to control mercury emissions from the largest industrial sources—to include modern technologies. The United States, which already employs these tools, should see a significant reduction in cross-border mercury pollution as a result of improved controls in other countries. The Agreement aims to protect human health and the environment from the adverse effects of mercury and the United States is a party.

4. Transboundary Air Pollution

On January 18, 2017, the Secretary of State signed the instrument of acceptance to join the 2012 amendments to the Gothenburg Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution (“LRTAP”), and the United States deposited the instrument with the UN as depositary. The UN depositary notification is available at <https://treaties.un.org/doc/Publication/CN/2017/CN.20.2017-Eng.pdf>. Acceptance by the United States includes the following declaration:

The United States does not accept the procedure set out in paragraph 7 of article 13bis with respect to amendments to annexes IV to XI. Accordingly, consistent with paragraph 6 of article 13bis, for amendments to these annexes the procedure set out in paragraph 3 of article 13bis will apply for the United States.

B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

1. Arctic

Arctic Council Ministerial

On May 11, 2017, in Fairbanks, Alaska, the governments of Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden, and the United States entered into an Agreement on Enhancing International Arctic Scientific Cooperation. The foreign ministers of the Arctic states also signed the Fairbanks Declaration.

The Agreement and Declaration were concluded as part of the 10th Arctic Council ministerial meeting, held in Fairbanks, and chaired by Secretary Tillerson. See May 11, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/05/270816.htm>. The media note summarizes other developments at the ministerial meeting:

At the meeting, Secretary Tillerson recognized the Arctic Council as an indispensable forum for cooperation and affirmed that the United States will continue to be an active member as it transfers chairmanship of the Council to Finland. As issues of great concern, he noted advancing the welfare and living conditions of Arctic communities; recognizing each country's strategic interests in the Arctic; and ensuring vigilance in protecting the fragile environment.

Secretary Tillerson announced the signing of the Fairbanks Declaration in which the Council reaffirmed its commitment to maintain peace, stability, and constructive cooperation in the Arctic, and to sustainable development and the protection of the Arctic environment. The Fairbanks Declaration recognized the key accomplishments during the 2015-2017 U.S. Chairmanship of the Arctic Council to advance Arctic Ocean safety, security, and stewardship and improve economic and living conditions. The full text of the agreement is available [here](#).

Secretary Tillerson also announced the signing of the Agreement on Enhancing International Arctic Scientific Cooperation by Canada, Denmark, Finland, Iceland, Norway, Russia, and the United States. This is the third legally binding agreement negotiated under the auspices of the Arctic Council. The agreement facilitates access by scientists of the eight Arctic States to Arctic areas that each State has identified, including entry and exit of persons, equipment, and materials; access to research infrastructure and facilities; and access to research areas. The agreement also calls for the parties to promote education and training of scientists working on Arctic matters. You can read the full text of the agreement [here](#).

Secretary Tillerson delivered remarks at the Arctic Council ministerial on May 11, 2017. His remarks are excerpted below and available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/05/270813.htm>.

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The United States had been privileged to lead the Arctic Council at a time when the Arctic Region has been facing unprecedented change and challenges.

I am grateful for the level of cooperation that the nations and the peoples of the Arctic have demonstrated as they continue to address these challenges.

The Arctic Council, which recently celebrated its 20th anniversary, has proven to be an indispensable forum in which we can pursue cooperation. I want to affirm that the United States will continue to be an active member in this council. The opportunity to chair the Council has only strengthened our commitment to continuing its work in the future.

We look forward to working with Finland as they assume the leadership role of this council. There are still issues of great concern to each of us that we can address, including advancing the welfare and living conditions of those who call the Arctic home; recognizing that each country has a strategic interest in being part of the Arctic's future; and making sure that we

continue to be vigilant in protecting the fragile environment.

In the United States, we are currently reviewing several important policies, including how the Trump administration will approach the issue of climate change. ...The Arctic Council will continue to be an important platform as we deliberate on these issues.

I could not hope to mention all of the individual initiatives and programs that the Council has brought to fruition over the past two years under U.S. chairmanship. Each of the Council's subsidiary bodies has done outstanding work in this respect, and I do wish to acknowledge and commend all of their efforts, even as I highlight but a few.

The signing of the [Agreement on Enhancing International Arctic Scientific Cooperation](#) will facilitate the movement of scientists, scientific equipment, and importantly, data sharing across the international boundaries of the Arctic.

The Council has produced the first-ever assessment of telecommunications infrastructure in the Arctic. During the Finnish chairmanship, the Arctic Council will build on this work in conjunction with the private sector to advance this ongoing effort to strengthen connectivity throughout the Arctic Region.

Arctic Council members have conducted multiple exercises to prepare for potential search-and-rescue events in the Arctic as well as to coordinate responses to environmental incidents. These exercises significantly advanced our capacity to address risks inherent in the increased human activity that is undergoing and will continue to expand in the Arctic Region.

At the community level, the council broke new ground in a number of ways. A compelling initiative known as RISING SUN has produced resources that will prove truly valuable to Arctic residents in addressing suicide prevention, particularly among indigenous youth. The council also built on work initiated by the State of Alaska to improve water and sanitation capacity in rural Arctic communities.

As Arctic shipping continues to increase, the Council took a number of measures designed to ensure that such shipping remains safe and reliable, including the Arctic Ship Traffic Database that will improve our understanding of the ship traffic in the Arctic, including the number and types of vessels in the Arctic, their exact routing, and other important information.

And finally, the Council has strengthened resilience at the national and local levels in the face of environmental and other change.

I could go on at length about our shared accomplishment, but I am certain other speakers today will mention the many other Arctic Council projects deserving of recognition.

Let me close my remarks by thanking again all of those involved in these initiatives—the many government officials, the permanent participants, the working group and task force chairs, the secretariats, the observers and invited experts. The last two years have witnessed remarkable growth in the reach and productivity of the Arctic Council, thanks to all of you. And I am confident that, under the leadership of Finland, the Council is poised to do even more.

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On May 8, 2017, David A. Balton, Deputy Assistant Secretary of State for the Bureau of Oceans and International Environmental and Scientific Affairs, held a special briefing previewing the Arctic Council ministerial. The transcript of the briefing is excerpted below and available at <https://www.state.gov/r/pa/prs/ps/2017/05/270728.htm>.

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...[T]he nations and people of the Arctic are gathering in Fairbanks, Alaska this week to bring to fruition the two-year chairmanship of the U.S. of the Arctic Council and to ...watch the passing of the baton from the United States to Finland, who takes over the chair of the Arctic Council this week.

What I thought I'd do at the outset here is just provide a little background of what the Arctic Council is, what the U.S. chairmanship tried to accomplish, and talk a little bit about what will actually happen here in Fairbanks this week, and then I'm happy to answer questions on any of this from any of you.

So the Arctic Council is 20 years old. The eight nations of the Arctic created it through a ...a declaration. It mostly focuses on sustainable development and environmental protection of the Arctic region. Every two years a different state of the Arctic takes over as chair. The United States assumed the chairmanship from Canada about two years ago at a meeting in Iqaluit in Nunavut, Canada.

We laid out at that time three principal areas of focus we hoped the Arctic Council would follow over the course of these two years ... that are coming to closure now. First, we were trying to improve the economic and living conditions of the people who actually reside in the Arctic, and I can talk about some of the projects that relate to that.

The second topic dealt with Arctic Ocean safety, security, and stewardship. As I think many of you know, the Arctic Ocean is opening up in a very real sense, so there are a lot of issues dealing with the increased human activity in the Arctic Ocean that we follow. And thirdly, we were dealing with adapting to climate change in the Arctic, strengthening our resilience and adaptation of Arctic communities in particular.

Some of the main things that you will hear about being brought to fruition this week: Now, one is ...the third binding agreement that the eight Arctic nations will sign. This one is on enhancing scientific cooperation in the Arctic. This was a negotiation that took place under the auspices of the Arctic Council, actually, over the course of several years. The negotiations themselves were co-led by Russia and the United States, and they have produced a binding agreement that we anticipate the Arctic ministers will sign on Thursday.

One other thing that has been completed already: For the first time ever, there is an assessment of the telecommunications infrastructure in the Arctic. Any of you who have spent time in the Arctic will know that there certainly are gaps and limitations in telecommunications here in the Arctic. Here, we spent two years with taking a hard look at that, with the idea that those gaps are to be filled over the next few years. Finland will take up this issue during its chairmanship, working with the private sector, trying to improve telecommunications delivery in the Arctic.

With the increase in Arctic shipping, we now have launched a new Arctic Shipping Traffic Database. The idea is to have a much better understanding ...in real time of ships that are coming into and going out of and passing through the Arctic region. This will help in the management of Arctic shipping going into the future.

And one other thing I would mention: In the past years, two other agreements that have been signed previously have been implemented rather successfully over the last two years. One relates to improving search-and-rescue in the arctic region, and the second relates to preparing and responding to potential oil pollution incidents in the Arctic. Over the last two years, there

were joint exercises among the Arctic states on both of those, and I think we made a lot of progress in getting ready for things that might happen in the future.

Obviously, there are a couple of dozen other individual initiatives that are coming to fruition this week. If you are interested in knowing about more of them and about them in more detail, the Arctic Council website is a good resource for you.

Let me say a word or two now about what actually will happen here in Fairbanks this week. The ministerial meeting itself will take place on Thursday morning. It will be livestreamed and Secretary of State Tillerson will chair the meeting. It will include a brief summary of the accomplishments of the Arctic Council, including some of the things I just mentioned now.

Each of the states, the governments of the Arctic, will also have statements, and so too will the representative of six organizations who represent the indigenous people for the Arctic and who participate in their own name and right in the Arctic Council. They will all be able to give statements as well. Finland will have a moment to lay out its plans for the next two years of the Arctic Council too, and there will be a passing of the gavel—literally and figuratively—from the United States to Finland to conclude the meeting.

One other document that will be signed in the course of the time here is what we will call the Fairbanks Declaration. Every two years when the Arctic Council meets at the ministerial level, it has developed and the ministers sign such declarations, the main purpose of which is to summarize in a little more detail the work that has been completed and to look ahead also in a little more detail at the two years of work to come.

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... The agreement to be signed here this week, the one on scientific cooperation, is essentially designed to allow scientists and their equipment and their data to flow more freely across international boundaries within the Arctic. There have been times in the past when permissions that scientists seek to do scientific research in another country have not been granted or not been granted as readily as need be. This agreement is designed to facilitate scientific agreement across international boundaries, not on any particular topic, but on any topic...

... This is a serious agreement, but I think ... if you're asking whether it obliges any of the governments to conduct specific scientific research projects, no—the answer to that is no.

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... So there's only one topic that is beyond the reach of the Arctic Council, and that is military security issues. When the Arctic Council was created 20 years ago, that was the one topic that was excluded from its mandate. The real problems in the Arctic, if you've been watching it at all, are socioeconomic and environmental in nature, and there are some security issues related to those topics. So, for example, the increase in human activity in the Arctic raises the prospect of search and rescue problems that might arise. I consider that to be a security issue and the Arctic Council has been working to prepare for that. The increase in shipping through the Arctic may lead to some oil spill or other environmental damage. That's a kind of security issue too, preparing for those types of incidents, and the Arctic Council has been working on things like that as well. So those are the security issues that the Arctic Council is immersed in.

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2. Antarctic

On December 1, 2017 the designation of the Ross Sea Region Marine Protected Area, the world's largest marine protected area ("MPA"), entered into force. See December 1, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/12/276157.htm>. See also *Digest 2012* at 441 and *Digest 2013* at 406-07 regarding the initiative of the United States and New Zealand to establish the Ross Sea MPA. The media note describes the Ross Sea MPA:

The Ross Sea in Antarctica is an area of unique biodiversity and one of the last unspoiled marine environments on the planet. This MPA will create special long-term opportunities for protecting marine life and for promoting marine scientific research.

The Ross Sea MPA was ... adopted by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) in October of 2016. It is 1.55 million square kilometers in size, about twice the size of the State of Texas.

3. International Fisheries Management Agreements

The United States deposited its instrument of ratification for the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean with New Zealand as depositary on January 19, 2017. In accordance with paragraph 3 of Article 38 of the Convention, it entered into force for the United States thirty days later on February 18, 2017. The United States announced the completion of the necessary steps for ratification at the 5th South Pacific Regional Fisheries Management Organization ("SPRFMO") Commission Meeting, held in Adelaide, Australia, from January 18-22, 2017. See February 18, 2017 press release of the SPRFMO, available at <https://www.sprfmo.int/new-meetingpage-News/archive-news/usa-ratifies-the-sprfmo-convention/>.

The United States also deposited its instrument of ratification for the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean with the Republic of Korea as depositary on January 19, 2017. In accordance with paragraph 3 of Article 25 of the Convention, it entered into force for the United States thirty days later on February 18, 2017. See NPFC press release, available at <https://www.npfc.int/news/usa-becomes-full-member-npfc>.

Also on January 19, 2017, the United States deposited its instrument of ratification for the amendments to the Convention on Cooperation in the Northwest Atlantic Fisheries, signed on October 24, 1978 in Ottawa, depositing its instrument of ratification with Canada as depositary. These amendments are intended to modernize management practices and improve the decision-making process of the Northwest Atlantic Fisheries Organization ("NAFO") and institute a formal dispute settlement mechanism. See NAFO website, governance page, at <https://www.nafo.int/Home/NAFO-Governance>. See also *Digest 2014* at 564-65

regarding Senate advice and consent to ratification of the amendments to the NAFO Convention.

4. Marine Pollution

Oil spills and marine pollution agreement with Cuba

On January 9, 2017, the United States and Cuba signed a bilateral agreement to prepare for and respond to oil spills and hazardous substance pollution in the Gulf of Mexico and the Straits of Florida. See January 9, 2017 State Department media note, available at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266726.htm>. See also U.S. Embassy in Cuba media note, available at <https://cu.usembassy.gov/united-states-cuba-sign-bilateral-oil-spill-preparedness-response-agreement/>. The agreement provides for cooperation and coordination to prevent, contain, and clean up oil and other hazardous pollution in order to minimize adverse effects to public health and safety and the marine and coastal environment. The agreement is available at <https://www.state.gov/s/l/c8183.htm>. Chargé d’Affaires of the U.S. Embassy in Havana Jeffrey DeLaurentis signed the agreement on behalf of the United States. Vice Minister Eduardo Rodríguez Dávila of the Ministry of Transportation signed for the Republic of Cuba. Ambassador DeLaurentis’s remarks at the signing are excerpted below and available at <https://cu.usembassy.gov/united-states-cuba-sign-bilateral-oil-spill-preparedness-response-agreement/>.

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The United States and Cuba have been working together since the re-establishment of diplomatic relations on a range of cooperative activities related to environmental protection. Today we make another advance in our common effort to protect the marine environment in the Straits of Florida and the Gulf of Mexico.

This bilateral agreement is an acknowledgement of the importance of protecting our marine ecosystems and coastal communities from pollution caused by oil spills and other hazardous substances. Establishing a mutual framework—including diplomatic, legal, and technical aspects—to prevent, prepare for, and respond to oil spills in the marine environment is particularly important for neighbors 90 miles apart.

I congratulate the U.S. and Cuban authorities on this historic achievement. The U.S. Coast Guard and Department of State have developed a strong and professional relationship with their Cuban counterparts. This agreement strengthens that relationship, and helps ensure that our coastlines, marine environments, and communities that depend on maritime commerce will be better protected for future generations.

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5. UN Ocean Conference

On June 7, 2017, Ambassador David Balton, Deputy Assistant Secretary of State for Oceans and Fisheries in the Bureau of Oceans and International Environmental and Scientific Affairs, delivered remarks at the United Nations Ocean Conference to Support the Implementation of Sustainable Development Goal 14. His remarks are excerpted below and available at <https://usun.state.gov/remarks/7832>.

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As we all know, the ocean and its resources play a vital role in global security and prosperity. But our ocean and its resources are under tremendous pressure from a variety of threats—including illegal fishing, marine pollution, and ocean acidification.

The United States views this conference as an important part of the overall global movement to address these threats and to promote the conservation and sustainable management of our ocean for this and future generations.

Of particular importance this week are the Partnership Dialogues. By bringing together all stakeholders to share methods, scientific insight, technological advances, pilot programs, and case studies, these dialogues will help us identify new approaches and innovative solutions.

Such collaborative partnerships and global cooperation are critical to realizing progress, which we have seen first-hand in the areas of fisheries management and combating marine debris.

In the United States, commercial fisheries generate over \$200 billion in sales and income and support 1.4 million jobs. Worldwide, fisheries and aquaculture generate \$148 billion in trade revenue, and support the livelihood of about 12 percent of the world's population.

However, illegal, unreported, and unregulated, or IUU, fishing around the world is jeopardizing international food security and economic growth, and threatening marine ecosystems.

The global value of IUU fishing is in the tens of billions of dollars each year. And illegal fisheries are often intertwined with drug trafficking, labor exploitation, environmental degradation, and organized crime.

To combat IUU fishing, the United States has championed the FAO Port State Measures Agreement, which had its first meeting of the parties just last week.

This agreement will help prevent illegal fishing from undermining valuable fisheries resources and help to level the playing field for legal fishers by keeping fish illegally harvested out of markets.

In 2014, the United States launched the Our Ocean Conference series. In the past three years, these events have generated commitments valued at over \$9.2 billion to protect our ocean and to protect over 9.9 million square kilometers of ocean—an area roughly the size of the United States. We look forward to participating in the next three Our Ocean events, beginning in Malta later this year.

One outgrowth of the Our Ocean Conference is the Safe Ocean Network—a global network of governments, industry, and civil society that is strengthening the global fight against IUU fishing.

We are hopeful that the Partnership Dialogue held this morning on sustainable fisheries, as well as the other six dialogues, will enhance collective efforts like these.

In the United States, this is National Ocean Month, a chance for Americans to reflect on the value and importance of the ocean not only to our security and economy, but also as a source of recreation, enjoyment, and relaxation.

We know everyone in this room understands these values, and the very real challenges that threaten them.

Through collective action and commitment, we can identify and implement the concrete actions needed to protect our ocean, using SDG 14 as our touchstone.

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On June 9, 2017, Ambassador Balton delivered the U.S. explanation of position on the adoption of the UN Ocean Conference outcome document. Ambassador Balton's statement is available at <https://usun.state.gov/remarks/7839>.

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The United States remains committed to working with all stakeholders, within and outside the UN system, to protect our ocean and promote development through its sustainable use. In that spirit, we make the following statements and clarifications with respect to the Call for Action.

The United States joins with other delegations through this legally non-binding Call for Action in emphasizing the need to enhance scientific knowledge and research, which is critically important to support the implementation of Goal 14. The United States reaffirms in this context that the strong protection and enforcement of intellectual property rights provides incentives needed to foster innovation that enables us to address health, environment, and development challenges of today and tomorrow. Therefore, the United States does not support the reference to technology transfer in paragraph 12 and continues to oppose language that we believe undermines intellectual property rights.

The United States disassociates from the language in Paragraph 13(p) that refers to WTO negotiations and special and differential treatment. For the United States, this language will have no standing in future WTO negotiations and does not apply in other forums. As we have stated before, the WTO's independence from the United Nations must be respected, and we continue to believe that the UN must not attempt to speak to ongoing or future work in the WTO, reinterpret existing WTO rules and agreements, or undermine the WTO's independent mandate and processes. Continued attempts to do so at the UN will make it difficult for the United States to join consensus on resolutions and conference documents.

With respect to the reference to the Paris Agreement in paragraph four, the United States notes that, on June 1, our president announced that the United States will withdraw from or renegotiate U.S. participation in the Paris Agreement or another international climate deal.

As we noted at the opening of the conference, the United States views this conference as an important part of the global movement to address threats to the ocean and to promote its conservation and sustainable management for this and future generations. Through our collective commitment to the conservation and sustainable management of the ocean, we can ensure security and economic prosperity.

With these statements and clarifications, the United States joins consensus on the adoption of the Call for Action. Thank you.

* * * *

6. Biodiversity Beyond National Jurisdiction

In 2017, the UN General Assembly convened an intergovernmental conference to elaborate the text of an international legally binding instrument under the UN Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (“BBNJ”). U.S. views regarding such an instrument are discussed in *Digest 2011* at 438-39 and *Digest 2016* at 560-68. On December 5, 2017, Special Advisor for the U.S. Mission to the UN Lloyd Claycomb delivered remarks, excerpted below, and available at <https://usun.state.gov/remarks/8204>, which touched upon the topic of BBNJ, among others.

* * * *

Mr. President, Distinguished Delegates, regarding the General Assembly resolution on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, the United States was pleased to participate in the Preparatory Committee on the Conservation and Sustainable use of Marine Biological Diversity of Areas Beyond National Jurisdiction. In particular, we welcomed discussions on marine protection and environmental impact assessments, and how a possible new treaty could be used to conserve and sustainably use marine biodiversity.

While we were pleased with the Preparatory Committee discussions, we were disappointed with its outcome. In particular, we were disappointed that the Preparatory Committee process did not enable delegations to negotiate consensus-based elements of a draft text of a new instrument, as the General Assembly had mandated it to do.

The issues before us are difficult and complex. Without a consensus-based starting point, my delegation is concerned that we will be unable to find a path forward, and that rather than reach an outcome that can be supported by all, instead we will have a controversial result that is not in keeping with the balance that was so carefully achieved in the Law of the Sea Convention.

For this reason, we strongly believe that the Intergovernmental Conference should operate by consensus. We believe this is the best way to find effective and lasting solutions on BBNJ that will be supported by the most States.

Unfortunately, the draft resolution before us does not mandate decision-making by consensus. And for that reason, we are unable to support it. However, we will not block consensus.

My delegation remains hopeful that we can make progress toward our shared goal of conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction and urges all States to continue to work on the basis of consensus as the best path to a meaningful and lasting new agreement.

* * * *

7. 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 1, 2017, the Department of State certified 39 nations and one economy as having adequate measures in place to protect sea turtles during the course of commercial shrimp fishing, permitting those countries to export wild-caught shrimp to the United States under Section 609 of Public Law 101-162 (Section 609). See May 8, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/05/270708.htm>. As elaborated in the media note:

Section 609 prohibits the importation of wild-caught shrimp and products from shrimp harvested in ways that may adversely affect sea turtles unless the Department of State certifies to Congress that the government of the harvesting nation or economy has adopted a regulatory program comparable to that of the United States to reduce the incidental taking of sea turtles in its shrimp trawl fisheries, such as through the use of turtle excluder devices (“TEDs”) or that the particular fishing environment of the harvesting nation or economy does not threaten sea turtles. The Department makes certifications annually and bases them in part on the results of overseas verification visits by a team composed of State Department and National Marine Fisheries Service representatives. ...

Six of the world’s seven species of marine turtles are listed as endangered or threatened under the Endangered Species Act. The seventh species is not found in U.S. waters. Implementation of Section 609 provides considerable benefits to sea turtles species. If properly designed, built, installed, used, and maintained, TEDs allow 97 percent of sea turtles to escape the shrimp net without appreciable loss of shrimp. The United States government is currently providing technology and capacity-building assistance to other nations in the hope they can contribute to the recovery of sea turtle species and be certified under Section 609, and is encouraging enactment by other countries of similar legislation to prevent the importation of shrimp harvested in a manner harmful to protected sea turtles. ...

See also 82 Fed. Reg. 21,295 (May 5, 2017); and information on United States government sea turtle conservation efforts, available at <https://www.state.gov/e/oes/ocns/fish/seaturtles/index.htm> or <http://www.nmfs.noaa.gov/>

[pr/species/turtles/](#).

C. OTHER CONSERVATION ISSUES

1. Wildlife Trafficking

On November 16, 2017, the State Department issued its report to Congress in accordance with the Eliminate, Neutralize, and Disrupt (“END”) Wildlife Trafficking Act (P.L. 114-231). The Act requires the Secretary of State, in consultation with the Secretary of the Interior and the Secretary of Commerce, to report on “focus countries” and “countries of concern.” The report is available at <https://www.state.gov/e/oes/rls/rpts/275703.htm> and excerpted below.

* * * *

The Task Force on Wildlife Trafficking (Task Force), co-chaired by the Secretary of State, the Secretary of the Interior, and the Attorney General, brings together 17 federal departments and agencies to implement the National Strategy for Combating Wildlife Trafficking (the “National Strategy”). In that implementation, the U.S. government is combating this illicit trade by targeting three strategic priorities: (1) strengthening enforcement; (2) reducing demand for illegally traded wildlife; and, (3) building international cooperation.

The Task Force’s work to combat wildlife trafficking is making a difference on the ground at home and worldwide. Task Force efforts and activities are better coordinated across the U.S. government; efficiencies are being identified and exploited, redundancies eliminated, and resources used more strategically; our international outreach continues to expand; and improved coordination with the intelligence community has spotlighted new areas of work. Working in partnership with the private sector, local communities, and non-governmental organizations, the United States has led the way globally, securing agreements and commitments from governments and stakeholders at all levels to take urgent action. Highlights of Task Force efforts are included in the separate Strategic Review, as called for in Sec. 301(d) of the END Wildlife Trafficking Act.

* * * *

Focus Countries

Methodology for Determining Focus Countries

The Department of State worked closely with the other agencies of the Task Force to develop and employ a qualitative and quantitative process for identifying focus countries and countries of concern, as defined in Section 2 of the Act. Technical experts and scientists from Task Force agencies began this effort by establishing a process to analyze wildlife trafficking information and subsequently obtaining a set of relevant and available data. This analysis included evaluation of data drawn from public reporting by U.S. government agencies; international entities such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the International Union for the Conservation of Nature (IUCN), and the UN Office of Drugs and Crime (UNODC); and non-government organizations (NGOs)

such as the Center for Advanced Defense Studies (C4ADS), TRAFFIC, the Environmental Investigation Agency (EIA), and Transparency International.

Based on the analysis of interagency experts, the input from outside experts, and the availability, quality, and consistency of data, the Task Force employed the following process to identify focus countries:

Range States: The Task Force used information from IUCN, CITES, the Endangered Species Act, and seizures reported to CITES to generate a list of wildlife species that are of high conservation concern and are known to be illegally traded based on seizure data as reported to CITES. Experts then used the IUCN Red List and other sources to determine the range states for biologically significant populations of these species.

Seizure Data: The Task Force compiled seizures of trafficked wildlife reported by the U.S. government since 2011, and added seizures that other countries reported to the CITES Secretariat. The seizures were analyzed in a manner that scored countries for being the source country for a seizure (and in some cases the transit or final destination if this information was known), but excluded from scoring the countries that successfully made the seizure.

The Task Force considered both seizures of illegal wildlife and wildlife products, as well as a secondary analysis of only those species identified in the range analysis, with countries being scored based on whichever analysis caused them to be ranked highest.

Recognizing that seizure data only capture a small but unknown percentage of all illegal wildlife trade and that much of that trade may not transit through a country with a strong customs enforcement system, the Task Force then considered additional data available for several key species.

Species Specific Data: The Task Force utilized the rankings listed in the 2016 CITES Elephant Trade Information System (ETIS) report of countries that plays a significant role as a supplier, transit, or consumer country. The Task Force also considered trade and market analyses conducted by NGOs for rhinos, reptiles, birds, and pangolins, as the most trafficked species.

Risk and Enabling Criteria: The Task Force further considered risk and enabling criteria, including Transparency International's Perceptions of Corruption Index; countries that are currently subject to CITES trade suspensions; and a Department of State analysis of the global transportation network that sought to identify key nodes and chokepoints for illegal wildlife trade.

Country-Specific Analysis: The above data sets were scored in a weighted manner, which led to a list of countries where further country-specific analysis was needed. Factors such as range states, seizures, and species-specific criteria were weighted more heavily than additional risk and enabling factors.

Task Force agencies, including those at U.S. overseas missions, reviewed the initial analysis and provided additional information that was often only available locally. These country-specific analyses helped to round out the global data, including by providing information on additional species such as felines, primates, and marine species. Agencies also considered the trajectory of wildlife populations and trafficking's impact on that trajectory, government and private sector efforts to prevent illegal trade, and the presence of legal or poorly regulated domestic markets for species threatened by wildlife trafficking.

The Task Force further evaluated whether governments have recently taken steps to improve legislation, regulations, and/or enforcement and other trends such that the country is stepping up its efforts to combat the illegal trade in wildlife.

2017 Focus Countries

Using the methodology described above, the Department of State, in consultation with the Departments of the Interior and Commerce as well as other agencies of the Task Force, determined the following countries should be listed as focus countries pursuant to Section 201(a) of the Act. In other words, each country listed is a “major source of wildlife trafficking products or their derivatives, a major transit point of wildlife trafficking products or their derivatives, or a major consumer of wildlife trafficking products.”

This determination is based on our analysis of the statutory criteria and does not reflect a positive or negative judgment of the listed countries or indicate that these countries are not working diligently to combat wildlife trafficking. Indeed, the United States has longstanding and deep partnerships with many of these countries with respect to combating wildlife trafficking and recognizes the strong political will that already exists in many of these countries to tackle this problem. The Department of State and other Task Force agencies look forward to continuing close and constructive relationships with these countries as we work collaboratively to combat wildlife trafficking.

2017 Focus Country List (in alphabetical order)

Bangladesh, Brazil, Burma, Cambodia, Cameroon, China, Democratic Republic of the Congo, Gabon, India, Indonesia, Kenya, Laos, Madagascar, Malaysia, Mexico, Mozambique, Nigeria, Philippines, Republic of the Congo, South Africa, Tanzania, Thailand, Togo, Uganda, United Arab Emirates, Vietnam.

Countries of Concern

Methodology for Identifying Countries of Concern

To identify countries of concern as directed by Section 201 (b) of the Act, the Department of State, in consultation with the Departments of the Interior and Commerce and other agencies of the Task Force, reviewed publicly available information as well as classified material that indicated the following governments actively engaged in or knowingly profited from the trafficking of endangered or threatened species. This designation does not indicate all parts of the government are or have been involved, but rather that there are serious concerns that either high-level or systemic government involvement in wildlife trafficking has occurred.

2017 Countries of Concern (in alphabetical order)

Democratic Republic of Congo, Laos, Madagascar.

* * * *

2. U.S.-Mexico Water Treaty

See *Digest 2012* at 444-45 regarding Minute 319 to the 1944 Treaty Concerning the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande (Feb. 3, 1944, U.S.-Mex., 59 Stat. 1219, T.S. 994) (“1944 Water Treaty”). By its terms, Minute 319 had a five-year duration through December 31, 2017. Minute 319 contemplated the possibility of a successor minute that could extend or replace its substantive provisions.

On September 21, 2017, the United States and Mexico, through the binational International Boundary and Water Commission (“IBWC”), signed Minute No. 323 to the 1944 Water Treaty, outlining joint measures that build on those agreed in Minute 319, providing for reductions in water deliveries during low-reservoir conditions (shortages), and increases in deliveries during high-reservoir conditions (wet periods). Minute 323 allows Mexico to defer delivery of a portion of its Colorado River allotment to create a

“Water Reserve,” subject to certain limitations, such as restrictions on delivery during low elevation reservoir conditions. Minute 323 expands cooperative efforts among the Governments of the United State and Mexico and nongovernmental organizations for environmental monitoring and habitat restoration. Minute 323 also establishes a “Binational Water Scarcity Contingency Plan,” to reduce the risks of the Lake Mead reservoir reaching critical levels. The Binational Water Scarcity Contingency Plan will only go into effect if a U.S. lower Basin Drought Contingency Plan is put into effect among the U.S. states of Arizona, California and Nevada. Minute 323 is available at <https://www.state.gov/s/l/c8183.htm>.

Cross references

Observer status in the UN General Assembly (Ramsar Convention on Wetlands), Ch. 7.A.8.

ILC work of its 69th session on protection of the atmosphere, Ch. 7.C.1.

Work of the ILC on protection of the environment in relation to armed conflicts, Ch. 7.C.1.

CHAPTER 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2017, the United States extended four international agreements and imposed emergency import restrictions for one country 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, in accordance with the Convention on Cultural Property Implementation Act (“CPIA”), which implements parts of the Convention. Pub. L. 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 and/or ethnological material of a nation, whose government has requested such protections and which has ratified, accepted, or acceded to the Convention. Accordingly, the United States took steps in 2017 to protect the cultural property of Peru, Cyprus, Mali, and Guatemala by extending existing memoranda of understanding (“MOUs”) with these countries, and corresponding import restrictions on certain archaeological and/or ecclesiastical ethnological material from these countries.

Additionally, 19 U.S.C. § 2603(b) provides the President the authority to apply import restrictions on a temporary basis, under certain conditions, where an “emergency condition” pertains. The United States imposed emergency import restrictions on certain archaeological and ethnological materials from Libya in 2017.

1. Peru

Effective June 9, 2017, the MOU Between the Government of the United States of America and the Government of the Republic of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru, signed in June 1997, was amended and extended for another five-year period. The text of the MOU is available at <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/peru>. The 1997 MOU with Peru was last extended in

2012. See *Digest 2012* at 446-47. The MOU was amended and extended in 2007 and 2002. See *Digest 2007* at 741-42. The Department of Homeland Security, U.S. Customs and Border Protection (“CBP”), and the Department of the Treasury extended the import restrictions imposed previously with respect to certain archaeological and ethnological materials from Peru. 82 Fed. Reg. 26,340 (June 7, 2017). The Designated List was also amended in 2017 to include Colonial Period documents and manuscripts. *Id.*

2. Cyprus

Effective July 14, 2017, the United States and Cyprus extended for five years their MOU Concerning the Imposition of Import Restrictions on Pre-Classical and Classical archaeological objects, and Byzantine and post-Byzantine ecclesiastical and ritual ethnological materials from Cyprus. The restrictions, which were originally imposed as an emergency measure in 1999 and pursuant to the original MOU in 2002, were last extended in 2012. See *Digest 2012* at 447. The United States and Cyprus previously amended and extended the MOU in 2006 and 2007. See *Digest 2002* at 814-15, *Digest 2006* at 899-901, and *Digest 2007* at 741. The 2017 extension was concluded via exchange of diplomatic notes. The text of the MOU and related documents are available at <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/cyprus>. The Federal Register notice announcing the extension of import restrictions for five years also includes the Designated List. 82 Fed. Reg. 32,452 (July 14, 2017).

3. Mali

Effective September 19, 2017, the United States and Mali amended and extended for five years their MOU Concerning the Imposition of Import Restrictions on Archaeological Material from Mali from the Paleolithic Era (Stone Age) to Approximately the Mid-Eighteenth Century. The United States and Mali entered into their first MOU concerning import restrictions on these materials in 1997 and extended and amended it in 2002 and 2007. See *Digest 2007* at 740-41. The MOU was amended and extended most recently in 2012. See *Digest 2012* at 447-48. The text of the 2017 amended and extended agreement is available at <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/mali>. CBP and the Department of the Treasury further extended the import restrictions imposed previously with respect to Mali. 82 Fed. Reg. 43,692 (Sep. 19, 2017).

4. Guatemala

Effective September 29, 2017, the United States and Guatemala extended for five years their Memorandum of Understanding (“MOU”) Concerning the Imposition of Import Restrictions on Archaeological Objects and Materials from the Pre-Columbian Cultures of Guatemala. The United States entered into the original bilateral agreement with

Guatemala concerning the imposition of import restrictions on archaeological materials from the Pre-Columbian cultures of Guatemala in 1997 and extended it in 2002 and 2007, and amended and extended it in 2012. See *Digest 2012* at 448. The text of the MOU is available at <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/guatemala>. Diplomatic notes were exchanged in 2017 in order to extend the agreement for another five years. CBP and Treasury further extended the import restrictions imposed previously with respect to certain archaeological materials from Guatemala. 82 Fed. Reg. 45,178 (Sep. 28, 2017).

5. Libya

The Government of Libya made a request to the Government of the United States under Article 9 of the 1970 UNESCO Convention, received by the State Department on May 30, 2017, seeking U.S. import restrictions on archaeological and/or ethnological materials representing Libya's cultural patrimony from the prehistoric through Ottoman Era. Notification of the request was published in the Federal Register on June 16, 2017. 82 Fed. Reg. 27,755 (June 16, 2017). Effective December 5, 2017, the United States imposed emergency import restrictions on certain archaeological and ethnological materials from Libya. 82 Fed. Reg. 57,346 (Dec. 5, 2017).^{*} Excerpts follow from the Federal Register notice of the imposition of import restrictions:

On September 22, 2017, the Acting Under Secretary for Public Diplomacy and Public Affairs, acting pursuant to delegated authority, made the determinations necessary under the [CPIA] for the emergency implementation of import restrictions on categories of archaeological and ethnological material from Libya. The Designated List below sets forth the categories of material that the import restrictions apply to. Thus, CBP is amending 19 CFR 12.104g(b) accordingly.

Importation of covered materials from Libya will be restricted for a five-year period until May 30, 2022. Importation of such materials from Libya continues to be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

...The Designated List covers archaeological material of Libya and Ottoman ethnological material of Libya (as defined in section 302 of the Convention on Cultural Property Implementation Act (19 U.S.C. 2601)), The archaeological materials represent the following periods and cultures: Paleolithic, Neolithic, Punic, Greek, Roman, Byzantine, Islamic and Ottoman dating approximately 12,000 B.C. to 1750 A.D. The ethnological materials represent categories of Ottoman objects derived from sites of religious and cultural importance made from 1551 A.D. through 1911 A.D.

^{*} Editor's note: On February 23, 2018, the United States and Libya concluded an MOU concerning the imposition of import restrictions on categories of archaeological and ethnological materials of Libya.

B. CULTURAL PROPERTY: LITIGATION**1. *United States v. Three Knife Shaped Coins***

In *United States v. Three Knife Shaped Coins*, No. 13-1183 (D. Md.), the district court granted the U.S. motion for summary judgment as to 15 coins in dispute and granted the motion for summary judgment by the Ancient Coin Collectors Guild (the “Guild”) as to seven coins the United States had agreed to return. The court issued its opinion on March 31, 2017. Excerpts follow from the opinion (with footnotes omitted). The Guild has appealed.

* * * *

In 1970, the United States became a signatory to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the “Convention”). Nov. 14, 1970, 823 U.N.T.S. 231. The purpose of the Convention was to protect cultural property from “the dangers of theft, clandestine excavation, and illicit export.” *Id.* pmbl. The Convention defines the term “cultural property” to mean “property which...is specifically designated by each State as being of importance for archaeology, pre-history, history, literature, art or science.” *Id.* art. 1. Under Article 9 of the Convention, any signatory to the Convention (“State Party”) can request that another State Party take measures to protect its cultural property “from pillage,” including by imposing import and export controls. *Id.* art. 9.

Congress enacted the CPIA to implement the Convention, which was not self-executing. Convention on Cultural Property Implementation Act, Pub. L. 97-446, tit. III, 96 Stat. 2350 (1983) (codified at 19 U.S.C. §§ 2601-2613). The CPIA authorizes the president to impose import restrictions on certain items of cultural property at the request of a State Party. 19 U.S.C. § 2602. When a State Party makes a request, the president must “publish notification of the request...in the Federal Register” and submit information regarding the request to the Cultural Property Advisory Committee (“CPAC”). *Id.* § 2602(f). CPAC is an 11-person committee, appointed by the president, whose members include “experts in the fields of archaeology, anthropology, ethnology, or related areas”; “experts in the international sale of archaeological, ethnological, and other cultural property”; representatives of the interests of museums; and representatives of “the interest of the general public.” *Id.* § 2605(b)(1).

After CPAC receives notice of a request from the president, it is responsible for conducting an investigation and review to determine whether import restrictions are warranted. *Id.* § 2605(f)(1); see *id.* § 2602(a)(1). CPAC then issues a report to Congress and the president that contains the results of this investigation and review, along with certain other findings and its recommendation regarding whether the United States should enter into an agreement or memorandum of understanding to implement Article 9 (“Article 9 agreement”) with the State Party. *Id.* § 2605(f)(1). When CPAC recommends entering into an Article 9 agreement, its report also sets forth the types of material that should be covered. *Id.* § 2605(f)(4). After receiving this report, the president determines whether to enter into such an agreement. *Id.* §§ 2602(a),(f). The existence of an Article 9 agreement is a prerequisite to the imposition of import restrictions under the CPIA. See *id.* § 2604.

The United States has Article 9 agreements with both Cyprus and China. It entered into an agreement with Cyprus in 2002, ... following a period of emergency import restrictions This agreement was amended in 2006, ... and extended in 2007.... After the 2007 extension, CBP promulgated an amended list of material subject to the import restrictions (“designated list”). ...

The United States and China entered into an Article 9 agreement in January 2009. CBP then promulgated a list of articles subject to CPIA restrictions ...

In April 2009, the Guild purchased 23 ancient Chinese and Cypriot coins from Spink, a numismatic dealer in London. ... According to the Spink invoice, each coin was minted in Cyprus or China, had “[n]o recorded provenance,” and had a “[f]ind spot” that was “unknown.” (*Id.*) Pursuant to the parties’ stipulation, the Chinese coins are numbered 1-15, and the Cypriot coins are numbered 16-22. ...

Later that month, the Guild imported the coins to the United States via a commercial flight from London to Baltimore. ... CBP detained the property at the time of entry for alleged violations of the CPIA and its implementing regulations. ...

After months passed without the initiation of forfeiture proceedings, the Guild brought an action against, inter alia, the U.S. Department of State and CBP. ... The government filed a motion to dismiss, which this court granted. ...

The Guild appealed, and the Fourth Circuit affirmed in October 2012. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, 698 F.3d 171, 175 (4th Cir. 2012) (“Fourth Circuit opinion”). As relevant here, the Fourth Circuit held that the State Department and CBP had not “acted ultra vires by placing import restrictions on all coins of certain types without demonstrating that all coins of those types were ‘first discovered within’ China or Cyprus.” *Id.* at 181-82. ... The Guild filed a petition for certiorari with the Supreme Court, which was denied. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection Agency*, 133 S. Ct. 1645 (2013).

The government initiated this forfeiture action on April 22, 2013, ... and the Guild filed a claim of interest in the defendant property, (Claim for Property, ECF No. 3). This court issued memorandum opinions on June 3, 2014, (ECF Nos. 22-23) (“June 3rd decision”) and February 11, 2016, (ECF No. 63) (“February 11th decision”). Those opinions clarified the scope of the litigation and made various preliminary rulings.

In the June 3rd decision, which granted the government’s motion to strike the Guild’s answer, the court observed that, “it is abundantly clear that [the Guild] seeks to expand the scope of this forfeiture action well beyond the limits set by the Fourth Circuit in its controlling opinion.” (Memorandum of June 3, 2014, at 1.) It clarified that “[t]he Fourth Circuit’s opinion forecloses any further challenge to the validity of the regulations.” *Id.* Quoting from dicta in the Fourth Circuit opinion, the court identified the following burden-shifting framework as applicable in CPIA forfeiture proceedings:

Under the CPIA, the government bears the initial burden in forfeiture of establishing that the coins have been “listed in accordance with section 2604,” 19 U.S.C. § 2610, which is to say that they have been listed “by type or other appropriate classification” in a manner that gives “fair notice ... to importers,” *id.* § 2604. If the government meets its burden, the Guild must then demonstrate that its coins are not subject to forfeiture in order to prevail. See *id.* § 1615.

(*Id.* (quoting *Ancient Coin Collectors Guild*, 698 F.3d at 185).)

The court explained that the importer bears the burden to show that

the article in question was either (1) lawfully exported from its respective state while CPIA restrictions were in effect; (2) exported from its respective state more than ten years before it arrived in the United States; or (3) exported from its respective state before CPIA restrictions went into effect.

(Memorandum of June 3, 2014, at 1-2 (quoting *Ancient Coin Collectors Guild*, 698 F.3d at 183).)

* * * *

Regarding coins 1-6, 12-13, and 16-22, the court finds that the government has satisfied its initial burden to show that the coins are of restricted types. Indeed, the Guild admitted in response to the government's request for admissions that coins 1-6 and 12-13 are of types that appear on the designated list for coins from China and that coins 16-22 are of types that appear on the designated list for coins of Cypriot type. ...

Regarding coins 7-11 and 14-15, the Guild contends that, "the government has failed to establish its minimal burden to show that certain Chinese coins have been restricted at all." ... The Guild did not concede in response to the government's request for admissions that these particular coins are of types that appear on the designated list for China. Rather, it stated that it was "unable to admit or deny whether [the coins] are of types that appear on the Chinese designated list" because it "ha[d] no working knowledge of the Chinese language." ... The court agrees that the relevant documents, including the Spink invoice, are insufficient to establish that coins 7-11 and 14-15 are of types that appear on the Chinese designated list. Because the government has not produced a Chinese language expert or provided any other evidence showing that the coins are of restricted types, the court finds that the government has failed to satisfy its initial burden regarding coins 7-11 and 14-15.

* * * *

... [T]he government asserts that it is in the process of returning the coins to the Guild and that the Guild's arguments with respect to those coins "will soon be moot."

* * * *

As discussed above, the government has made out a prima facie case with respect to coins 1-6, 12-13, and 16-22. The burden therefore shifts to the Guild ...

The CPIA places the burden on the importer to provide specific documentation, either at the time of entry or during the 90-day period following the customs officer's refusal to release the material, showing that designated archaeological material is "eligible for import" to the United States. *Ancient Coin Collectors Guild*, 698 F.3d at 182 (citing 19 U.S.C. § 2606).

* * * *

The Guild has admitted that it cannot provide the documentation specified in § 2606. (Mot. Prot. Order, Ex. 4, ECF No. 48-5 (May 27, 2009, letter from Peter Tompa).) Instead, in order to satisfy its burden, it relies on the expert testimony ...

The parties dispute whether the Guild may rely on scholarly evidence to rebut the government's prima facie case. ...

The court's previous rulings do not resolve this dispute. ...

Here, it is not necessary for the court to comprehensively delimit the boundaries of these competing provisions because the government is entitled to judgment as a matter of law regardless of which evidentiary standard applies. If claimants in CPIA forfeiture actions are limited to the forms of documentation specified in § 2606, the Guild—which has conceded that it cannot provide such documentation—has failed to satisfy its burden to rebut the government's prima facie case. If, on the other hand, § 1615 permits courts to consider scholarly evidence, the court still must look to the substantive law to determine whether the proffered expert testimony establishes the Guild's entitlement to summary judgment or raises a disputed issue of material fact. Neither [of the Guild's experts'] testimony supports the Guild's claims.

* * * *

In summary, even if 19 U.S.C. § 1615 provides the applicable evidentiary standard and authorizes the Guild to rely on scholarly evidence, that scholarly evidence must be particularized to the coins at issue and either establish that the Guild is entitled to judgment as a matter of law or raise a disputed issue of material fact. The [experts'] testimony regarding the Chinese coins [is] insufficiently particularized, and the [expert] testimony regarding both the Cypriot and Chinese coins fails as a matter of law. The Guild has provided no other evidence or argument that “establish[es], by a preponderance of the evidence, that the property is not subject to forfeiture, or ... establish[es] an applicable affirmative defense.” See *Peruvian Oil*, 597 F. Supp. 2d at 623. Accordingly, the government is entitled to summary judgment as to coins 1-6, 12-13, and 16-22. See *id.*

* * * *

2. *United States v. Twenty-nine Artifacts from Peru*

In a June 2, 2017 opinion, the U.S. Court of Appeals for the Eleventh Circuit affirmed a decision of the district court in 2015 ordering the forfeiture of artifacts CBP had confiscated from Jean Combe-Fritz when he arrived in Miami from Peru. *United States (Plaintiff-Appellee) v. Twenty-nine Pre-Columbian and Colonial Artifacts from Peru, et al. (Defendants), Jean Combe-Fritz (Claimant-Appellant)*. 695 Fed.Appx. 461 (2017). CBP seized the artifacts pursuant to both the CPIA and 19 U.S.C. § 1595a(c), which restricts the importation of items “contrary to law.” The Court of Appeals affirmed that subject matter jurisdiction lies with the district court rather than the Court of International Trade, and that the district court had not abused its discretion in striking and dismissing Combe-Fritz's claims of interest in light of his willful violation of a specific court discovery order. Excerpts follow from the opinion.

* * * *

Mr. Combe-Fritz raises a host of complaints regarding the district court's rulings. As an initial matter, Mr. Combe-Fritz contends that the district court lacked subject matter jurisdiction over the action in its entirety because exclusive jurisdiction lay with the CIT. Additionally, Mr. Combe-Fritz raises challenges to both CBP's procedures and the district court's conduct of the forfeiture litigation—including the striking of his claims of interest, which resulted in the ultimate judgment of forfeiture. We discuss these issues in turn.

A. Subject Matter Jurisdiction

We are obligated to consider, as a threshold inquiry, whether subject matter jurisdiction properly lay with the district court. ...

As a general rule, the federal district courts possess original jurisdiction over forfeiture proceedings, "except matters within the jurisdiction of the [CIT] under section 1582 of this title." 28 U.S.C. § 1355(a). Mr. Combe-Fritz contends that the CIT possessed exclusive jurisdiction over the CPIA-based forfeiture, not as a result of § 1582 but, rather, according to § 1581. Under 28 U.S.C. § 1581(i), the CIT "shall have exclusive jurisdiction of any civil action commenced against the United States ... that arises out of any law of the United States providing for ... (3) embargoes or other quantitative restrictions on the importation of merchandise; or (4) administration and enforcement" of such an embargo or quantitative restriction. 28 U.S.C. § 1581(i)(3), (4) (emphasis added). Mr. Combe-Fritz argues that the CPIA effectively creates an embargo by restricting the importation into the United States of certain foreign goods.

We need not reach the question of whether the CPIA in fact creates an embargo as recognized by § 1581(i)(3) because we agree with the district court that the government's in rem forfeiture action cannot be characterized as a "civil action commenced against the United States," a necessary precondition under the statute. 28 U.S.C. § 1581(i). Regardless of his belief that it is legal fiction to label the twenty-nine items seized under the CPIA as "guilty property," Mr. Combe-Fritz cannot overcome the plain fact that the instant forfeiture proceedings were commenced by the United States, against the defendant property. ...

Therefore, the general rule that district courts have original jurisdiction over forfeiture proceedings brought by the government is properly applied in this case.

B. Rule 37 Sanctions

District courts have broad authority and discretion to fashion sanctions against parties who fail to engage in discovery (e.g., a party's failure to attend its own deposition) or otherwise disobey court orders. See Fed. R. Civ. P. 37(b), (d). Such sanctions include "striking pleadings in whole or in part" or "rendering a default judgment against the disobedient party." Fed. R. Civ. P. 37(b)(2)(A)...

Based on the procedural history ..., we cannot say that the district court abused its discretion in striking and dismissing Mr. Combe-Fritz's claims of interest. ... The facts show that, over the course of more than a year, Mr. Combe-Fritz consistently shirked his obligation to appear for his deposition, depriving the government of a meaningful opportunity to explore his claims of interest. Despite having both the government's assurances that there was no federal criminal investigation pending against him and a limited protective order from the magistrate judge, Mr. Combe-Fritz continued to cite hypothetical self-incrimination concerns as his only reason for not appearing. This was unavailing.

In addition to attempts to accommodate Mr. Combe-Fritz's Fifth Amendment concerns, the district court and magistrate judge repeatedly gave Mr. Combe-Fritz chances to avoid dismissal, exhausting other, less severe sanctions. In response to the government's motion in limine and motion for sanctions, the magistrate judge ordered that "[Mr. Combe-Fritz] must appear for his deposition within ten days of this Order, or he will be excluded from testifying at trial." The threat of this lesser sanction was not sufficient, and Mr. Combe-Fritz ignored it. Then, following its order to show cause why the court should not strike Mr. Combe-Fritz's claims of interest, the district court issued an order compelling his deposition within thirty days, providing him a final opportunity to cure his discovery misconduct. Following well-established law, the district court specifically explained that Mr. Combe-Fritz could not rely on his Fifth Amendment concerns, even if legitimate, to avoid being deposed. ... And the district court warned that, should Mr. Combe-Fritz fail to appear within thirty days, "it may be grounds for dismissal of his claim."

As we have already noted, Mr. Combe-Fritz did not sit for his deposition within the thirty-day deadline. Instead he chose to file a motion for reconsideration, in which he again asserted an improper "blanket refusal" to sit in light of his self-incrimination concerns and argued that requiring his deposition would be a "waste of judicial resources." Consequently, the district court determined that, "[w]hile the issue of whether [Mr. Combe-Fritz] had actually violated a specific Court discovery order may have been at one time 'at least slightly, ambiguous,' that is no longer the case. Claimant has willfully violated the Court's Order to Compel and is solely at fault for the violation."

* * * *

Moreover, because the district court acted within its discretion in striking Mr. Combe-Fritz's claims, we need not address Mr. Combe-Fritz's remaining challenges, both to CBP's procedures and to the district court's numerous other rulings. ...

The district court's entry of final judgment of forfeiture in the consolidated forfeiture action is therefore affirmed.

* * * *

C. G7 AND UN ACTIONS

1. G7 Ministerial on Culture

The ministers of culture and cultural authorities of the G7 met in Florence in March 2017 for the first such meeting, themed "Culture as an Instrument for Dialogue among Peoples." The Joint Declaration of the ministerial is excerpted below. The Declaration was signed by government representatives of Canada, France, the United States, the United Kingdom, Germany, Japan, and Italy.

* * * *

Mindful of the importance of concerted international action in the field of the protection of cultural heritage and, in this framework, commending the recent approval by the UN Security Council of its Resolution 2347 (2017);

Taking note of the Milan Declaration adopted on July 31, 2015, during the meeting of the Ministers of Culture of the countries participating in Expo 2015, and of the Abu Dhabi Declaration made during the Conference on Safeguarding Endangered Cultural Heritage on December 2-3, 2016;

We reaffirm our belief that cultural heritage, in all its forms, tangible and intangible, movable and immovable, being an extraordinary link between past, present and future of mankind:

a) contributes to the preservation of identity and memory of mankind and encourages dialogue and cultural exchanges among nations, thereby fostering tolerance, mutual understanding, recognition and respect for diversity;

b) is an important tool for the growth and sustainable development of our societies, also in terms of economic prosperity; and

c) is both a driver and a subject of the most advanced technologies and a context for measuring the potentials and opportunities generated by the digital era;

We express our deep concern at the ever-increasing risk, arising not only from terrorist attacks, armed conflicts and natural disasters but also from raids, looting and other crimes committed on a global scale, to cultural heritage and all related institutions and properties, such as museums, monuments, archaeological sites, archives and libraries;

We express our deep concern about the destruction of cultural heritage sites, as such actions obliterate irreplaceable patrimony, extinguish the identity of targeted communities and erase any evidence of past diversity or religious pluralism;

We affirm the need to promote effective implementation of existing international legal instruments for protection of the world's cultural heritage;

We further call upon all States to take steps to increase their safeguarding and preservation of cultural heritage, including the heritage of religious and ethnic minorities, as well as to identify and share appropriate best practices for fighting every form of illegal activity in this field, including those concerning the protection of endangered cultural heritage in conflict zones;

We also affirm that effective international cooperation facilitates widely accepted solutions for assuring the protection and promotion of cultural heritage and cultural diversity;

We call upon the United Nations, in particular UNESCO and other relevant International Organizations working in this field, to strengthen their activities, within their existing mandates, for the protection of cultural heritage and to continue these activities in a coordinated way, including initiatives undertaken within the United Nations, mindful of the above mentioned UN Security Council Resolution 2347 (2017), that may encompass, where appropriate and on a case-by-case basis, when authorized by the UN Security Council, a cultural heritage protection component in security and peacekeeping missions;

We express our strong support for UNESCO's role in promoting the protection and preservation of cultural heritage, aware that cooperation and dialogue are vital to all efforts in countering violent extremism and radicalization to violence; in this regard, we welcome relevant measures already taken, such as the "Unite4Heritage" campaign, and take note of the Strategy for Reinforcing UNESCO's Action for the Protection of Culture and the Promotion of Cultural

Pluralism in the Event of Armed Conflict and the drawing up of a Plan of Action to make it operational;

We affirm the leadership role of UNESCO in coordination of international efforts within its mandate to protect cultural heritage, working closely with Member States and relevant international organizations;

We call upon all States to take strong and effective measures to combat the looting and trafficking in cultural property from their places of origin, particularly from countries experiencing conflict and internal strife, and to identify and prohibit the trade in looted cultural property that has been trafficked across borders and, as appropriate, to reinforce the monitoring of free ports and free trade zones; we also affirm that closer cooperation and determined action among international judicial and law enforcement authorities is a crucial element in our continuing efforts to preserve and protect cultural heritage worldwide;

We encourage all States to prioritize the safeguarding and enjoyment of cultural heritage, including through the promotion of public awareness and education, in order to preserve the memory of the past for future generations, to foster cultural development, and to encourage cultural dialogue and peace among nations;

We welcome the designation of 2018 as the European Year of Cultural Heritage, with the opportunities it will offer for the protection and valorization of the world's cultural heritage, as a positive example of an initiative supporting the principles expressed by this Declaration;

We stress the role of cultural relations in promoting tolerance for cultural and religious diversity and mutual understanding among peoples, and encourage all States to provide opportunities for cultural exchanges in the spirit of reciprocity and mutual benefit, including at large-scale international events, such as the World Expositions or the Olympic and Paralympic Games;

We encourage the forthcoming Chairs of the G7 to organize future meetings of Ministers of Culture and cultural authorities, in order to monitor the progress of our efforts.

* * * *

2. UN Security Council Resolution 2347

UN Security Council Resolution 2347 on the destruction and trafficking of cultural heritage by terrorist groups and in situations of armed conflict, referred to in the joint declaration above, was adopted on March 24, 2017. Ambassador Michelle J. Sison, U.S. Deputy Permanent Representative to the UN, delivered the statement for the United States on the resolution. Her remarks are excerpted below and available at <https://usun.state.gov/remarks/7721>.

* * * *

Over the past two decades, we have seen damage to and destruction of our shared cultural heritage on an unprecedented scale.

Those engaged in conflict and terror deliberately destroy cultural property to create fear, undermine governments, and cause animosity among different groups within a society. The

wanton devastation by ISIS, Al Qaeda, and others in Iraq and Syria, by the Taliban in Afghanistan, and by other groups elsewhere has taken a devastating toll not only on human lives, but also on our common cultural heritage.

This destruction tears at the very fabric of our societies.

The policy of the United States government is clear: the unlawful destruction or trafficking of cultural heritage is deplorable—we unequivocally oppose it, and we will take all feasible steps to halt, limit, and discourage it.

The United States seeks to hold accountable those who engage in the illegal trade of cultural property and the perpetrators of deliberate cultural heritage destruction.

Enhanced international law enforcement cooperation to counter these destructive and destabilizing activities is already showing results.

For example, the United States shared information with our international partners about the activities of the deceased Abu Sayyaf, a former high-ranking ISIS official who was responsible for financing the group’s terrorist activities, including through the illicit sale of antiquities.

Growing international coordination and cooperation among law enforcement and other agencies enabled the United States to take direct action in order to seek the recovery of these items.

We believe that there are no “one-size-fits-all” strategies for cultural heritage preservation in armed conflict. Complex situations around the world warrant a variety of responses.

Many states have demonstrated the ability to safeguard their cultural treasures in conflict zones during times of crisis.

It is a long-standing U.S. policy to preserve cultural heritage in situ whenever possible, thereby avoiding the need to remove cultural property from its country of origin.

The United States looks forward to strengthened international cooperation, and to finding new channels of cooperation for the protection and preservation of cultural heritage in armed conflicts, in order to preserve this priceless inheritance for future generations.

* * * *

Ambassador Sison delivered further remarks on cultural heritage on November 30, 2017 at a UN Security Council briefing on the destruction and trafficking of cultural heritage by terrorist groups in situations of armed conflict. Her remarks are excerpted below and available at <https://usun.state.gov/remarks/8167>.

* * * *

Even after liberation from ISIS, cultural heritage and antiquities remain under threat as fleeing members of ISIS will likely seek to sell artifacts that could continue to provide a substantial revenue stream. The ability to sell looted goods over the internet has turned a once cost-prohibitive market into one accessible by anyone with a cellphone or a connection to the internet.

The United States has been unwavering in its commitment to protecting and preserving cultural heritage. Our policy is clear: the unlawful destruction of cultural heritage and the

trafficking of cultural property are unacceptable. We join the UN and Council members in affirming that countries have a responsibility to preserve and protect this heritage of universal importance and to prevent its exploitation for terrorist purposes and illicit financial gain. The United States continues robust implementation of our own domestic tools for putting an end to destruction of cultural heritage and the trafficking of cultural property.

The emergency import restrictions on Syrian and certain Iraqi cultural property remain in place and serve as a strong disincentive to would-be traffickers. The United States has also negotiated bilateral agreements with 16 countries to block illegal importation of archaeological and ethnological material into the United States.

We urge other States Parties to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property whose heritage is in jeopardy to request the same type of protection. The Cultural Antiquities Task Force, created by the State Department, focuses on the recovery and repatriation of looted cultural objects and supports law enforcement agencies in these efforts. The United States FBI maintains the National Stolen Art File, a computerized database of stolen art and cultural property, and makes its information available to law enforcement agencies around the world.

For several years, the U.S. government has provided funding to the American Schools of Oriental Research, ASOR, to continue its important work in Syria and northern Iraq. This year, we have expanded ASOR's work to also include Libya. With this funding, ASOR monitors cultural heritage sites in those areas using satellite imagery, human intelligence, and public information to document evidence of destruction and looting by ISIS and other actors. U.S. funding has also enabled the Smithsonian Institution to train Iraqi cultural heritage professionals so they can be prepared to implement needed interventions when the security situation allows.

We remain fully committed to these efforts and look forward to coordinating with the United Nations and Member States, and with UN and international entities including UNODC, INTERPOL, and the UN 1267 Committee over the coming year on full implementation of Resolution 2347.

* * * *

D. EXCHANGE PROGRAMS

1. Fulbright Programs

On March 30, 2017, the United States and Lithuania signed an MOU on the Fulbright Academic Exchange Program. The MOU is available at <http://www.state.gov/s/l/c8183.htm>. On November 27, 2017, the United States and Malaysia concluded an MOU on the Fulbright English Teaching Assistant Program. The MOU is available at <http://www.state.gov/s/l/c8183.htm>.

2. ASSE Litigation

As discussed in *Digest 2016* at 582-83; *Digest 2015* at 611; and *Digest 2014* at 576-79, ASSE International, a program sponsor in the State Department's J-1 Exchange Visitor Program ("EVP") challenged in federal court the imposition of sanctions by the Department for ASSE's violations of EVP regulations. After the Ninth Circuit reversed the

district court's dismissal and remanded the case, *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059 (9th Cir. 2015), the State Department conducted further administrative proceedings in accordance with the Ninth Circuit's opinion and re-imposed one of the "lesser sanctions," a written reprimand. On June 21, 2017, the district court granted in part and denied in part ASSE's motion to supplement the administrative record and for limited discovery. The district court required the State Department to supplement the administrative record with three categories of information: (1) any other diplomatic security documents that were before the bureau making the decision; (2) any additional "findings" that the bureau made; and (3) intra-agency communications and communications with outside parties concerning the subject matter of the case. The district court denied the request for discovery as well as the request to supplement the record as to certain other categories of documents. **

E. INTERNATIONAL EXPOSITIONS

1. General

The 2017 World Expo in Astana, Kazakhsan, which featured a U.S. Pavilion, closed on September 10, 2017. In October 2017, Secretary of State Rex Tillerson sent a letter to the United Arab Emirates expressing U.S. intent to participate in the next World Expo in Dubai in 2020.

2. Proposed Minnesota World Expo 2023

As discussed in *Digest 2016* at 584, the Minnesota World's Fair Bid Committee developed a proposal to host a world's fair in Minneapolis in 2023 and the committee's president recognized the Minnesota proposal, prompting the Secretary of State to formally request consideration of the proposal by the Bureau of International Expositions ("BIE").

In order for the Minnesota proposal to be considered, the United States had to rejoin the Convention relating to international exhibitions, signed at Paris on November 22, 1928, and supplemented by the Protocols of May 10, 1948, November 16, 1966, November 30, 1972, and the Amendments of June 24, 1982 and May 31, 1988 ("the Convention"). The United States had been a Party to the Convention from 1968 to 2002. On May 9, 2017, Secretary of State Rex Tillerson signed the instrument of accession by the United States to the Convention. The instrument of accession was deposited with the Government of the French Republic, which acts as the depositary for the Convention, thereby bringing the Convention into force for the United States.

** Editor's note: On January 3, 2018, the district court ruled in favor of the State Department on ASSE's second motion to supplement the administrative record. The decision and further proceedings will be discussed in *Digest 2018*.

The Convention created the BIE and established procedures and standards for the registration of international expositions. Expositions that are international and not expressly excepted from the reach of the Convention must be registered or the parties will not participate in them (Article 9). Registration involves submission of detailed plans and rules, which are approved or disapproved in light of the standards agreed to in the Convention and practice under it. Other provisions of the Convention guard against too frequent or overlapping expositions. The Convention provides procedures, including arbitration, for the settlement of disputes (Article 34).

The U.S. accession is subject to one reservation with respect to paragraph (2) of Article 10, which reads:

(2) If the said Government does not itself organise the exhibition it shall officially recognise the organisers for this purpose and it shall guarantee the fulfilment of the obligations of the organisers.

The reservation states that:

...the obligation of the United States thereunder will be to guarantee fulfillment of its own obligations and, with respect to juristic persons officially recognized by it for the purpose of organizing expositions, to make every reasonable effort to ensure the fulfillment by them of their obligations.

The U.S. accession was also subject to one declaration that the United States would not be bound by the provisions of paragraphs (3) and (4) of Article 34 which relate to binding arbitration.

The United States acceded to the BIE Convention pursuant to authority in the "U.S. wants to compete for a World's Expo Act," 22 U.S.C. § 2452b (note). A Senate amendment to the legislation bars State Department employees from fundraising to support U.S. pavilions at expos.

In November 2017, the BIE General Assembly voted for Buenos Aires, Argentina to host the 2023 World Expo.

Cross References

Annual Thematic Resolutions on the 10th Anniversary of the UNDRIP, **Ch. 6.G.4.**

CHAPTER 15

Private International Law

A. COMMERCIAL LAW/UNCITRAL

1. UNCITRAL

Emily Pierce, Counselor for the U.S. Mission to the United Nations, delivered remarks on October 9, 2017 at the UN General Assembly Sixth Committee on the report of the United Nations Commission on International Trade Law (“UNCITRAL”) on the work of its 50th session. Ms. Pierce’s comments are excerpted below and available at <https://usun.state.gov/remarks/8020>.

* * * *

The United States welcomes the Report of the 50th session of the United Nations Commission on International Trade Law and commends the efforts of UNCITRAL’s Member States, observers, and Secretariat in continuing to promote the development and harmonization of international commercial law.

This session marked a significant anniversary for UNCITRAL. We note that UNCITRAL has accomplished a remarkable amount in its first fifty years, and we look forward to the next fifty years being even more productive.

Regarding the work of UNCITRAL in this past year, we are pleased that, after years of discussions, a Model Law on Electronic Transferable Records was adopted. We encourage states to consider implementing this model law if their domestic law does not already provide an adequate framework enabling the use of electronic equivalents to paper-based transferable documents or instruments in commerce.

We are also pleased that UNCITRAL completed work on a Guide to Enactment for the Model Law on Secured Transactions. This guide will assist states in using the Model Law to reform their domestic legal regime in ways that will facilitate access to credit, particularly for micro, small, and medium-sized enterprises.

With respect to the ongoing work on conciliation, we welcome UNCITRAL's plan to develop a convention, which should help to promote the use of conciliation internationally in the same way that the New York Convention has helped to promote the use of arbitration. In particular, the approach endorsed at the 50th session would ensure that the convention covers not only enforcement of conciliated settlements but the most relevant aspect of recognition of those settlements—the use of settlements in defense against a claim.

We are also encouraged to see UNCITRAL continue to discuss various ways of improving its working methods and becoming even more efficient. At the 50th session, several valuable ideas were discussed, such as the goal of structuring the agenda in a way that permits states to deliberate on the overall work program before the session focuses on individual topics, as well as the goal of relying more on written reports in order to improve utilization of conference time.

Finally, last year we had the pleasure of informing this body that the United States had taken steps toward becoming party to three conventions negotiated at UNCITRAL—namely, that three UNCITRAL conventions had been transmitted to the Senate for its approval. Subsequently, we took this same step with a fourth UNCITRAL convention: in December 2016, the UN Convention on Transparency in Treaty-Based Investor-State Arbitration was also transmitted to our Senate for its approval.

* * * *

2. UN Convention on the Assignment of Receivables

On December 13, 2017, Acting Legal Adviser Richard Visek testified before the Senate Committee on Foreign Relations at a hearing on treaties being considered by the Committee. Mr. Visek's testimony includes discussion of the UN Convention on the Assignment of Receivables in International Trade. See Chapter 4 for Mr. Visek's testimony.

3. Securities Convention

The Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary ("Securities Convention") entered into force, including for the United States, on April 1, 2017. See *Digest 2016* at 598-601 regarding U.S. Senate advice and consent to ratification and *Digest 2006* at 936-38 regarding the U.S. statement upon signing. The text of, and further information about the Convention are available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=72>.

4. Apostille Convention

On September 6, 2017, the United States provided notice to the Ministry of Foreign Affairs of the Kingdom of the Netherlands, as depositary for the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (“Apostille Convention”), in support of Kosovo’s authority as a sovereign, independent country. The U.S. Declaration follows. More information on U.S.-Kosovo relations is available at <https://www.state.gov/r/pa/ei/bgn/100931.htm>.

* * * *

The Embassy of the United States of America [...] has the honor to convey that, having regard to the July 2016 entry into force of the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (“the Apostille Convention”) for the Republic of Kosovo, the United States wishes to notify all Contracting States that, consistent with its obligations under the Apostille Convention, the United States will not give legal effect under the Convention to any certification purporting to be an Apostille issued within the territory of Kosovo by an entity other than the designated Kosovo competent authority.

As recognized in Conclusion and Recommendation 7 of the 2016 Special Commission on the Practical Operation of the Apostille Convention, and as memorialized in Paragraph 113 of the Handbook on the Practical Operation of the Apostille Convention, the law of Kosovo determines whether a document is a public document to which the Apostille Convention applies and to which only the competent authorities of Kosovo may affix an Apostille Certificate.

* * * *

B. FAMILY LAW

1. Hague Convention on the Civil Aspects of International Child Abduction

On November 29, 2017, the U.S. Court of Appeals for the Second Circuit decided the case, *Marks, acting on behalf of infant children, SM, AM, and BM v. Hochhauser*, 876 F.3d 416 (2d Cir. 2017). The case was initiated by a father seeking the return of his children from their mother in the United States pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Abduction Convention”), as implemented by the International Child Abduction Remedies Act (“ICARA”). The children and their mother had been living in Thailand with the children’s father, but did not return from a trip to New York in 2015. The lower court dismissed the father’s petition and he appealed. The Second Circuit affirmed, finding that the claim was barred because the allegedly wrongful retention occurred before the United States accepted Thailand’s accession to the Hague Abduction Convention. The court’s opinion is excerpted below.

* * * *

The Convention, a multilateral treaty, governs the wrongful removal and retention of children from their country of habitual residence. ... It was adopted in 1980 “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.” Convention, preamble; Article 1 explains that:

The objects of the present Convention are—

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Convention, art. 1.

A parent seeking the return of a child under the Convention must prove, by a preponderance of the evidence, that: “(1) the child was habitually resident in one State and has been removed to or retained in a different State; (2) the removal or retention was in breach of the petitioner’s custody rights under the law of the State of habitual residence; and (3) the petitioner was exercising those rights at the time of the removal or retention.” *Gitter*, 396 F.3d at 130-31 (citing 22 U.S.C. § 11603(e)(1)(A)). The Convention ceases to apply “when the child attains the age of 16 years.” Convention, art. 4; *see Gitter*, 396 F.3d at 132 n.7.

The Convention permits a parent whose child is “habitually resident” in a contracting State and has been “wrongfully removed to or retained in” a different contracting State to commence proceedings for the return of the child. Convention, arts. 1, 3; *Gitter*, 396 F.3d at 130. A removal or retention is “wrongful” where “it is in breach of rights of custody attributed to a person ..., either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention,” and the custody rights were “actually exercised, either jointly or alone,” or would have been but for the removal or retention. Convention, art. 3. Proceedings for the return of the child must be brought within one year “from the date of the wrongful removal or retention.” Convention, art. 12.

B. Entry into Force of the Convention

Article 35 of the Convention provides that it “shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.” Convention, art. 35. Hence, if the removal or retention occurs before the Convention has entered into force between two States, the Convention does not apply.

The Convention does not define “Contracting State,” but Articles 37 and 38 provide two separate procedures for countries to accept the Convention. Under Article 37, “[t]he Convention shall be open for signature by the States which were Members of the Hague Conference of Private International Law [the ‘CPIL’] at the time of its Fourteenth Session.” Convention, art. 37. Once a State signs, the Convention must be “ratified, accepted or approved and the instruments of ratification, acceptance or approval” must be deposited with the Ministry of Foreign Affairs in the Netherlands. Convention, art. 37.

Article 38 provides a second acceptance procedure for states that were not members of the CPIL at the time of its fourteenth session. In lieu of ratification, these states may “accede” to the Convention. Article 38 explains that:

Any other State may accede to the Convention. ... The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. ... The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Convention, art. 38. As Article 38 makes clear, accession requires the acceptance of other states before the Convention “will enter into force,” *i.e.*, the accession has effect only as to Contracting States that “have declared their acceptance of the accession.” *Id.*

At the time the Convention was opened for signature, the United States was a member of the CPIL and Thailand was not. *See Convention of 25 October 1980 on the Civil Aspects of Child Abduction: Status Table*, Hague Convention on Private International Law, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (last updated August 2, 2017) (“Contracting State Status Table”).

The United States signed the Convention in 1981 and ratified it, thereby becoming a Contracting State, in 1988, and the Convention entered into force in the United States on July 1, 1988. *See Contracting State Status Table*; *Souratgar*, 720 F.3d at 102 n.5. Thailand acceded to the Convention, pursuant to Article 38, on August 14, 2002, and it entered into force in Thailand on November 1, 2002. *Id.* The United States accepted Thailand’s accession to the Convention on January 26, 2016. *See Acceptances of Accessions: Thailand*, Hague Conference on Private International Law, <https://www.hcch.net/en/instruments/conventions/status-table/acceptances/?mid=670> (last visited Sept. 26, 2017) (“Acceptances of Accessions Table”). The first day of the third calendar month after the United States accepted Thailand’s accession was April 1, 2016. *See id.*; Convention, art. 38.

II. Application

Two principal issues are presented. First, Marks argues that the district court erred in concluding that retention is a singular event and fixing a particular date of the allegedly wrongful retention because the term “retention” itself implies ongoing activity. Second, Marks argues that the Convention entered into force between the United States and Thailand in 2002, when Thailand acceded to the Convention, rather than April 1, 2016, after the United States accepted Thailand’s accession. If Marks is correct as to the first issue, we would not need to reach the second issue as the “retention” would then have continued past April 1, 2016.

A. Retention

The first question is whether “retention” for these purposes is a singular or a continuing act. We agree with the district court that “retention” is a singular and not a continuing act.

“ ‘The interpretation of a treaty, like the interpretation of a statute, begins with its text.’ ” *Abbott*, 560 U.S. at 10, 130 S.Ct. 1983 The text of a treaty is to be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, art. 31.1 *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; The Supreme Court has also noted, in the context of the Convention, that the views of the Executive Branch are entitled to “great weight.” *Abbott*, 560 U.S. at 15, 130 S.Ct. 1983. Finally, in interpreting the Convention in particular, our cases have also relied on the report of Elisa Pérez-Vera, “the official Hague Conference reporter for the Convention.” Dep’t of State, Hague Int’l Child Abduction Convention; Text and Legal

Analysis, 51 Fed. Reg. at 10,503 (1986) (“State Dep’t Legal Analysis”); *see, e.g., Gitter*, 396 F.3d at 129 & n.4; *Blondin v. Dubois*, 189 F.3d 240, 246 & n.5 (2d Cir. 1999).

The Convention specifies when the “removal or retention of a child is to be considered wrongful,” Convention, art. 3, but it does not define the term “retention.” Hence, we look to the ordinary meaning of “retention.” The word, however, has more than one ordinary meaning. “Retention” means “the act of retaining or state of being retained.” *Retention*, Webster’s Third New Int’l Dictionary (1961) (“Webster’s”). “Retain” can mean “restrain” or “prevent” or “to hold or continue to hold in possession or use.” *Retain*, Webster’s. Hence, looking just at the plain meaning of the word, “retention” can be a singular act or, as Marks argues, an ongoing, continuous act.

Notwithstanding this ambiguity, there are a number of considerations that demonstrate that “retention” is a singular act for the purpose of the Convention—“wrongful retention” occurs when one parent, having taken the child to a different Contracting State with permission of the other parent, fails to return the child to the first Contracting State when required. *See generally Taveras v. Morales*, 22 F.Supp.3d 219, 231-32 (S.D.N.Y. 2014).

Other provisions of the Convention suggest that retention is a singular act. Article 35 provides that the Convention “shall apply as between Contracting States only to wrongful removals or retentions occurring *after* its entry into force in those States.” Convention, art. 35 (emphasis added). Article 12 provides that proceedings for the return of a child must be brought within one year “from the date of the wrongful removal or retention.” Convention, art. 12. These provisions contemplate a singular act, and the provisions would make little sense if “retention” were a continuous, ongoing state. A retention that began before the Convention’s entry into force would still be actionable as long as the child was not returned before the Convention entered into force. Similarly, under Marks’s interpretation, the one-year time limitation would have no effect, for the “retention” would continue as long as the child was not returned to the first Contracting state. The structure and context of the Convention suggest that “retention” is a single act—one that must occur after the Convention takes force and less than a year before the commencement of proceedings.

Foreign courts that have interpreted Article 35 have concluded that retention is a single act. In the consolidated cases of *In re H.* and *In re S.* [1991] 2 AC 476, the House of Lords held that “both removal and retention are events occurring on a specific occasion,” explaining that Article 12 expressly contemplates wrongful removals and retentions as specific occasions. 2 AC at 488, 499; *see also Kilgour v. Kilgour*, [1987] SC 55 (Scot.) (“[O]ne is in my view given a very firm indication indeed that the retention in question is an initial act of retention ... and that the Convention is not primarily concerned ... with the new state of affairs which will follow on such initial acts and which might also be described as retention.”). Although the colloquial meaning of retention could suggest a continuous state of affairs, no court has endorsed this perspective. Lynda R. Herring, *Taking Away the Pawns: International Parental Abduction & the Hague Convention*, 20 N.C. J. Int’l L. & Com. Reg. 137, 162 (1994) (“Some contention has been raised as to the issue of retroactivity, as some applicants have argued that a wrongful retention is a ‘continuing offense’ such that an order for return could still be granted once the Convention became effective between Contracting States. The case law on this point makes it explicit that such a contention will not prevail.”).

The State Department, in its “Legal Analysis” of the Convention, has explained the distinction between “removal” and “retention” as follows:

Generally speaking, “wrongful removal” refers to the taking of a child from the person who was actually exercising custody of the child. “Wrongful retention” refers to the act of keeping the child without the consent of the person who was actually exercising custody. The archetype of this conduct is the refusal by the noncustodial parent to return a child at the end of an authorized visitation period.

State Dep’t Legal Analysis., 51 Fed. Reg. at 10503. This language suggests that “retention” is a singular act—such as the failure of Hochhauser to return the Children to Thailand at the end of the authorized visit to the United States.

Finally, the observations of the official reporter of the Convention also suggest that retention is a singular act:

The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child’s stay in a place other than that of its habitual residence.

Elisa Pérez–Vera, *Explanatory Report: Hague Conference on Private International Law*, in 3 Acts and Documents of the Fourteenth Session 426, 458, ¶ 108 (1982).

Accordingly, we conclude that the Convention contemplates that “retention” occurs on a fixed date. Here, that date was October 7, 2015...

B. Applicability of the Convention

As noted above, the key dates are as follows: The United States signed the Convention in 1981 and it came into force in the United States in 1988. Thailand was not an original signatory and did not accede to the Convention until 2002, when the Convention entered into force in Thailand. The United States did not accept Thailand’s accession to the Convention until January 26, 2016. *See* Acceptances of Accessions Table.

Marks argues that the Convention entered into force between the United States and Thailand in 2002 when Thailand acceded to the Convention, even though the United States did not formally accept Thailand’s accession until 2016. We disagree.

Marks’s argument is belied by the plain wording of the Convention. Article 38 provides that an accession “will have effect only” as to relations between an acceding State and Contracting States that “declared their acceptance of the accession.” Convention, art. 38. Article 38 further provides that “[t]he Convention will *enter into force* as between the acceding State and the State that has declared its acceptance of the accession *on the first day of the third calendar month after the deposit of the declaration of acceptance.*” Convention, art. 38 (emphasis added). Hence, the Convention enters into force as between an acceding State and a Contracting State that accepts the accession “on the first day of the third calendar month after” the acceptance. As the CPIL’s website on the Convention reports, the United States accepted Thailand’s accession on January 26, 2016, and the Convention entered into force as between the two countries on April 1, 2016. *See* Acceptances of Accessions Table ; *accord Souratgar*, 720 F.3d at 102 n.5 (“Under Article 38, one state’s accession will have effect with respect to another contracting state only after such other state has declared its acceptance of the accession

Singapore's accession was accepted by the United States on February 9, 2012 and entered into force on May 1, about three weeks before [the wrongful removal].") (citations omitted).

The State Department has reached the same conclusion: "Article 35 limits application of the Convention to wrongful removals or retentions occurring after its entry into force *between* the two relevant Contracting States." State Dep't Legal Analysis, 51 Fed. Reg. at 10509 (emphasis added). The State Department also notes that "under Article 38 the Convention ... enters into force only between [acceding] States and member Contracting States which specifically accept their accession to the Convention." *Id.* at 10514. Clearly, the Convention did not come into force between Thailand and the United States until after the latter accepted the former's accession.

This interpretation conforms to the academic consensus on the issue. ...

Marks relies heavily on a decision of the United States District Court for the Northern District of Illinois holding that "Article 35 requires only that the wrongful removal or retention at issue occur after the Convention enters into force individually in the acceding State and in the State to which the child was removed to or is retained." *Viteri v. Pflucker*, 550 F.Supp.2d 829, 839 (N.D. Ill. 2008). We decline to adopt the reasoning of the *Viteri* court. Not only is its conclusion inconsistent with the plain wording of the Convention, the *Viteri* court expressly stated that it lacked the benefit of the State Department's interpretation of Article 35. *See id.* at 837 (noting that "the parties [did not] offer any executive interpretation of this portion of the Convention to which this court would defer.").

Marks also points out that the State Department has noted that "countries *may* agree to apply the Convention retroactively to wrongful removal and retention cases arising prior to its entry into force for those countries." State Dep't Legal Analysis 51 Fed. Reg. at 10514 (emphasis added). He suggests that we adopt this "liberal interpretation of Article 35" contemplated by the State Department. Pet.-Appellant Br. at 22. As he acknowledges, however, the State Department has not endorsed this reading of Article 35. *See* State Dep't Analysis, 51 Fed. Reg. at 10,514. Nor is there any indication that Thailand has.

Accordingly, we conclude that the Convention does not "enter into force" until a ratifying state accepts an acceding state's accession and that Article 35 limits the Convention's application to removals and retentions taking place after the Convention has entered into force between the two states involved. Thus, because the Convention did not enter into force between the United States and Thailand until April 1, 2016, after the allegedly wrongful retention of the Children in New York on October 7, 2015, the Convention does not apply to Marks's claim and the district court did not err in dismissing his petition.

* * * *

2. Hague Child Support Convention

On January 1, 2017, the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance entered into force for the United States. *See Digest 2007* at 769-70 regarding the conclusion of the Child Support Convention and the U.S. statement upon signing the Convention. For the text of the Convention, see <https://www.hcch.net/en/instruments/conventions/full-text/?cid=131>.

C. INTERNATIONAL CIVIL LITIGATION

1. *Water Splash, Inc. v. Menon*

In January 2017, the United States filed a brief as *amicus curiae* in the Supreme Court of the United States in *Water Splash, Inc. v. Menon*, No. 16-254. The issue in the case is whether the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague Service Convention”) authorizes service of process by mail. Article 10 of the Hague Service Convention enumerates three alternatives to service via the Central Authorities identified pursuant to the Convention, including “(a) the freedom to send judicial documents, by postal channels, directly to persons abroad.” The appeals court in Texas held that the plaintiff, a U.S. corporation, had not properly served its former employee, a citizen of Canada, in a suit alleging the employee had given proprietary designs and drawings to a competitor. The trial court in Texas had authorized service by mail after the corporation claimed inability to serve the former employee in Texas. The employee failed to appear and the trial court granted a default judgment to the corporation. The U.S. brief, excerpted below, urges the Supreme Court to reverse the Texas appeals court.

* * * *

1. Article 10(a) of the Convention states that, if “the State of destination does not object,” the Convention “shall not interfere with * * * the freedom to send judicial documents, by postal channels, directly to persons abroad.” App., *infra*, 2a. Unlike the other two paragraphs of Article 10, which reference methods to “effect service of judicial documents,” *id.* at 3a, Article 10(a)’s reference to postal channels does not use the term “service.” It must not, however, be viewed in isolation. In context, its reference to “send[ing] judicial documents” is readily understood as referring to the sending of documents through postal channels for purposes of service. The court of appeals’ contrary reading would transform Article 10(a) into a bizarre and solitary interloper—the only portion of the Convention that would be about something other than service of documents.

a. The full title of the Hague Service Convention indicates that it is concerned with “Service Abroad.” Its preamble explains that the Convention was intended “to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,” and to “simplify[] and expedit[e]” the procedures for doing so. App., *infra*, 1a. Then, in establishing the general scope of the Convention, Article 1 provides that it “shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.” *Ibid.*

As this Court has previously explained, the Convention’s negotiating history demonstrates that its applicability was consciously limited to instances requiring the transmission of documents to other countries for purposes of “service of process in the technical sense.” *Schlunk*, 486 U.S. at 700. A preliminary draft of Article 1 referred to “all cases in which there are grounds to transmit or to give formal notice of a judicial or extrajudicial document in a civil or

commercial matter to a person staying abroad.” *Id.* at 700-701 (translating the French text from 3 Conférence de la Haye de Droit International Privé, *Actes et Documents de la Dixième Session* 65 (1965)). That preliminary draft, however, was criticized for “suggest[ing] that the Convention could apply to transmissions abroad that do not culminate in service.” *Id.* at 701. As a result, the final version of Article 1 was revised, such that the Convention now “applies only to documents transmitted for service abroad.” *Ibid.* The decision below cannot be reconciled with this Court’s authoritative construction of Article 1 and the negotiating history upon which the Court relied.

The Court’s reading of Article 1 is buttressed by the many other provisions of the Convention that are expressly tied to service of process rather than transmission of documents for some other purpose. Article 5 obliges a Central Authority that receives a request for service either to “serve the document” or to “arrange to have it served.” 20 U.S.T. 362, 658 U.N.T.S. 167. Article 8 permits a contracting state to “effect service of judicial documents” through its diplomatic or consular agents, and Article 9 permits the use of consular or diplomatic channels “to forward documents, for the purpose of service.” App., *infra*, 2a; see, e.g., *id.* at 3a (Art. 11) (permitting contracting states to agree to alternate channels of transmission “for the purpose of service of judicial documents”); Art. 13, 20 U.S.T. 364, 658 U.N.T.S. 171 (restricting grounds upon which a state may refuse to comply with “a request for service” that complies with the Convention); Art. 14, 20 U.S.T. 364, 658 U.N.T.S. 171 (providing that disputes over “the transmission of judicial documents for service” will be settled diplomatically); App., *infra*, 5a (Art. 19) (providing that the Convention will not alter a contracting state’s law permitting other methods of transmission “of documents coming from abroad, for service within its territory”).

Because the scope of the entire Convention thus was intentionally limited to “documents transmitted for service abroad,” *Schlunk*, 486 U.S. at 701, there is no reason to infer that Article 10(a) was intended, through the word “send,” to refer exclusively to unspecified uses of postal channels that do *not* involve service of process. Rather, the language in Article 10(a) preserving the freedom to “send” judicial documents, by postal channels, “directly” to persons abroad can be explained by the fact that, in contrast to Article 10(a), all other methods of service identified in the Convention require the affirmative engagement of an intermediary to effect “service.” The word “send” in Article 10(a) is the most natural way to describe the using of “postal channels” as an alternative way of effecting service—“directly”—without invoking an intermediary.

b. Moreover, the only provision of the Convention that refers to Article 10 does not give any indication that paragraph (a) was seen as unique or as being about a different topic than is the rest of the Convention. Article 21 directs each contracting state to give formal notice (to the Ministry of Foreign Affairs of the Netherlands) of any “opposition” that the contracting state has “to the use of methods of transmission pursuant to [A]rticles 8 and 10.” App., *infra*, 6a. Article 8 applies only to “service of judicial documents,” as do paragraphs (b) and (c) of Article 10. *Id.* at 2a-3a. Article 21 thus indicates that the drafters perceived no categorical difference between the types of transmission of judicial documents addressed by those provisions and the type of transmissions governed by Article 10(a).

2. The negotiating history of Article 10(a) itself also provides strong support for the view that it refers to service of process. See *Saks*, 470 U.S. at 400 (recognizing that, in interpreting a treaty, “it is proper * * * to refer to the records of its drafting and negotiation”).

The Rapporteur’s report on the final text of the Convention, as adopted in the plenary session of the Hague Conference, “states that, except for minor editorial changes, Article 10 of the Convention corresponds to” the same article in an earlier draft. 1 Ristau § 4-3-5, at 205. The report about that draft version of Article 10, in turn, had explained as follows:

a) Postal channels (para. 1)

Paragraph 1 [designated “(a)” in the final text] of Article 10 corresponds to paragraph 1 of Article 6 of the 1954 Convention.

The provision of paragraph 1 also permits service * * * by telegram if the state where *service* * * * is to be made does not object.

The Commission did not accept the proposal that postal channels be limited to registered mail.

Ibid. (brackets in original) (translated by Ristau from the original French). The report about the draft version of Article 10 also noted that, as was the case under the similar provision of the earlier convention, service of process could be made by postal channels only if it was also “authorized by the law of the forum state.” *Ibid.* Thus, the description of the earlier draft of Article 10 demonstrates that the drafters intended for the provision to permit service of process by postal channels in the absence of the receiving state’s objection pursuant to Article 21.

3. That construction is also supported by the derivation of the parallel phrase in the French version of the Convention. The French text—which, according to the Convention’s final clause, is “equally authentic” with the English text, 20 U.S.T. 367, 658 U.N.T.S. 181—contains the same potential anomaly, using a different word in Article 10(a) than in Article 10(b) and (c). But “the verb ‘*adresser*’ * * *, rendered in English by the verb ‘send’, had been used in substantially the same context in the three predecessor treaties [about civil procedure] drafted in The Hague [in 1896, 1905, and 1954].” 2016 *Handbook* ¶ 279, at 91. Even though the verb “*adresser*” is not actually “equivalent to the concept of ‘*service*,’ ” it had “been consistently interpreted” in the earlier treaties “as meaning service or notice.” *Ibid.* The drafters accordingly would have expected the same interpretation to apply to the term’s appearance in the Hague Service Convention. In addition, Article 10(a) of the Hague Service Convention replaced Article 6(1) of the 1954 Convention (for states that were parties to both). See 1 Ristau § 4-3-5, at 204; see also Art. 22, 20 U.S.T. 366, 658 U.N.T.S. 177. In light of that history, it would be particularly incongruous if the similar French text in Article 10(a) were construed as eliminating the earlier understanding that postal channels could indeed be used for service when it is authorized by the law of the forum state and the receiving state does not object. See 1 Ristau § 4-3-5, at 205.

4. Other evidence contemporaneous with the negotiation of the Convention also supports the conclusion that Article 10(a) refers to service of process. Philip W. Amram was the member of the United States delegation who was the “principal American spokesman in the Committee of the Conference that produced the [Convention].” S. Exec. Rep. No. 6, 90th Cong., 1st Sess. 5 (1967) (S. Exec. Rep. No. 6) (reprinting statement of Deputy Legal Adviser Richard D. Kearney). In an article dated just a few months before the Convention’s signing (and nine months after “[t]he final text of the Convention * * * was developed,” 1 Ristau § 4-1-1, at 145), he summarized the Convention and stated that “Article 10 permits direct service by mail * * * unless th[e] state objects to such service.” Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 653 (1965).

Thus, when read in the context of the Convention, its negotiation history, the predecessors to the parallel French text, and contemporaneous statements by one of its drafters, the text of Article 10(a) is best construed as permitting service of process through postal channels.

B. The Executive Branch Has Consistently Interpreted Article 10(a) To Permit Service Of Process By Postal Channels

“It is well settled that the Executive Branch’s interpretation of a treaty ‘is entitled to great weight.’ ” *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184 (1982)). The decision below, however, contradicts the Executive Branch’s longstanding position that Article 10(a) refers to service of process, not to the sending of documents for other unspecified purposes.

1. When President Johnson transmitted the Convention to the Senate in 1967 for its advice and consent, his transmittal letter noted that “[t]he provisions of the convention are explained in the report of the Secretary of State transmitted herewith.” *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Message from the President of the United States*, S. Exec. C, 90th Cong., 1st Sess. 1 (1967). The accompanying report explained that “Articles 8 through 11 provide for channels of service entirely outside the central authority.” *Id.* at 4. It further stated that “Article 10 permits direct service by mail or by any persons who are competent for that purpose in the state addressed unless that state objects to such service.” *Id.* at 5 (emphasis added).

Consistent with that construction, U.S. delegate Amram testified before the Senate Foreign Relations Committee that use of the Central Authority is “not obligatory” and that “[o]ptional techniques” include, “unless the requested State objects, direct service by mail.” S. Exec. Rep. No. 6, at 13 (citing Article 10).

2. Since the United States ratified the Convention, the Executive Branch has consistently adhered to that construction of Article 10(a). In 1980, the Administrative Office of the U.S. Courts sent a memorandum to all United States District Court Clerks requesting, based on advice from the Department of State, that they “refrain from sending summonses and complaints by international mail to foreign defendants in those countries” that had “made a reservation with respect to Article 10(a) of the Convention.” 2 Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law 1981–1988*, at 1447 (1994). Service by mail to defendants in non-objecting countries was not seen as a problem in the context of the Convention.

In 1989, the Eighth Circuit became the first federal court of appeals to hold that the Convention does not permit service by registered mail on a defendant in a foreign country. See *Bankston*, 889 F.2d at 174. A few months later, the Deputy Legal Adviser, Alan J. Kreczko, sent a letter to the Administrative Office of the U.S. Courts and the National Center for State Courts that expressed the Department of State’s disagreement with the *Bankston* decision. See *United States Department of State Opinion Regarding the Bankston Case and Service by Mail to Japan under the Hague Service Convention*, 30 I.L.M. 260, 260–261 (1991) (reprinting excerpts of March 14, 1990 letter). That letter concluded that “the decision of the Court of Appeals in *Bankston* is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service of process the sending of a copy of a summons and complaint by registered mail to a defendant in a foreign country.” *Id.* at 261.

That view continues to be reflected on the Department of State’s website, which explains that “[s]ervice by registered or certified mail, return receipt requested is an option in many countries in the world,” but that “[s]ervice by registered mail should * * * not be used in the countries party to the Hague Service Convention that objected to the method described in Article 10(a) (postal channels).” U.S. Dep’t of State, Bureau of Consular Affairs, *Legal Considerations: International Judicial Assistance: Service of Process*,

<https://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process.html> (last visited Jan. 24, 2017).

The Court should give great weight to the Executive Branch's contemporaneous, longstanding, and consistent interpretation of Article 10(a). See, e.g., *Medellin v. Texas*, 552 U.S. 491, 513 (2008).

C. Other Parties To The Convention Agree That Article 10(a) Permits Service By Postal Channels

Because a treaty is “in its nature a contract between . . . [N]ations,” the Court has recognized its “responsibility to read the treaty in a manner consistent with the *shared* expectations of the contracting parties.” *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232-1233 (2014) (citations and internal quotation marks omitted). As a result, the views of the other states that are parties to the treaty are “entitled to considerable weight.” *Abbott*, 560 U.S. at 16 (citations omitted). With respect to the Hague Service Convention, many of the United States' treaty partners have consistently indicated—both singly and in joint Special Commissions periodically convened to assist in the Convention's implementation—that Article 10(a) permits “service” through postal channels, so long as the receiving state has not exercised its right under Article 21 to object to that form of service.

1. In formally giving notice to the Ministry of Foreign Affairs of the Netherlands of their ratification or accession to the Convention (Article 21), several contracting states—including Canada—have made clear their understanding that Article 10(a) of the Convention refers to using postal channels for service of process, not sending documents for other purposes. In its 1988 accession to the Convention, Canada declared, under a heading referring to Article 10(a), that “Canada does not object to service by postal channels.” In 1990, Pakistan declared that it does not object to “service by postal channels directly to the persons concerned (Article 10(a)).” In 2009, the Republic of Latvia, citing Article 10(a), declared that it “does not object to the freedom to send a judicial document, by postal channels, directly to an addressee within the Republic of Latvia * * * if the document to be served” satisfies certain conditions. In 2010, Australia referred to Article 10(a) when declaring that “Australia does not object to service by postal channels, where it is permitted in the jurisdiction in which the process is to be served” and the documents are “sent via registered mail.” In 2016, Vietnam declared that it does not oppose “the service of documents through postal channels mentioned in paragraph a of Article 10” if the documents are “sent via registered mail with acknowledgment of receipt.”

Other contracting states have expressly *objected* to “service” pursuant to Article 10(a) or to having documents “served” through “postal channels.” By doing so, they have made clear their shared understanding that Article 10(a) would otherwise have permitted service by mail. Similarly, at least 13 states have declared their objection to all of the methods of transmission in Article 10 and described them collectively as involving “service,” without discriminating between paragraph (a) and the rest. Under the decision below, objections to “service” through postal channels would effectively be rendered meaningless; those states would have exercised their Article 21 power to object to Article 10(a) by objecting to something that Article 10(a) had not allowed in the first place.

To be sure, the declarations of some states have referred to the “sending,” “transmitting,” or “transmission” of documents under Article 10, or have referred to “service or transmission” or “transmission and service” under Article 10. Such formulations do not clearly express a view on whether Article 10(a) refers to service. But no country has affirmatively indicated—either in its formal reservations, declarations, or objections, or, to our knowledge, anywhere else—that it

shares the understanding of the decision below that Article 10(a) does *not* refer to service of process.

2. Nor are we aware of any foreign courts that have adopted the view of the decision below. To the contrary, several have expressly stated their understanding that Article 10(a) permits “service” through postal channels. For instance, an Ontario appellate court recently explained that “art. 10 of the Hague Service Convention provides that documents can be served directly by postal channels or local judicial officers of the state of destination, unless that state objects.” *Wang v. Lin* (2016), 132 O.R. 3d 48, 61 (Can. Ont. Sup. Ct. J.). That statement was consistent with earlier Ontario cases that had recognized the validity of service by mail on persons located in states that have not objected to Article 10(a). In 1999, the Court of Justice of the European Union repeated without disagreement an Italian court’s recognition that “Article 10(a) * * * allows service by post.” In 2000, a Greek Court of Appeal held that an Italian judgment was enforceable against a defendant that had been served in Greece by registered mail, because Greece had not yet objected to Article 10(a), which “envisaged” the “possibility of serving judicial documents in civil and commercial cases through postal channels.” In 1987, the Chancery Division of the English High Court concluded that the “service of a * * * summons by post on a resident of Belgium” was valid because Belgium had not objected to Article 10(a). Such reasoning remains hornbook law in the United Kingdom.

In other words, we have no basis to doubt the Ninth Circuit’s conclusion that foreign courts are “essentially unanimous” in disagreeing with the reasoning of *Bankston* and the decision below. *Brockmeyer*, 383 F.3d at 802; cf. 2016 *Handbook* ¶ 274, at 89 n.379 (“Space does not allow us to refer to the numerous decisions of other States expressly supporting the view that Art. 10(a) allows for service of process.”).

3. Contracting states to the Convention have also collectively expressed their views about Article 10(a) in other ways. In particular, several Special Commissions have been convened by the Hague Conference on Private International Law to assist in the implementation of the Convention by providing a “forum for Contracting States to raise issues with the practical operation of the Convention, including differences with other States.” 2016 *Handbook* ¶ 105, at 38.20 Those Special Commissions have produced multiple reports making it clear that Article 10(a) is universally regarded by the contracting states as involving service.

The first such Special Commission was convened in 1977 and included 28 experts from 18 states and three international organizations. See *Report on the Work of the Special Commission on the Operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (21-25 November 1977), 17 I.L.M. 319, 319 (1978). Those experts deemed Article 10(a) to be about service of documents, not transmission for other purposes. Thus, the portion of the 1977 report addressing the use of postal channels said that “[i]t was determined [by the Special Commission] that most of the States made no objection to the *service* of judicial documents coming from abroad directly by mail in their territory.” *Id.* at 326 (emphasis added). And, in light of the Article 21 power to object, the report further observed that “[t]he States which object to the utilisation of *service* by post sent from abroad are known thanks to the declarations made to the Ministry of Foreign Affairs.” *Id.* at 329 (emphasis added).

A second Special Commission was convened in 1989, with representatives from 22 states that were members of the Hague Conference. *Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18*

March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ¶ 2, at 2 (Apr. 1989), https://assets.hcch.net/upload/scrpt89e_20.pdf. The resulting report on the Special Commission's work criticized "certain courts in the United States" for having concluded that "service of process abroad by mail was not permitted under the Convention." *Id.* ¶ 16, at 5. The report explained that "the postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers," and further that "theoretical doubts about the legal nature" of "service by mail" are "unjustified" when a contracting state has not declared reservations about Article 10(a). *Ibid.*

In 2003, a third Special Commission produced a set of conclusions and recommendations that were unanimously approved by representatives from 57 states that were members of the Hague Conference. *Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions* ¶ 1, at 3 (Oct./Nov. 2003), https://assets.hcch.net/upload/wop/lse_concl_e.pdf (2003 *Conclusions and Recommendations*). In those conclusions, the Special Commission "reaffirmed its clear understanding that the term 'send' in Article 10(a) is to be understood as meaning 'service' through postal channels." *Id.* ¶ 55, at 11. There could scarcely be clearer evidence that the decision below is out of step with the views of the parties to the Convention.

The Special Commissions have also supported the preparation of a "practical handbook" about the operation of the Convention by the Permanent Bureau of the Hague Conference. Like the reports of the Special Commissions themselves, the last three editions of that handbook (in 1992, 2006, and 2016) have consistently described Article 10(a) as permitting the "service" of documents through postal channels, and they have expressly criticized the minority of U.S. courts that, like the decision below, have concluded otherwise. The 2016 version of the *Handbook* reiterates frustration that the Deputy Legal Adviser's 1990 letter about *Bankston* "does not seem to have had the desired effect," and notes that "only courts in the United States have had difficulties with the interpretation of [Article 10(a)]." 2016 *Handbook* ¶ 274, at 89. It rejects the Eighth Circuit's decision in *Bankston*, agrees with the Ninth Circuit's decision in *Brockmeyer* sustaining service by mail, and squarely concludes that "[s]ervice by mail under Article 10(a) is possible and effective." *Id.* ¶ 280, at 91.

In sum, there is overwhelming support for the conclusion that the United States' treaty partners construe Article 10(a) to permit service of process by postal channels. This Court should construe the Convention in light of that widely shared understanding.

D. Policy Concerns Do Not Support The Lower Court's Reading Of Article 10(a)

Although the decision below rests principally on the supposed textual disparity between "sending" and "serving" documents, it also suggests that its conclusion is supported by policy considerations. J.A. 55-56. In particular, the court of appeals suggested that the mail is too uncertain for service of process, especially when the Convention's drafters contemplated the use of other methods of service, including diplomatic channels and contracting states' Central Authorities. *Ibid.*; see *Nuovo Pignone*, 310 F.3d at 384-385. Those concerns are not well founded, and United States courts should not second-guess the comparative reliability of service by mail in countries that have not seen fit to lodge their own objections under Article 21.

There is no basis for the implication that postal channels are less likely to give foreign defendants notice of a suit "in sufficient time to defend the allegation." *Nuovo Pignone*, 310 F.3d at 384. Diplomatic channels are the "most time-consuming form of transmission." 2016 *Handbook* ¶ 239, at 76. And postal channels are not necessarily slow. Indeed, the drafters contemplated that postal channels could include service "by telegram." 1 Ristau § 4-3-5, at 205.

The 2003 Special Commission recognized “the increasing use of private courier services for the expeditious transmission of documents” and “concluded that for the purposes of Article 10(a) the use of a private courier was the equivalent of the postal channel.” *2003 Conclusions and Recommendations* ¶ 56, at 11.

Such courier services will often be significantly faster than the Convention’s other channels. Many of the countries that allow for service by mail indicate that service through their Central Authorities takes weeks or months. Others do not indicate how long service through their Central Authorities will take—resulting in a level of uncertainty and delay for litigants. As in the United States, where a service request through the Central Authority will involve a \$95 fee, service through Central Authorities in other countries may also involve higher costs than service by postal channels. The United States favors a reading that, consistent with the purpose of the Convention, presents litigants with efficient and cost-effective options for service abroad.

Nor is there any basis to think that postal channels are simply too “unreliable,” when compared with Central Authorities. Indeed, “[t]he postal channel * * * is commonly used” for the initial transmission of a document *to the Central Authority* abroad, and—after the Central Authority effects service—the postal channel may again be used to return the certificate of service. *2016 Handbook* ¶ 134, at 46; see *id.* ¶ 212, at 69. And, when there is uncertainty about whether a mailed document was actually received, Article 15 provides protections for defendants, generally requiring proof that the document was served as required by the receiving state or that it was “actually delivered,” and that service or delivery was effected in due time. App., *infra*, 3a.

Construing Article 10(a) as precluding service of process by postal channels would make cross-border service of process more burdensome and would cause a substantial increase in the number of requests for service submitted to Central Authorities. Factoring in the execution time and cost associated with sending requests through foreign Central Authorities (or with the other methods of service in the Convention), the result may have a detrimental effect on U.S. and foreign litigants in cross-border litigation—disserving the Convention’s express purpose of “simplifying and expediting” service abroad. App., *infra*, 1a (Pmbl.).

* * * *

The Supreme Court issued its decision in *Water Splash* on May 22, 2017.
Excerpts follow from the opinion (with footnotes omitted).

* * * *

In interpreting treaties, “we begin with the text of the treaty and the context in which the written words are used.” *Schlunk*, 486 U. S., at 699 (internal quotation marks omitted). For present purposes, the key word in Article 10(a) is “send.” This is a broad term, and there is no apparent reason why it would exclude the transmission of documents for a particular purpose (namely, service). Moreover, the structure of the Hague Service Convention strongly counsels against such a reading.

The key structural point is that the scope of the Convention is limited to service of documents. Several elements of the Convention indicate as much. First, the preamble states that the Convention is intended “to ensure that judicial and extrajudicial documents *to be served abroad* shall be brought to the notice of the addressee in sufficient time.” (Emphasis added.) And Article 1 defines the Convention’s scope by stating that the Convention “shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document *for service abroad*.” (Emphasis added.) Even the Convention’s full title reflects that the Convention concerns “Service Abroad.”

We have also held as much. *Schlunk*, 486 U. S., at 701 (stating that the Convention “applies only to documents transmitted for service abroad”). As we explained, a preliminary draft of Article 1 was criticized “because it suggested that the Convention could apply to transmissions abroad that do not culminate in service.” *Ibid.* The final version of Article 1, however, “eliminates this possibility.” *Ibid.* The wording of Article 1 makes clear that the Convention “applies only when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended.” *Ibid.*

In short, the text of the Convention reveals, and we have explicitly held, that the scope of the Convention is limited to service of documents. In light of that, it would be quite strange if Article 10(a)—apparently alone among the Convention’s provisions—concerned something other than service of documents.

Indeed, under that reading, Article 10(a) would be superfluous. The function of Article 10 is to ensure that, absent objection from the receiving state, the Convention “shall not interfere” with the activities described in 10(a), 10(b) and 10(c). But Article 1 already “eliminates [the] possibility” that the Convention would apply to any communications that “do not culminate in service,” *id.*, at 701, so it is hard to imagine how the Convention could interfere with any non-service communications. Accordingly, in order for Article 10(a) to do any work, it *must* pertain to sending documents for the purposes of service.

Menon attempts to avoid this superfluity problem by suggesting that Article 10(a) does refer to serving documents—but only *some* documents. Specifically, she makes a distinction between two categories of service. According to Menon, Article 10(a) does not apply to *service of process* (which we have defined as “a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action,” *id.*, at 700)). But Article 10(a) does apply, Menon suggests, to the service of “post-answer judicial documents” (that is, any additional documents which may have to be served later in the litigation). Brief for Respondent 30–31. The problem with this argument is that it lacks any plausible textual footing in Article 10.

If the drafters wished to limit Article 10(a) to a particular subset of documents, they presumably would have said so—as they did, for example, in Article 15, which refers to “a writ of summons or an equivalent document.” Instead, Article 10(a) uses the term “judicial documents”—the same term that is featured in 10(b) and 10(c). Accordingly, the notion that Article 10(a) governs a different set of documents than 10(b) or 10(c) is hard to fathom. And it certainly derives no support from the use of the word “send,” whose ordinary meaning is broad enough to cover the transmission of *any* judicial documents (including litigation-initiating documents). Nothing about the word “send” suggests that Article 10(a) is *narrower* than 10(b) and 10(c), let alone that Article 10(a) is somehow limited to “post-answer” documents.

Ultimately, Menon wishes to read the phrase “send judicial documents” as “serve a subset of judicial documents.” That is an entirely atextual reading, and Menon offers no sustained argument in support of it. Therefore, the only way to escape the conclusion that Article

10(a) includes service of process is to assert that it does not cover service of documents at all—and, as shown above, that reading is structurally implausible and renders Article 10(a) superfluous.

B

The text and structure of the Hague Service Convention, then, strongly suggest that Article 10(a) pertains to service of documents. The only significant counterargument is that, unlike many other provisions in the Convention, Article 10(a) does not include the word “service” or any of its variants. The Article 10(a) phrase “send judicial documents,” the argument goes, should mean something different than the phrase “effect service of judicial documents” in the other two subparts of Article 10.

This argument does not win the day for several reasons. First, it must contend with the compelling structural considerations discussed above. See *Air France v. Saks*, 470 U.S. 392, 397 (1985) (treaty interpretation must take account of the “context in which the written words are used”); cf. *University of Tex. Southwestern Medical Center v. Nassar*, 570 U. S. ___, ___ (2013) (slip op., at 13) (“Just as Congress’ choice of words is presumed to be deliberate, so too are its structural choices”).

Second, the argument fails on its own terms. Assume for a second that the word “send” must mean something other than “serve.” That would not imply that Article 10(a) must *exclude* service. Instead, “send[ing]” could be a broader concept that includes service but is not limited to it. That reading of the word “send” is probably *more* plausible than interpreting it to exclude service, and it does not create the same superfluity problem.

Third, it must be remembered that the French version of the Convention is “equally authentic” to the English version. *Schlunk*, 486 U. S., at 699. Menon does not seriously engage with the Convention’s French text. But the word “adresser”—the French counterpart to the word “send” in Article 10(a)—“has been consistently interpreted as meaning service or notice.” Hague Conference on Private Int’l Law, *Practical Handbook on the Operation of the Service Convention* ¶279, p. 91 (4th ed. 2016).

In short, the most that could possibly be said for this argument is that it creates an ambiguity as to Article 10(a)’s meaning. And when a treaty provision is ambiguous, the Court “may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.” *Schlunk*, *supra*, at 700 (internal quotation marks omitted). As discussed below, these traditional tools of treaty interpretation comfortably resolve any lingering ambiguity in *Water Splash*’s favor.

III

Three extratextual sources are especially helpful in ascertaining Article 10(a)’s meaning: the Convention’s drafting history, the views of the Executive, and the views of other signatories.

Drafting history has often been used in treaty interpretation. See *Medellín v. Texas*, 552 U. S. 491, 507 (2008); *Saks*, *supra*, at 400; see also *Schlunk*, *supra*, at 700 (analyzing the negotiating history of the Hague Service Convention). Here, the Convention’s drafting history strongly suggests that Article 10(a) allows service through postal channels.

Philip W. Amram was the member of the United States delegation who was most closely involved in the drafting of the Convention. See S. Exec. Rep. No. 6, 90th Cong., 1st Sess. 5 (App.) (1967) (S. Exec. Rep.) (statement of State Department Deputy Legal Adviser Richard D. Kearney). A few months before the Convention was signed, he published an article describing and summarizing it. In that article, he stated that “Article 10 permits direct service by mail

...unless [the receiving] state objects to such service.” The Proposed International Convention on the Service of Documents Abroad, 51 A. B. A. J. 650, 653 (1965).

Along similar lines, the Rapporteur’s report on a draft version of Article 10—which did not materially differ from the final version—stated that the “provision of paragraph 1 also permits service... by telegram” and that the drafters “did not accept the proposal that postal channels be limited to registered mail.” 1 Ristau §4–3–5(a), at 149. In other words, it was clearly understood that service by postal channels was permissible, and the only question was whether it should be limited to registered mail.

The Court also gives “great weight” to “the Executive Branch’s interpretation of a treaty.” *Abbott v. Abbott*, 560 U. S. 1, 15 (2010) (internal quotation marks omitted). In the half century since the Convention was adopted, the Executive has consistently maintained that the Hague Service Convention allows service by mail.

When President Johnson transmitted the Convention to the Senate for its advice and consent, he included a report by Secretary of State Dean Rusk. That report stated that, “Article 10 permits direct service by mail... unless [the receiving] state objects to such service.” Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Message From the President of the United States, S. Exec. Doc. C, 90th Cong., 1st Sess., 5 (1967).

In 1989, the Eighth Circuit issued *Bankston*, the first Federal Court of Appeals decision holding that the Hague Service Convention prohibits service by mail. 889 F. 2d, at 174. The State Department expressed its disagreement with *Bankston* in a letter addressed to the Administrative Office of the U. S. Courts and the National Center for State Courts. See Notice of Other Documents (1), United States Department of State Opinion Regarding the *Bankston* Case and Service by Mail to Japan Under the Hague Service Convention, 30 I. L. M. 260, 260–261 (1991) (excerpts of Mar. 14, 1990, letter). The letter stated that “*Bankston* is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service of process the sending of a copy of a summons and complaint by registered mail to a defendant in a foreign country.” *Id.*, at 261. The State Department takes the same position on its website.

Finally, this Court has given “considerable weight” to the views of other parties to a treaty. *Abbott*, 560 U. S., at 16 (internal quotation marks omitted); see *Lozano v. Montoya Alvarez*, 572 U. S. ___, ___ (2014) (slip op., at 9) (noting the importance of “read[ing] the treaty in a manner consistent with the *shared* expectations of the contracting parties” (internal quotation marks omitted)). And other signatories to the Convention have consistently adopted Water Splash’s view.

Multiple foreign courts have held that the Hague Service Convention allows for service by mail. In addition, several of the Convention’s signatories have either objected, or declined to object, to service by mail under Article 10, thereby acknowledging that Article 10 encompasses service by mail. Finally, several Special Commissions—comprising numerous contracting States—have expressly stated that the Convention does not prohibit service by mail. By contrast, Menon identifies no evidence that any Opinion of the Court signatory has ever rejected Water Splash’s view.

In short, the traditional tools of treaty interpretation unmistakably demonstrate that Article 10(a) encompasses service by mail. To be clear, this does not mean that the Convention affirmatively *authorizes* service by mail. Article 10(a) simply provides that, as long as the receiving state does not object, the Convention does not “interfere with ...the freedom” to serve documents through postal channels. In other words, in cases governed by the Hague Service

Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law. See *Brockmeyer*, 383 F. 3d, at 803–804.

Because the Court of Appeals concluded that the Convention prohibited service by mail outright, it had no occasion to consider whether Texas law authorizes the methods of service used by Water Splash. We leave that question, and any other remaining issues, to be considered on remand to the extent they are properly preserved.

For these reasons, we vacate the judgment of the Court of Appeals, and we remand the case for further proceedings not inconsistent with this opinion.

* * * *

2. ***DA Terra Siderurgica LTDA v. American Metals International***

As discussed in *Digest 2016* at 605-13, in 2016, the United States submitted an *amicus* brief in *DA Terra Siderurgica LTDA v. American Metals International*, No. 15-1133, 15-1146 (2d. Cir.). The Court of Appeals for the Second Circuit issued its decision on January 18, 2017. On March 2, 2017, the Court issued an amended opinion, holding that the district court erred in determining that the New York Convention and the Federal Arbitration Act (“FAA”) required confirmation prior to enforcement and erred in dismissing the fraud claims. The opinion as amended agrees with the views expressed in the U.S. brief that an arbitral award-creditor need not “confirm” a foreign arbitral award under the New York Convention before seeking to “enforce” that award; and that an award-creditor may enforce a foreign arbitral award directly against alleged alter egos or successors. Excerpts follow (with footnotes omitted) from the amended opinion.

* * * *

On April 18, 2013, appellants filed an action to enforce their foreign arbitral award in the district court for the Southern District of New York, seeking to enforce the award against SBT’s “alter egos” and “successor[s] in interest” as well as to recover on state law fraud claims (the “Enforcement Action”). App’x at 37. On July 30, 2013, appellees filed a motion to dismiss the Enforcement Action on the grounds that, among other things, forum in the United States was improper (forum non conveniens), that the action was an improper effort to modify the award, and that appellants were precluded from asserting the state law fraud claims because their fraud claims had been denied by the ICC Paris. Appellants assert that while briefing was “ongoing” in the Enforcement Action, unbeknownst to appellants, SBT was deleted from the Swiss Commercial Register on September 30, 2013. Appellants’ Br. at 19 (citing App’x at 1249 & n.6). Appellants also allege that appellees never disclosed this fact to the district court in their reply brief or in any of their other motions in the Enforcement Action.

On April 9, 2014 and again on March 16, 2015, the district court dismissed the Enforcement Action, holding that appellants could enforce the award only after the award was confirmed in Switzerland or another court of competent jurisdiction, and dismissed the state law fraud claims on the basis that appellants were precluded from asserting them. Enforcement

Decision, 2015 WL 1190137, at *1, *8 *9 (dismissing enforcement action); *CBF Indústria de Gusa S/A/ v. AMCI Holdings, Inc.*, 14 F. Supp. 3d 463, 473 79 (S.D.N.Y. 2014) (hereinafter “Initial Order”) (dismissing enforcement claim for failure to file confirmation action and dismissing fraud claims). The district court held that under *Orion Shipping & Trading Co., Inc. v. E. States Petroleum Corp.*, 312 F.2d 299, 301 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963), appellants could not pursue enforcement of an arbitral award under the Convention for the Enforcement and Recognition of Foreign Arbitral Awards (the “New York Convention”) and its implementing legislation, Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201 *et seq.*, without first confirming the award. Enforcement Decision, 2015 WL 1190137, at *8 *9; Initial Order, 14 F. Supp. 3d at 476 79. The district court held that *Orion* required a two step process by which appellants were required to confirm the award prior to seeking enforcement of that award. Initial Order, 14 F. Supp. 3d at 478 79. Appellants had proposed a “carve out” whereby confirmation was not required when confirmation was made impossible by appellees’ alleged fraudulent acts. *See* Enforcement Decision, 2015 WL 1190137, at *8. Appellants argued in support that the confirmation “prerequisite should not apply where alter ego defendants, through their own intentional wrongdoing, foreclosed any opportunity to confirm the award.” *Id.* (internal quotation marks and citation omitted). The district court rejected appellants’ argument, reasoning that this proposed exception would “undermine ‘the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.’” *Id.* at *9 (quoting *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005)).

The district court also dismissed appellants’ five causes of action for fraud on the basis that the claims sought “a remedy previously sought by [appellants] in the ICC [a]rbitration” and therefore were barred under a theory of issue preclusion. Initial Order, 14 F. Supp. 3d at 480. The district court observed that, as it sat in secondary jurisdiction with regard to appellants’ arbitral award, it could not modify that award either during the enforcement of the award or pursuant to appellants’ fraud based causes of action. Enforcement Decision, 2015 WL 1190137, at *9 (citing Initial Order, 14 F. Supp. 3d at 480); Initial Order, 14 F. Supp. 3d at 480.

VIII. The Confirmation Action

In response to the district court’s initial ruling that *Orion* required appellants to confirm their award prior to seeking its enforcement, appellants initiated an action on April 29, 2014 to confirm the arbitral award in the same district court (the “Confirmation Action”). As a legal entity, however, SBT was effectively a nullity after it was deleted from the Swiss Commercial Register. ... As a result, the district court held that, under Rule 17(b) of the Federal Rules of Civil Procedure, SBT lacked capacity to be sued because it was no longer a corporate entity according to Swiss law. *CBF Indústria de Gusa S/A v. Steel Base Trade AG*, No. 14 Civ. 3034, 2015 WL 1191269, at *3 (S.D.N.Y. Mar. 16, 2015) (hereinafter “Confirmation Decision”).

The district court also held that appellees were not judicially estopped from asserting SBT’s lack of capacity as a defense. Appellants had argued that “[appellees] asserted repeatedly that Switzerland and France provided adequate forums for [appellants’] claims [against SBT] and, indeed, were the proper forums for this action[,]” thereby estopping appellees from arguing SBT lacked capacity to be sued in any fora. Confirmation Decision, 2015 WL 1191269, at *3 (internal quotation marks omitted). The district court noted that, under Second Circuit precedent, a party may be judicially estopped from asserting a position if “(1) the party took an inconsistent position in a prior proceeding and (2) that position was adopted by the first tribunal in some manner, such as by rendering a favorable judgment.” *Id.* (quoting *Holtz v. Rockefeller & Co.*,

258 F.3d 62, 80 (2d Cir. 2001) and citing *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6- 8 (2d Cir. 1999)). The district court noted that “[t]he purposes of the doctrine are to preserve the sanctity of the oath and to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings.” *Id.* (quoting *Mitchell*, 190 F.3d at 6). But the district court held that, because the Enforcement Action was not dismissed on the grounds of forum non conveniens, the second prong of *Holtz* did not apply and appellees were therefore not judicially estopped from making the argument that SBT presently lacked capacity to be sued. *Id.* at *4.

IX. Appeal

Appellants timely filed their appeals from both the Enforcement Decision (No. 15 1133) and the Confirmation Decision (No. 15 1146). In their consolidated appeals, appellants argue, in relevant part, that: (1) the district court erred in holding that *Orion Shipping & Trading Co.*, 312 F.2d at 300 01, required appellants to confirm their foreign arbitral award prior to enforcement; (2) the district court erred in dismissing appellants’ fraud claims on the basis of issue preclusion; and (3) the district court erred in determining that equitable estoppel did not preclude appellees from using SBT’s immunity from suit as a basis for dismissing the Confirmation Action.

Appellees contest each of appellants’ arguments and further argue in response that this court should affirm the district court’s dismissal of appellants’ Enforcement Action and Confirmation Action on the alternative grounds of forum non conveniens and international comity.

DISCUSSION

I. The District Court Erred in Holding Appellants were Required to Confirm their Foreign Arbitral Award Prior to Enforcement

* * * *

This action arises under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517. The United States acceded to the New York Convention on September 30, 1970, and it entered into force in the United States on December 29, 1970. Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (hereinafter “N.Y. Convention”). The New York Convention only applies to “the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought” and to “arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.” N.Y. Convention, art. I(1). According to the Restatement (Third) of the U.S. Law of International Commercial Arbitration, an arbitral award is “made” in the country of the “arbitral seat,” which is “the jurisdiction designated by the parties or by an entity empowered to do so on their behalf to be the juridical home of the arbitration.” Restatement (Third) of the U.S. Law of Int’l Commercial Arbitration §1 1 (s), (aa) (Am. Law Inst., Tentative Draft No. 2, 2012). Thus, the New York Convention applies to arbitral awards “made” in a foreign country that a party seeks to enforce in the United States (known as foreign arbitral awards), to arbitral awards “made” in the United States that a party seeks to enforce in a different country, and to nondomestic arbitral awards that a party seeks to enforce in the United States. *See, e.g.*, Restatement (Third) of the U.S. Law of Int’l Commercial Arbitration §1 1 (i), (k), (o) (Am. Law Inst., Tentative Draft No. 2, 2012).

Here, the parties set the seat of the arbitration as the ICC Paris in Paris, France. The arbitral award which appellants seek to enforce was rendered by the ICC Paris under French law. Initial Order, 14 F. Supp. 3d at 474. The parties are thus correct that the New York Convention governs this case as a matter of international arbitration law. Since the arbitral award was made in France while recognition and enforcement is sought in the Southern District of New York, this litigation presents a classic case of a foreign arbitral award.

Under the New York Convention, the country in which the award is made “is said to have *primary* jurisdiction over the arbitration award.” *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007) (internal quotation marks omitted) (hereinafter “*Karaha Bodas 2d Cir.*”). “The [New York] Convention specifically contemplates that the state in which, or under the law of which, [an] award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.” *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) (citing N.Y. Convention, art. V(1)(e)). Here, that country is France because the parties agreed to arbitrate before the ICC Paris. “All other signatory States are *secondary* jurisdictions, in which parties can only contest whether that State should enforce the arbitral award.” *Karaha Bodas 2d Cir.*, 500 F.3d at 115 n.1 (citation omitted). “[C]ourts in countries of *secondary* jurisdiction may refuse enforcement only on the limited grounds specified in Article V” of the New York Convention. *Id.* (citation omitted); *Yusuf Ahmed Alghanim & Sons*, 126 F.3d at 23 (“[T]he [New York] Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the [New York] Convention.”). The district court here sits in secondary jurisdiction with respect to the foreign arbitral award at issue. Initial Order, 14 F. Supp. 3d at 474.

Chapter 2 of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 201 *et seq.*, implements the United States’ obligations under the New York Convention. *See Scherk v. Alberto Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Section 203 provides that original jurisdiction for “[a]n action or proceeding falling under the [New York] Convention” lies in the United States federal district courts. 9 U.S.C. § 203. Under Section 202, actions or proceedings that “fall[] under the [New York] Convention” include “arbitration agreement[s] or arbitral award[s] arising out of a legal relationship, whether contractual or not, which is considered as commercial” between any parties, *unless* both parties are citizens of the United States *and* “that relationship involves [neither] property located abroad, [nor] envisages performance or enforcement abroad, [n]or has some other reasonable relation with one or more foreign states.” 9 U.S.C. § 202. As the instant case involves non U.S. citizens—all of the appellants, for example, are Brazilian corporate entities—this case properly falls under Chapter 2 of the FAA as well as under the New York Convention.

“The goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.” *Scherk*, 417 U.S. at 520 n. 15 (citations omitted). Thus, both the New York Convention and its implementing legislation in Chapter 2 of the FAA “envision a single- step process for reducing a foreign arbitral award to a domestic judgment.” Amicus Curiae Memorandum Br. at 6.

Under the New York Convention, this process of reducing a foreign arbitral award to a judgment is referred to as “recognition and enforcement.” N.Y. Convention, arts. III, IV, V. “Recognition” is the determination that an arbitral award is entitled to preclusive effect; “Enforcement” is the reduction to a judgment of a foreign arbitral award (as contrasted with a nondomestic arbitral award, discussed below). Restatement (Third) of the U.S. Law of Int’l Commercial Arbitration §11(l), (z) (Am. Law Inst., Tentative Draft No. 2, 2012). Recognition and enforcement occur together, as one process, under the New York Convention. N.Y. Convention, arts. III, IV, V.

Chapter 2 of the FAA implements this scheme through Section 207, which provides that any party may, “[w]ithin three years after an arbitral award... is made, ... apply to any court having jurisdiction under this chapter for an order confirming the award.” 9 U.S.C. § 207. Additionally, Chapter 2 of the FAA provides that “[t]he court shall confirm the award unless it finds one of the 34 grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention” at Article V. 9 U.S.C. § 207. Read in context with the New York Convention, it is evident that the term “confirm” as used in Section 207 is the equivalent of “recognition and enforcement” as used in the New York Convention for the purposes of foreign arbitral awards. As the United States as *amicus curiae* explained, “the ‘confirmation’ proceeding under Chapter Two of the FAA fulfills the United States’ obligation under the [New York] Convention to provide procedures for ‘recognition and enforcement’ of [New York] Convention arbitral awards.” Amicus Curiae Memorandum Br. at 7. A single proceeding, therefore, “facilitate[s] the enforcement of arbitration awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs.” *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366 67 (5th Cir. 2003) (footnote omitted).

This, in fact, was the entire purpose of the New York Convention, which “succeeded and replaced the Convention on the Execution of Foreign Arbitral Awards (‘Geneva Convention’), Sept. 26, 1927, 92 L.N.T.S. 301.” *Yusuf Ahmed Alghanim & Sons*, 126 F.3d at 22. “The primary defect of the Geneva Convention was that it required an award first to be recognized in the rendering state before it could be enforced abroad[.]” *Id.* (citation omitted). This was known as the “double *exequatur*” requirement, and the New York Convention did away with it “by eradicating the requirement that a court in the rendering state recognize an award before it could be taken and enforced abroad.” *Id.* (citations omitted) (stating that the New York Convention “intentionally liberalized procedures for enforcing foreign arbitral awards” (internal quotation marks and citations omitted)).

* * * *

c. Applicable Law for an Enforcement Action

Here, appellants properly sought to have the district court enforce a foreign arbitral award under its secondary jurisdiction. On remand, therefore, we instruct the district court to evaluate appellants’ Enforcement Action, particularly appellants’ effort to reach appellees as alter egos of SBT, under the standards set out in the New York Convention, Chapter 2 of the FAA, and applicable law in the Southern District of New York.

The New York Convention provides that a signatory State “shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.” N.Y. Convention, art. III. The New York Convention clarifies that this means that “[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” *Id.* Thus, the question of whether a third party not named in an arbitral award may have that award enforced against it under a theory of alter ego liability, or any other legal principle concerning the enforcement of awards or judgments, is one left to the law of the enforcing jurisdiction, here the Southern District of New York, under the terms of Article III of the New York Convention.

. * * * *

Thus, it appears that the sole issue at present for the district court to consider on remand pertains to the liability of appellees for satisfaction of appellants’ foreign arbitral award as alter-egos of the award debtor under the applicable law in the Southern District of New York. We leave further legal and factual development of this issue, and any other barriers to enforcement that appellees may argue on remand, to the district court.

II. The District Court Erred in Dismissing Appellants’ Fraud Claims Under the Doctrine of Issue Preclusion

The district court dismissed appellants’ five causes of action for fraud on the basis that these claims sought “a remedy previously sought by [appellants] in the ICC Arbitration ... [and] are therefore barred.” Initial Order, 14 F. Supp. 3d at 480 (citations omitted).

We understand the district court’s finding to be one of as issue preclusion, *i.e.*, that appellants, having already had a “full and fair opportunity” to litigate their fraud claims and having received an unfavorable determination from the ICC Paris, are not permitted to relitigate the issue in the federal district court in an attempt to achieve a more favorable outcome. ... The mere fact, however, that an issue appears to have been resolved by an earlier arbitration does not necessarily mean that issue preclusion applies. “An arbitration decision may effect [issue preclusion] in a later litigation . . . [only] if the proponent can show with clarity and certainty that the same issues were resolved.” *Bear, Stearns & Co., Inc. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 91 (2d Cir. 2005) (internal quotation marks and citation omitted).

* * * *

Here, appellants argue that they were denied a full and fair opportunity to litigate the merits of their fraud claims due to appellees’ fraud and misconduct before the ICC Paris. Specifically, appellants claim that appellees misled the ICC Paris as to the extent of the fraud committed by appellees, thereby leading the ICC Paris to issue an unfavorable decision on the issue which appellees now seek to enforce for purposes of issue preclusion.

... Given appellants’ assertions of fraud on the part of appellees, ... we find the district court’s application of the equitable doctrine of issue preclusion was inappropriate. On remand, appellants should be allowed to conduct discovery with respect to the fraud claims. Appellees may be given the opportunity to re raise the issue preclusion issue after discovery at the district court’s discretion.

III. The Court Declines to Affirm the Rulings of the District Court on the Alternative Grounds of Forum Non Conveniens and International Comity

In addition to challenging appellants' affirmative arguments on appeal, appellees also urge this court to affirm the district court's dismissal of appellants' Enforcement Action on the alternative grounds of forum non conveniens and international comity. "It is well settled that we may affirm [a district court's decision] on any grounds for which there is a record sufficient to permit conclusions of law, including grounds not relied upon by the district court." *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 157 58 (2d Cir. 2015) (internal quotation marks and citations omitted). We, however, have "discretion to choose not to do so based on prudential factors and concerns." *Id.* at 158...

We decline to affirm the district court's dismissal on the alternative grounds of forum non conveniens and international comity here. We leave these issues for consideration by the district court in the first instance should appellees choose to raise them again.

* * * *

3. Mobil Cerro Negro, Ltd. v. Venezuela

As discussed in *Digest 2016* at 390-96, the United States submitted an *amicus* brief in *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707 (2d. Cir.). The U.S. Court of Appeals for the Second Circuit issued its decision on July 11, 2017, holding that the FSIA provides the sole basis for subject matter jurisdiction over actions to enforce ICSID awards against a foreign sovereign. The decision refers extensively to the U.S. *amicus* brief and is excerpted in Chapter 10.A.1.

Cross References

Child Abduction, **Ch. 2.B.2.**

UN Convention on the Assignment of Receivables in International Trade, **Ch. 4.A.1.**

Cooper v. TEPCO (comity, forum non conveniens), **Ch. 5.C.4.**

Application of the FSIA in Enforcement of ICSID Arbitration Awards, **Ch. 10.A.1.**

CHAPTER 16

Sanctions, Export Controls, and Certain Other Restrictions

This chapter discusses selected developments during 2017 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 <https://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. Details on the State Department's defense trade control programs are available at <http://www.pmddtc.state.gov>.

A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS

1. Iran

a. The Joint Comprehensive Plan of Action ("JCPOA")

As discussed in *Digest 2015* at 634-35, the P5+1 and Iran concluded the Joint Comprehensive Plan of Action ("JCPOA") on July 14, 2015, to address the international community's concerns with Iran's nuclear program. Under the JCPOA, the U.S. committed to lift nuclear-related secondary sanctions, which are generally directed toward non-U.S. persons for specified conduct involving Iran that occurs entirely outside of U.S. jurisdiction and does not involve U.S. persons. See Chapter 19 for discussion of the Trump administration's review of the JCPOA.

b. Implementation of UN Security Council resolutions

As discussed in *Digest 2015* at 636, the UN Security Council endorsed the JCPOA via Resolution 2231. Resolution 2231 terminated prior UN Security Council Resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1929 (2010), and 2224 (2015)

based on receipt by the Security Council of the report from the IAEA verifying that Iran had taken the actions specified in paragraphs 15.1-15.11 of Annex V of the JCPOA.

c. U.S. sanctions and other controls

Sanctions relating to Iran that are outside the scope of the JCPOA have remained in place and are being enforced. Further information on Iran sanctions is available at <https://www.state.gov/e/eb/tfs/spi/iran/index.htm> and <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx>.

(1) E.O. 13382

On February 3, 2017, the Treasury Department's Office of Foreign Assets Control ("OFAC") designated nine individuals and eight entities pursuant to E.O. 13382 ("Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters"), subjecting them to sanctions for their ties to or support for persons previously designated under E.O. 13382 based on involvement in Iran's WMD programs. 82 Fed. Reg. 9960 (Feb. 8, 2017). The individuals are: Abdollah ASGHARZADEH; Tenny DARIAN; Qin XIANHUA; Richard YUE; Carol ZHOU; Mohammad MAGHAM; Mostafa ZAHEDI; Ghodrat ZARGARI; and Kambiz ROSTAMIAN. *Id.* The entities are: COSAILING BUSINESS TRADING COMPANY LIMITED; EAST STAR COMPANY; NINGBO NEW CENTURY IMPORT AND EXPORT COMPANY, LTD.; OFOG SABZE DARYA COMPANY; ERVIN DANESH ARYAN COMPANY; ZIST TAJHIZ POOYESH COMPANY; MKS INTERNATIONAL CO. LTD.; and ROYAL PEARL GENERAL T.R.D. *Id.*

On May 17, 2017, OFAC designated three individuals and four entities pursuant to E.O. 13382 for their support of, or ties to, previously-designated entities involved in Iran's WMD program. 82 Fed. Reg. 23,715 (May 23, 2017). The individuals are: Ruan RUNLING (for support of SHIRAZ ELECTRONICS INDUSTRIES); Rahim AHMADI (linked to SHAHID BAKERI INDUSTRIAL GROUP); and Morteza FARASATPOUR (linked to DEFENSE INDUSTRIES ORGANIZATION). *Id.* The entities are: SHANGHAI GANG QUAN TRADE CO. (for support of SHIRAZ ELECTRONICS INDUSTRIES); SHANGHAI NORTH BEGINS INTERNATIONAL (for support of SHIRAZ ELECTRONICS INDUSTRIES); SHANGHAI NORTH TRANSWAY INTERNATIONAL TRADING CO. (for support of SHIRAZ ELECTRONICS INDUSTRIES); and MATIN SANAT NIK ANDISHAN (for support of SHAHID HEMMAT INDUSTRIES GROUP). *Id.*

On July 18, 2017, OFAC designated five individuals* and seven entities** pursuant to E.O. 13382 for support of or links to persons previously designated under

* Editor's note: Two additional individuals listed in the same Federal Register notice, along with others linked to Iranian entities and previously designated pursuant to E.O. 13382, were designated pursuant to E.O. 13581, "Blocking Property of Transnational Criminal Organizations." They are Mohammed Saeed AJILY and Mohammed Reza REZAKHAH.

** Editor's note: Two additional entities listed in the same Federal Register notice, along with others linked to persons designated for Iran-related actions, were designated pursuant to E.O. 13581, "Blocking Property of Transnational Criminal Organizations." They are AJILY SOFTWARE PROCUREMENT GROUP and ANDISHEH VESAL MIDDLE EAST COMPANY.

E.O. 13382. 82 Fed. Reg. 33,943 (July 21, 2017). The individuals are: Emily LIU (linked to SHIRAZ ELECTRONICS INDUSTRIES); Seyyed Reza GHASEMI (linked to RAYAN ROSHD AFZAR COMPANY); Farshad HAKEMZADEH (linked to RAYAN ROSHD AFZAR COMPANY); Mohsen PARSAJAM (linked to RAYAN ROSHD AFZAR COMPANY); Resit TAVAN (linked to QESHM MADKANDALOO SHIPBUILDING COOPERATIVE CO). *Id.* The designated entities are: ABASCIENCE TECH CO. LTD. (linked to SHIRAZ ELECTRONICS INDUSTRIES and Emily LIU); RAYBEAM OPTRONICS CO. LTD. (linked to Emily LIU); RAYTRONIC CORPORATION, LIMITED (linked to Emily LIU); SUNWAY TECH CO., LTD, (linked to SHIRAZ ELECTRONICS INDUSTRIES and Emily LIU); RAYAN ROSHD AFZAR COMPANY (a.k.a. RAYAN ROSHD COMPANY; a.k.a. “RAYAN ROSHD”) (linked to ISLAMIC REVOLUTIONARY GUARD CORPS); QESHM MADKANDALOO SHIPBUILDING COOPERATIVE CO (linked to ISLAMIC REVOLUTIONARY GUARD CORPS); and RAMOR GROUP (linked to Resit TAVAN). *Id.* The State Department issued a press statement on the July 18, 2017 designations, available at <https://www.state.gov/r/pa/prs/ps/2017/07/272635.htm>, and excerpted below.

* * * *

The United States remains deeply concerned about Iran’s malign activities across the Middle East, which undermine regional stability, security, and prosperity. Iran continues to support terrorist groups—such as Hizballah, Hamas, and Palestinian Islamic Jihad—that threaten Israel and stability in the Middle East. Iran has maintained its steadfast support for the Assad regime, despite Assad’s atrocities against his own people. Iran also continues to provide the Houthi rebels in Yemen with advanced weaponry that threatens freedom of navigation in the Red Sea, has been used to attack Saudi Arabia, and is prolonging the Yemen conflict. Additionally, Iran continues to test and develop ballistic missiles, in direct defiance of UN Security Council Resolution 2231. The Joint Comprehensive Plan of Action (JCPOA) states the anticipation of JCPOA participants that “full implementation of this JCPOA will positively contribute to regional and international peace and security.” However, Iran’s other malign activities are serving to undercut whatever “positive contributions” to regional and international peace and security were intended to emerge from the JCPOA.

In response to these continued Iranian threats, the Administration today announces that it has designated 18 entities and individuals supporting Iran’s ballistic missile program and for supporting Iran’s military procurement or Iran’s Islamic Revolutionary Guard Corps (IRGC), as well as an Iran-based transnational criminal organization and associated persons. Today’s actions were taken pursuant to Executive Order (E.O.) 13382, which targets proliferators of weapons of mass destruction and their means of delivery and supporters of such activity, as well as E.O. 13581, which targets transnational criminal organizations.

Specifically, the U.S. Department of State designated two entities pursuant to E.O. 13382 for engaging, or attempting to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass

destruction or their means of delivery. The State Department designated the IRGC Aerospace Force Self Sufficiency Jihad Organization (ASF SSJO), which is involved in Iranian ballistic missile research and flight test launches. In addition, the State Department designated the IRGC Research and Self Sufficiency Jihad Organization (RSSJO), which is responsible for the research and development of ballistic missiles.

Additionally, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), designated seven entities and five individuals for engaging in activities in support of Iran's military procurement or the IRGC, as well as an Iran-based transnational criminal organization and three associated persons. Today's action targets three networks supporting Iran's military procurement or the IRGC through the development of unmanned aerial vehicles and military equipment for the IRGC, the production and maintenance of fast attack boats for the IRGC-Navy, or the procurement of electronic components for entities that support Iran's military. OFAC also designated two Iranian businessmen and associated entities who orchestrated the theft of U.S. and western software programs which, at times, were sold to the Government of Iran.

The Iranian regime also continues to detain U.S. citizens and other foreigners on fabricated national-security related charges. We call upon Iran to release U.S. citizens Baquer Namazi, Siamak Namazi, and Xiyue Wang, and all other unjustly detained U.S. citizens, so that they can be reunited with their families. The United States is deeply concerned about reports of the declining health of the Namazis, Wang, and other detained U.S. citizens. Iran should immediately release all of these U.S. citizens on humanitarian grounds. It has also been more than a decade since Robert Levinson disappeared from Iran's Kish Island. Iran committed to cooperating with the United States in bringing Bob home and we call on Iran to fulfill this commitment. The United States remains unwavering in its efforts to return Bob to his family. The Federal Bureau of Investigations (FBI) has offered a \$5 million reward for any information that could lead to Bob's safe return. We call on anyone with information about this case to contact the FBI at <http://tips.fbi.gov> or email the FBI at levinsonfbireward@ic.fbi.gov. Information will be kept confidential and can be provided anonymously.

Iran's regime has an egregious human rights record, which includes denial of the freedom of religion or belief as well as other human rights and fundamental freedoms to individuals in Iran. Notably, arbitrary arrest and detention of members of religious minorities and political activists, is common as is the use of torture and other forms of abuse in detention. On June 27, the United States released its annual report on Trafficking in Persons. In the report, Iran is again ranked as a Tier 3 country because it does not take significant steps to address its extensive trafficking problem nor does it fully meet the minimum standards for the elimination of trafficking and is not making significant efforts to do so. Iran is a source, transit, and destination country for men, women, and children subjected to sex trafficking and forced labor. Notably, Iran also coerces Afghan refugees into participating in combat in Syria, deporting those who refuse to do so, and it supports militias fighting in Iraq that recruited and used child soldiers. These abhorrent abuses only fuel conflict throughout the Middle East.

The Administration is continuing to conduct a full review of U.S. policy toward Iran. During the course of this review, the United States will continue to aggressively counter Iran's malign activities in the region. While the review is ongoing, the United States will also continue to expect strict Iranian adherence to Iran's nuclear commitments under the JCPOA and look to the International Atomic Energy Agency to continue to monitor and verify all of Iran's nuclear commitments. In addition, the United States will continue to comply with its commitments under

the JCPOA. As a result, we communicated to the U.S. Congress on July 17 that the United States continues to waive sanctions as required to continue implementing U.S. sanctions-lifting commitments in the JCPOA, and is certifying to Congress that, based on available information, the conditions of Section 135(d)(6) of the Atomic Energy Act of 1954 (AEA), as amended, including as amended by the Iran Nuclear Agreement Review Act of 2015 (Public Law 114-17), enacted on May 22, 2015, are met as of July 17, 2017. We also note Iran's continued malign activities outside the nuclear issue undermine the positive contributions to regional and international peace and security that the deal was supposed to provide. The United States will continue to use sanctions to target those who lend support to Iran's destabilizing behavior and above all, the United States will never allow the regime in Iran to acquire a nuclear weapon.

* * * *

On July 28, 2017, OFAC designated the following entities pursuant to E.O. 13382: AMIR AL MO'MENIN INDUSTRIES; SHAHID CHERAGHI INDUSTRIES; SHAHID KALHOR INDUSTRIES; SHAHID KARIMI INDUSTRIES; SHAHID RASTEGAR INDUSTRIES; and SHAHID VARAMINI INDUSTRIES. 82 Fed. Reg. 39,154 (Aug. 17, 2017).

On September 14, 2017, OFAC designated SADID CARAN SABA ENGINEERING COMPANY pursuant to E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, Iran's ISLAMIC REVOLUTIONARY GUARD CORPS. 82 Fed. Reg. 44,026 (Sep. 20, 2017).

On October 13, 2017, OFAC designated four entities pursuant to E.O. 13382 for their support of previously-designated entities involved in Iran's WMD program. 82 Fed. Reg. 48,591 (Oct. 18, 2017). 82 Fed. Reg. 48,591 (Oct. 18, 2017). The entities are: FANAMOJ, RASTAFANN ERTEBAT ENGINEERING COMPANY, SHAHID ALAMOLHODA INDUSTRIES, and WUHAN SANJIANG IMPORT AND EXPORT CO. LTD. *Id.*

(2) CAATSA

The Countering America's Adversaries Through Sanctions Act of 2017, Public Law 115-44, Aug. 2, 2017, 131 Stat. 886 (22 U.S.C. § 9401 *et seq.*) ("CAATSA") was signed into law on August 2, 2017. See Chapter 1.B.2.d. for discussion of the President's signing statement. On October 31, 2017, OFAC published amendments to the Global Terrorism Sanctions Regulations ("GTSR") to implement Section 105 of CAATSA, which requires the President to impose sanctions under E.O. 13224 on Iran's Islamic Revolutionary Guard Corps ("IRGC") and IRGC officials, agents, and affiliates. 82 Fed. Reg. 50,313 (Oct. 31, 2017). The functions and authorities of the President in section 105 of CAATSA were delegated to the Secretaries of State and Treasury by an October 11, 2017 Presidential Memorandum. OFAC designated the IRGC on October 13, 2017, pursuant to E.O. 13224, for providing support to the IRGC-Qods Force, which previously had been designated for its support to various terrorist groups. On November 9, 2017, OFAC published the names of 41 persons previously designated whose property and interests in property are blocked pursuant to section 594.201(a)(5) of the GTSR. These persons were identified on the SDN List as officials, agents, or affiliates of the IRGC. 82 Fed. Reg.

50,313 (Oct. 31, 2017). Accordingly, OFAC added the reference “[SDGT]” to their SDN List entries. 82 Fed. Reg. 54,467 (Nov. 17, 2017).

(3) *Comprehensive Iran Sanctions Accountability and Divestment Act of 2010 (“CISADA”)*

In a May 17, 2017 media note, available at <https://www.state.gov/r/pa/prs/ps/2017/05/270925.htm>, the State Department announced the release of its semi-annual report to Congress detailing sanctions imposed on persons involved in human rights abuses in Iran. The report, available at <https://www.state.gov/e/eb/rls/othr/2017/270917.htm>, lists individuals and entities determined by the Secretary of the Treasury, in consultation with or at the recommendation of the Secretary of State, to meet the criteria in Sections 105(b) and 105B(b) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (“CISADA”) (Public Law 111-195). Executive Order 13553 implements Section 105 of CISADA, as amended by the Iran Threat Reduction and Syria Human Rights Act of 2012 (“TRA”). Acting Assistant Secretary of State for Near Eastern Affairs Ambassador Stuart Jones gave the following statement on the report:

As we continue to closely scrutinize Iran’s commitment to the JCPOA and develop a comprehensive Iran policy, we will continue to hold Iran accountable for its human rights abuses with new actions. We urge our partners around the world to join us in calling out individuals and entities who violate international sanctions targeting Iran’s human rights abuses.

Whether it’s imprisoning people arbitrarily, inflicting physical abuse and torture, or executing juvenile offenders, the Iranian regime has for decades committed egregious human rights violations against its own people and foreign nationals, and this pattern of behavior must come to an end. The U.S. and its partners will continue to apply pressure on Iran to protect the human rights and fundamental freedoms for everyone in Iran. This includes the U.S. citizens wrongfully detained or missing in Iran, and we call on Iran to immediately return them to their families.

In addition to the actions taken today, we are communicating to the U.S. Congress that the United States continues to waive sanctions as required to continue implementing U.S. sanctions-lifting commitments in the Joint Comprehensive Plan of Action. This ongoing review does not diminish the United States’ resolve to continue countering Iran’s destabilizing activity in the region, whether it be supporting the Assad regime, backing terrorist organizations like Hezbollah, or supporting violent militias that undermine governments in Iraq and Yemen. And above all, the United States will never allow the regime in Iran to acquire a nuclear weapon.

The persons designated under E.O. 13553 as of May 17, 2017 are:

- **Abdollah Araghi**, Islamic Revolutionary Guard Corps (IRGC) Ground Forces Deputy Commander
- **Abbas Jafari Dolatabadi**, Prosecutor General of Tehran

- **Hassan Firouzabadi**, senior military advisor to the Supreme Leader, former Chairman of Iran's Joint Chiefs of Staff
- **Mohammad Ali Jafari**, Commander of the IRGC
- **Ismail Ahmadi Moghadam**, former Commander of the Law Enforcement Forces
- **Sadeq Mahsouli**, former Minister of Welfare and Social Security, former Minister of the Interior and Deputy Commander-in-Chief of the Armed Forces for Law Enforcement
- **Qolam-Hossein Mohseni-Ejei**, Judiciary Spokesman, former Prosecutor-General of Iran, former Minister of Intelligence
- **Saeed Mortazavi**, former head of Iranian Anti-Smuggling Task Force, former Prosecutor-General of Tehran
- **Heydar Moslehi**, former Minister of Intelligence
- **Mostafa Mohammad Najjar**, former Minister of the Interior and Deputy Commander-in-Chief of the Armed Forces for Law Enforcement
- **Mohammad Reza Naqdi**, Commander of the Basij Guard Corps (IRGC)
- **Ahmad-Reza Radan**, former Deputy Chief of Iran's Law Enforcement Forces, Senior Iranian Law Enforcement Official
- **Hossein Taeb**, Deputy Commander of the IRGC, Commander of the IRGC Intelligence Organization, former Commander of the Basij Forces
- **Asghar Mir-Hejazi**, Intelligence advisor to the Supreme Leader
- **Sohrab Soleimani**, Supervisor of the Office of the Deputy for Security and Law Enforcement of the State Prisons Organization, former Director General of the Tehran Prisons Organization
- **The Islamic Revolutionary Guard Corps**
- **The Basij Resistance Force**
- **Law Enforcement Forces of the Islamic Republic of Iran**
- **The Iranian Ministry of Intelligence and Security**
- **Abysec**
- **Tehran Prisons Organization**

Sohrab Soleimeini and the Tehran Prisons Organization were designated under E.O. 13553 on April 13, 2017. 82 Fed. Reg. 18,342 (Apr. 18, 2017).

(4) *Iran, North Korea, and Syria Nonproliferation Act ("INKSNA")*

On March 21, 2017, the United States imposed sanctions on entities and individuals from 10 countries pursuant to the Iran, North Korea, and Syria Nonproliferation Act ("INKSNA"). 82 Fed. Reg. 15,780 (Mar. 30, 2017); 82 Fed. Reg. 15,547 (March 29, 2017). INKSNA authorizes sanctions on persons who transfer to, or acquire from, Iran, North Korea, or Syria, items that contribute to WMD or missile development. Those sanctioned are the following (and any successors, sub-units, or subsidiaries):

- Ministry of Defense Directorate of Defense Industries (DDI) (Burma)
- Beijing Zhong Ke Electric Co., LTD. (ZKEC) (China)
- Dalian Zhenghua Maoyi Youxian Gongsi (China)

- Jack Qin (Chinese individual)
- Jack Wang (Chinese individual)
- Ningbo New Company Import
- Export Company Limited (China)
- Karl Lee [aka Li Fangwei] (Chinese individual)
- Shanghai Horse Construction [aka Forrisio International Group] (China)
- Shenzhen Yataida High-Tech Company Ltd. (China)
- Sinotech (Dalian) Carbon and Graphite Corporation (SCGC) (China)
- Sky Rise Technology [aka Reekay Technology Limited] (China)
- Sun Creative (Zhejiang) Technologies, Inc. (China)
- T-Rubber Co. Ltd (China)
- Special Defense Research Center (SDRC) (Egypt)
- Eritrean Navy (Eritrea)
- Aerospace Industries Organization (AIO) (Iran)
- Saeng Pil Trading Corporation (SPTC) (North Korea)
- 150th Aircraft Repair Plant (Russia)
- Aviaexport (Russia)
- Bazalt (Russia)
- Kolomna Design Bureau of Machine- Building (KBM) (Russia)
- Rosoboronexport (ROE) (Russia)***
- Ulyanovsk Higher Aviation Academy of Civil Aviation (UVAUGA) (Russia)
- Ural Training Center for Civil Aviation (UUTsGA) (Russia)
- Zhukovskiy and Gagarin Academy (Z&G Academy) (Russia)
- Madar Yara Medical Company (Saudi Arabia)
- Giad Heavy Industries (GHI) (Sudan)
- Military Industries Corporation (MIC) (Sudan)
- Muhammad al-Husayn Yusuf (Sudanese individual)
- Mabrooka Trading (United Arab Emirates)

The measures imposed on the sanctioned persons include a ban on U.S. Government procurement; a prohibition on U.S. Government assistance; a ban on U.S. Government sales of U.S. Munitions List or defense articles or services; and a ban on export licenses for controlled items.

*** Editor's note: With respect to ROE, the measures applied include an exception to the procurement ban for "the maintenance, repair, overhaul, or sustainment of Mi-17 helicopters for the purpose of providing assistance to the security forces of Afghanistan, as well as for the purpose of combating terrorism and violent extremism globally" and an exception for "the Digital Electro Optical Sensor OSDCAM4060 to improve the U.S. ability to monitor and verify Russia's Open Skies Treaty compliance." 82 Fed. Reg. at 15,548.

Senior State Department officials held a briefing on the sanctions on March 30, 2017. The briefing is available at <https://www.state.gov/r/pa/prs/ps/2017/03/269329.htm>, and excerpts discussing Iran-related sanctions appear below.

* * * *

SENIOR STATE DEPARTMENT OFFICIAL TWO: ... Iran’s destabilizing activities in the region are provocative and undermine regional security, stability, and prosperity. The imposition of these measures today underscores our commitment to counter these activities, which include Iran’s sponsorship of terrorism, its ballistic missile program, and its support for the Houthi rebels in Yemen.

These sanctions today include designations targeting Iran’s missile programs that remains one of our most significant security concerns in the region as it contributes to regional tensions and poses a serious threat to international stability and security.

Through this action, we have sanctioned 11 individuals and entities for their support for Iran’s ballistic missile program. These steps we have taken are outside the JCPOA. The JCPOA is limited to Iran’s nuclear program, and the United States continues to implement its commitments under the JCPOA.

We have consistently said that we will continue to counter Iran’s support for terrorism, its ballistic missile program, its human rights abuses, including through sanctions where appropriate. It should not be of any surprise to Iran that we would take actions against entities and individuals that engage in proliferation activity with Iran, North Korea, and Syria.

* * * *

SENIOR STATE DEPARTMENT OFFICIAL TWO: ...[W]e’ve got a number of measures—and they’re not just sanctions that we engage in—to slow down or prevent Iran from advancing its ballistic missile program. One of those [is] sanctions, of course. But they include interdictions—interdictions in conjunction with partner governments, our activities at the United Nations to spotlight those—Iran’s ballistic missile activities, and other activities we engage in as well. So this is just part of a series of things that we do to counter Iran’s ballistic missile program.

Sanctions alone are important. Sanctions shine a public spotlight. They limit the activities of the sanctioned entities. And they also discourage other entities from engaging in those kinds of activities, but will admit that alone they are ... just one tool that’s part of a larger toolkit.

* * * *

2. Syria

On January 12, 2017, the Department of State imposed sanctions on an entity associated with Syria’s weapons of mass destruction (“WMD”)-capable ballistic missile program. The entity, Organization for Technological Industries (“OTI”), was designated

under Executive Order 13382. 82 Fed. Reg. 6686 (Jan. 19, 2017). The media note on the designation, available at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266898.htm>, provides additional information on OTI:

According to a June 26, 2012 report broadcast by Syrian Satellite Channel Television of an address by Syrian President Bashar al-Asad to the then-new Syrian Cabinet, OTI belongs to the Syrian Ministry of Defense, was established in 2010, and is involved in “high level technical industries.” OTI’s primary mission is to import advanced strategic technologies for surface-to-surface missile (SSM) and surface-to-surface rocket (SSR) programs in Syria. OTI is involved in furthering Syria’s WMD-capable ballistic missile program. As of May 2014, OTI changed its purpose to include producing components for SSMs and SSRs produced by the Syrian Scientific Studies and Research Center (SSRC)—Syria’s leading advanced weapons development and production entity. SSRC was designated by President George W. Bush in the Annex to E.O. 13382 issued on June 29, 2005.

The Department’s action follows findings by the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism (JIM) that the Syrian regime used chemicals as a weapon against its own citizens. In reports issued in August and October 2016, the JIM—established by the United Nations Security Council in 2015 to identify those involved in the use of chemical weapons—determined that the Syrian government was involved in three attacks involving chemicals used as weapons. Specifically, the JIM found that the Syrian Arab Armed Forces used chemicals as weapons against the Syrian people in three separate incidents.

OFAC made concurrent designations of 18 senior regime officials connected to Syria’s WMD programs and five Syrian military branches as part of the Government of Syria.

Also on January 12, 2017, OFAC made designations relating to Syria pursuant to multiple executive orders. 82 Fed. Reg. 8260 (Jan. 24, 2017). Seven individuals were designated pursuant to E.O. 13382, “Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters,” based on their links to the Scientific Studies and Research Center: Ghassan ABBAS; Firas AHMAD; Samir DABUL; Habib HAWRANI; Zuhayr HAYDAR; Ali WANUS; and Bayan BITAR. *Id.* Five individuals were designated pursuant to E.O. 13572, “Blocking Property of Certain Persons With Respect to Human Rights Abuses in Syria,” due to links to Syrian intelligence and security agencies: Suhayl Hasan AL-HASAN; Muhammad Nafi BILAL; Yasin Ahmad DAHI; Muhammad Mahmud MAHALLA; and Muhammad Khalid RAHMUN. *Id.* Five individuals were designated pursuant to E.O. 13573, “Blocking Property of Senior Officials of the Government of Syria:” Ahmad BALLUL; Saji Jamil DARWISH; Muhammad IBRAHIM; Talal Shafiq MAKHLUF; and Badi MUALLA. *Id.* One individual, Rafiq Shihadah, was designated pursuant to E.O. 13582, “Blocking Property of the Government of Syria and Prohibiting Certain Transactions with Respect to Syria. *Id.* And, OFAC identified the following five entities as

falling within the definition of the Government of Syria as set forth in section 8(d) of E.O. 13582 and section 542.305 of the Syrian Sanctions Regulations, 31 CFR part 542: SYRIAN AIR FORCE; SYRIAN ARAB AIR DEFENSE FORCES; SYRIAN ARAB ARMY; SYRIAN ARAB NAVY; and SYRIAN ARAB REPUBLICAN GUARD. *Id.*

On February 23, 2017, OFAC designated one Syrian entity pursuant to E.O. 13382 (“Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters”): METALLIC MANUFACTURING FACTORY. 82 Fed. Reg. 12,702 (Mar. 6, 2017). On April 24, 2017, OFAC designated 271 persons pursuant to E.O. 13582, “Blocking Property of the Government of Syria and Prohibiting Certain Transactions with Respect to Syria.” 82 Fed. Reg. 19,786 (Apr. 28, 2017). On May 16, 2017, OFAC designated two persons pursuant to E.O. 13582; two persons pursuant to E.O. 13382; and six persons pursuant to E.O. 13572, “Blocking Property of Certain Persons With Respect to Human Rights Abuses in Syria”. 82 Fed. Reg. 23,721 (May 23, 2017). The E.O. 13582 designations are: Iyad MAKHLUF and CHAM ISLAMIC BANK. The E.O. 13382 designations are: Muhammed Bin-Muhammed Faris QUWAYDIR and SYRIAN COMPANY FOR INFORMATION TECHNOLOGY. The E.O. 13572 designations are: Muhammad ABBAS, Ihab MAKHLUF, Samir Sakhir DARWISH, AL-BUSTAN CHARITY, AL-AJNIAH, and BARLY OFF-SHORE.

On July 17, 2017, the State Department issued a press statement welcoming sanctions imposed by the European Union on officers in the Syrian regime and scientists involved in the use of chemical weapons in Syria. The press statement, available at <https://www.state.gov/r/pa/prs/ps/2017/07/272643.htm>, includes the following:

We applaud today’s decision by the European Council to sanction sixteen senior military officials and Syria’s Scientific Studies and Research Centre Scientists (SSRC) for their roles in the development and use of chemical weapons against civilian populations. This action follows sanctions designations recently undertaken by the United States, similarly aimed at holding the Syrian regime accountable for its repeated use of chemicals weapons on the Syrian people, including the April 4 Khan Shaykhun attack. In April 2017, the United States sanctioned numerous employees of the SSRC, the Syrian government agency responsible for developing and producing non-conventional weapons in support of Syria’s chemical weapons program. Additionally, in May 2017, the United States sanctioned a number of Syrian individuals and entities in response to acts of violence committed by the Government of Syria against its own citizens.

3. Cuba

Amendments to the Cuban Assets Control Regulations

See *Digest 2016* at 626-27, *Digest 2015* at 639-40, and *Digest 2014* at 336 regarding amendments to the Cuban Assets Control Regulations (“CACR”) to implement the 2014 policy on Cuba. On January 6, 2017, OFAC removed from the specially designated nationals list (“SDN List”) the following individuals and entities, whose property and

interests in property were blocked pursuant to the CACR: Alejandro Abood ANGELINI, Carlos DOMINGUEZ, Naomi A. DE FRANCE, Wilfred EGGLETON, Daniel GARCIA, Carlos Alfonso GONZALEZ, Guadalupe ORTIZ, Lazaro PONCE DE LEON GOMEZ, Anabel SANTO, Melvia Isabel Gallegos YAM, CARIBSUGAR INTERNATIONAL TRADERS, CUREF METAL PROCESSING BV, MANZPER CORP., NIPPON-CARIBBEAN CO., LTD., BELMEX IMPORT EXPORT CO., LTD., COLONY TRADING, CORPORACION ARGENTINA DE INGENIERIA Y ARQUITECTURA, S.A., EXPORTADORA DEL CARIBE, KYOEI INTERNATIONAL COMPANY, LIMITED, LEVERYE, S.A., MARISCO DE FARALLON, S.A., PANOAMERICANA, PROMOCIONES ARTISTICAS (a.k.a. PROARTE), SHIPLEY SHIPPING CORP. 82 Fed. Reg. 4460 (Jan. 13, 2017).

On June 16, 2017, the President signed the National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba (“NSPM”). As required by the NSPM, on November 9, 2017, OFAC published amendments to the CACR and the Department of Commerce’s Bureau of Industry and Security (“BIS”) published amendments to the Export Administration Regulations (“EAR”) regarding Cuba. 82 Fed. Reg. 51,998 (Nov. 9, 2017). The amendment to the CACR prohibits direct financial transactions with certain entities and subentities identified on the State Department’s Cuba Restricted List. The EAR amendment provides that BIS will generally deny applications to export or reexport items for use by entities or subentities identified on the Cuba Restricted List. The Cuba Restricted List is available at <http://www.state.gov/e/eb/tfs/spi/cuba/cubarestrictedlist/index.htm>. The Cuba Restricted List identifies entities or subentities, as appropriate, that are under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services or personnel, and with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba.

On November 9, 2017, the Department of State published the Cuba Restricted List of persons with which direct financial transactions are prohibited under the CACR. 82 Fed. Reg. 52,089 (Nov. 9, 2017). Background information on the Cuba Restricted List from the Federal Register notice follows:

Travel and Related Transactions

Educational travel. In accordance with section 3(b) of the NSPM, OFAC is revising the categories of educational travel currently set forth in § 515.565(a)(1)–(6) to authorize travel that was permitted by regulation in effect on January 27, 2011.

In addition, OFAC is adding the requirement set forth in the NSPM that certain categories of educational travel authorized by § 515.565(a), which were not permitted by regulation in effect on January 27, 2011, take place under the auspices of an organization that is a person subject to U.S. jurisdiction. This requirement is incorporated in § 515.565(a)(2). The same provision also now will require that all travelers must be accompanied by a person subject to U.S. jurisdiction who is an employee, paid consultant, agent, or other representative of the sponsoring organization, except in cases where the traveler is an employee, paid consultant, agent, or other representative traveling individually

(not as part of a group), if the individual obtains a letter from the sponsoring organization. Such a letter must state that: (1) The individual is traveling to Cuba as an employee, paid consultant, agent, or other representative (including specifying the responsibilities of the individual that make him or her a representative) of the sponsoring organization; (2) the individual is acting for or on behalf of, or otherwise representing, the sponsoring organization; and (3) the individual's travel to Cuba is related to his or her role at the sponsoring organization.

In addition, OFAC is adding a "grandfathering" provision in § 515.565(d) to authorize certain travel that previously was authorized where the traveler has already completed at least one travel-related transaction (such as purchasing a flight or reserving accommodation) prior to November 9, 2017.

People-to-people educational travel.

In accordance with section 3(b)(ii) of the NSPM, OFAC is amending § 515.565(b) to require that people-to-people educational travel be conducted under the auspices of an organization that is subject to U.S. jurisdiction and that sponsors such exchanges to promote people-to-people contact, and that such travelers be accompanied by a person subject to U.S. jurisdiction who is an employee, paid consultant, agent, or other representative of the sponsoring organization. Travel-related transactions authorized pursuant to this section must be for the purpose of engaging, while in Cuba, in a full-time schedule of activities that enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people's independence from Cuban authorities; and result in meaningful interactions with individuals in Cuba. In addition, OFAC is adding a "grandfathering" provision in § 515.565(e) to authorize certain people-to-people travel that previously was authorized where the traveler has already completed at least one travel-related transaction (such as purchasing a flight or reserving accommodation) prior to June 16, 2017.

Support for the Cuban people. In accordance with section 3(b)(ii) of the NSPM, OFAC is amending § 515.574 to require that each traveler engage in a full-time schedule of activities that result in meaningful interaction with individuals in Cuba and that enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people's independence from Cuban authorities.

Other Amendments

Definition of prohibited officials of the Government of Cuba. In accordance with section 3(d) of the NSPM, OFAC is amending the definition of the term *prohibited officials of the Government of Cuba* in § 515.337 to include certain additional individuals. The revised definition corresponds to that which was in place prior to October 17, 2016.

4. Venezuela

a. U.S. Sanctions

On May 18, 2017, OFAC designated eight individuals pursuant to Executive Order 13692, “Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela.” 82 Fed. Reg. 23,982 (May 24, 2017). The eight were designated for being current or former officials of the Government of Venezuela: Luis Fernando DAMIANI BUSTILLOS, Arcadio de Jesus DELGADO ROSALES, Gladys Maria GUTIERREZ ALVARADO, Juan Jose MENDOZA JOVER, Maikel Jose MORENO PEREZ, Calixto Antonio ORTEGA RIOS, Lourdes Benicia SUAREZ ANDERSON, and Carmen Auxiliadora ZULETA DE MERCHAN. The Treasury Department’s May 18, 2017 press release, available at <https://www.treasury.gov/press-center/press-releases/Pages/sm0090.aspx>, provides further information about the eight individuals:

The designated officials, members of Venezuela's Supreme Court of Justice (*Tribunal Supremo de Justicia* or TSJ), are responsible for a number of judicial rulings in the past year that have usurped the authority of Venezuela's democratically-elected legislature, the National Assembly, including by allowing the Executive Branch to rule through emergency decree, thereby restricting the rights and thwarting the will of the Venezuelan people. The National Assembly has been controlled by a majority of opposition-party members since January 2016.

“The Venezuelan people are suffering from a collapsing economy brought about by their government's mismanagement and corruption. Members of the country’s Supreme Court of Justice have exacerbated the situation by consistently interfering with the legislative branch's authority,” said Secretary of the Treasury Steven T. Mnuchin. “By imposing these targeted sanctions, the United States is supporting the Venezuelan people in their efforts to protect and advance democratic governance in their country.”

On July 26, 2017, OFAC designated 13 individuals pursuant to E.O. 13692. 82 Fed. Reg. 35,870 (Aug. 1, 2017). They were designated for being current or former officials of the Government of Venezuela: Rocco ALBISINNI SERRANO, Alejandro Antonio FLEMING CABRERA, Franklin Horacio GARCIA DUQUE, Elias Jose JAUA MILANO, Tibisay LUCENA RAMIREZ, Carlos Erik MALPICA FLORES, Carlos Alfredo PEREZ AMPUEDA, Nestor Luis REVEROL TORRES, Sergio Jose RIVERO MARCANO, Tarek William SAAB HALABI, Jesus Rafael SUAREZ CHOURIO, Maria Iris VARELA RANGEL, and Simon Alejandro ZERPA DELGADO. On July 31, 2017, OFAC designated Nicolas MADURO MOROS pursuant to E.O. 13692 for being a current or former official of the Government of Venezuela. 82 Fed. Reg. 37,290 (Aug. 9, 2017).

On August 9, 2017, OFAC designated eight individuals—Francisco Jose AMELIACH ORTA, Adan Coromoto CHAVEZ FRIAS, Tania D’AMELIO CARDIET, Hermann Eduardo ESCARRA MALAVE, Erika del Valle FARIAS PENA, Bladimir Humberto LUGO ARMAS,

Carmen Teresa MELENDEZ RIVAS, Ramon Dario VIVAS VELASCO—pursuant to E.O. 13692 for being a current or former official of the Government of Venezuela. 82 Fed. Reg. 37,984 (Aug. 14, 2017).

On November 9, 2017, OFAC designated Manuel Angel FERNANDEZ MELENDEZ, Socorro Elizabeth HERNANDEZ DE HERNANDEZ, Elvis Eduardo HIDROBO AMOROSO, Jorge Elieser MARQUEZ MONSALVE, Sandra OBLITAS RUZZA, Carlos Alberto OSORIO ZAMBRANO, Carlos Enrique QUINTERO CUEVAS, Julian Isaias RODRIGUEZ DIAZ, and Ernesto Emilio VILLEGAS POLJAK, each pursuant to E.O. 13692 for being a current or former official of the Government of Venezuela. 82 Fed. Reg. 54,466 (Nov. 17, 2017). In addition, OFAC updated the designations of persons under the Foreign Narcotics Kingpin Designation Act to indicate they are also designated under E.O. 13692 for being a current or former official of the Government of Venezuela. *Id.*

On August 24, 2017, the President issued Executive Order 13808, entitled “Imposing Additional Sanctions With Respect to the Situation in Venezuela.” 82 Fed. Reg. 41,155 (Aug. 29, 2017). E.O. 13808 responds to actions of the Government of Venezuela, including: human rights abuses; the establishment of an illegitimate Constituent Assembly; rampant public corruption; and repression of political opposition. Excerpts follow from E.O. 13808. Ambassador Haley made a statement at the UN announcing the new U.S. financial sanctions relating to Venezuela on August 25, 2017. That statement (not excerpted herein) is available at <https://usun.state.gov/remarks/7943>.

* * * *

Section 1. (a) All transactions related to, provision of financing for, and other dealings in the following by a United States person or within the United States are prohibited:

(i) new debt with a maturity of greater than 90 days of Petroleos de Venezuela, S.A. (PdVSA);

(ii) new debt with a maturity of greater than 30 days, or new equity, of the Government of Venezuela, other than debt of PdVSA covered by subsection (a)(i) of this section;

(iii) bonds issued by the Government of Venezuela prior to the effective date of this order; or

(iv) dividend payments or other distributions of profits to the Government of Venezuela from any entity owned or controlled, directly or indirectly, by the Government of Venezuela.

(b) The purchase, directly or indirectly, by a United States person or within the United States, of securities from the Government of Venezuela, other than securities qualifying as new debt with a maturity of less than or equal to 90 or 30 days as covered by subsections (a)(i) or (a)(ii) of this section, respectively, is prohibited.

(c) The prohibitions in subsections (a) and (b) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the effective date of this order.

Sec. 2. (a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

* * * *

b. UN Sanctions

On July 26, 2017, Ambassador Nikki Haley, U.S. Permanent Representative to the United Nations, delivered a statement of support on sanctioning individuals associated with corruption and violence in Venezuela. Ambassador Haley's statement follows and is available at <https://usun.state.gov/remarks/7910>.

* * * *

The United States made a promise to the Venezuelan people when we said we would not stand by and watch the Maduro regime continue to brutalize its citizens and destroy their democracy. Today, we keep that promise through sanctions on individuals associated with corruption and violence against the Venezuelan people.

The United States will keep all options on the table, including sanctioning anyone who joins the Constituent Assembly, and will look into additional measures to hold the Maduro regime accountable. We will also continue to have the backs of the Venezuelan people as they fight to save their once prosperous democracy—even in the face of violence, intimidation, and denial of services by their own government.

* * * *

5. Democratic People's Republic of Korea

a. State Sponsor of Terrorism Designation

In November 2017, the Secretary of State determined that the Democratic People's Republic of Korea ("DPRK") has repeatedly provided support for acts of international terrorism. The determination was made in accordance with section 6(j)(1) of the Export Administration Act of 1979 (50 U.S.C. App. § 2405(j)), [now 50 U.S.C. § 4605(j)], as continued in effect by Executive Order 13222 of August 17, 2001, section 620A(a) of the Foreign Assistance Act of 1961, Public Law 87–195, as amended (22 U.S.C. 2371(c)), and section 40(f) of the Arms Export Control Act, Public Law 90–629, as amended (22 U.S.C. 2780(f)). 82 Fed. Reg. 56,100 (Nov. 27, 2017).

b. Human rights

On January 11, 2017, the State Department issued a press statement on the release of its second report on human rights abuses and censorship in North Korea, submitted in compliance with Section 304 (a) of the North Korea Sanctions and Policy Enhancement Act of 2016, Public Law 114-122, enacted on February 18, 2016. The press statement is available at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266857.htm>. The Act provides for a report every 180 days that: (1) identifies each person the Secretary determines to be responsible for serious human rights abuses or censorship in North Korea and describes the conduct of that person; and (2) describes serious human rights abuses or censorship undertaken by the Government of the DPRK or any person acting for or on behalf of the DPRK in the most recent year ending before the submission of the report. For further information on the North Korea Sanctions and Policy Enhancement Act of 2017, see *Digest 2016* at 629 and 646.

The January 2017 report identifies Kim Won Hong (Minister of State Security), Kim Yo Jong (Vice Director of the Propaganda and Agitation Department), Choe Hwi (Vice Director KWP Propaganda and Agitation Department), Kim Il-nam (Chief of South Hamgyong Province State Security), Min Byong Chol (Director of the Inspection Division of the Organization and Guidance Department), Jo Yong-won (Vice Director of the Organization and Guidance Department), Kang Pil Hoon (Director of the Political Bureau in the Ministry of People's Security), the State Planning Commission, and the Ministry of Labor, as being responsible for serious human rights abuses or censorship in North Korea. In conjunction with this report, the Department of the Treasury is adding the seven individuals and two entities to the List of Specially Designated Nationals and Blocked Persons. The report is available at <https://www.state.gov/j/drl/rls/266853.htm>.

On October 26, 2017, Scott Busby, Deputy Assistant Secretary of State for the Bureau of Democracy, Human Rights, and Labor, provided a briefing on the release of the next periodic report on human rights abuses and censorship in North Korea. In conjunction with the issuance of the report, the Department of Treasury added persons and entities identified in the report to the SDN List. The briefing is excerpted below and available at <https://www.state.gov/r/pa/prs/ps/2017/10/275123.htm>.

* * * *

...Today, as part of our continuing efforts to promote accountability for North Korean officials, ... we're releasing our third report on serious human rights abusers from the DPRK. And this report identifies seven individuals and three entities as responsible for serious human rights abuses or censorship in North Korea.

In conjunction with the report, the Treasury Department has added these 10 North Korean individuals and entities to the Specially Designated Nationals and Blocked Persons List. Both actions are consistent with the North Korean Sanctions and Policy Enhancement Act of 2016.

Like the two prior reports, this report shines a spotlight on serious human rights abuses committed by the DPRK regime, including extrajudicial killings, forced labor, torture, prolonged arbitrary detention, as well as rape, forced abortions, and other sexual violence.

In particular, this report focuses on the many human rights abuses that underwrite the regime's weapons program, including forced labor, re-education through labor camps, and overseas labor contracts. Thousands of North Koreans are sent abroad every year to work in slave-like conditions, earning revenue for the regime. The government also deploys security officials abroad to monitor the activities of North Korean citizens and to forcibly repatriate individuals who seek asylum. This report includes individuals and entities responsible for these types of abuses.

With these efforts, we aim to send a signal to all DPRK Government officials, particularly prison camp managers and mid-level officials, that we can and we will expose human rights abuses and censorship in the DPRK and that these individuals will suffer consequences for such actions.

* * * *

Also on October 26, 2017, the State Department released a media note, available at <https://www.state.gov/j/drl/rls/275095.htm>, which summarizes the report and provides information on the designated persons under the Act. Excerpts follow from the media note.

* * * *

The **Military Security Command** (MSC) monitors military personnel for anti-regime activity and investigates political crimes in the military. According to the UN Commission of Inquiry (COI) on the situation in the DPRK, it is “the military’s own secret police.” While technically part of the Korean People’s Army General Staff Department, the MSC reports to the Ministry of State Security. In practice, its jurisdiction extends beyond the military to ordinary citizens of the DPRK, as well. COI witnesses have stated that the MSC extracts information through torture and those accused of political crimes can be executed without trial by the MSC. Defectors and numerous non-governmental organizations (NGOs) report that the MSC operates special prison camps where military personnel are held indefinitely without trial for political offenses.

Jo Kyong-Chol is the commander of the MSC. According to NGO reports, he is responsible for human rights abuses in the DPRK’s defense-industrial complex. Jo is also responsible for communication and implementation of state policies, including those involving human rights abuses, passed directly to him by Supreme Leader Kim Jong Un to elements of the security apparatus. South Korean media has reported he is considered one of three “angels of death” for his direct involvement in purges soon after Kim Jong Un assumed power, which targeted Kim’s uncle, Jang Song-taek, as well as people close to Jang. According to various NGO and media reports, the purges for which Jang and his associates are responsible involved arbitrary arrest and detention, banishment, and executions conducted without due process. In addition, family members and associates of officials purged with Jang were rounded up and sent to political prison camps without trial.

Sin Yong Il is the deputy director of the MSC. In his capacity as one of four deputies, Sin Yong Il conducts the daily on-the-ground operations for the MSC and has direct knowledge of the special investigations it conducts. He reports to the commander of the MSC, who takes orders directly from Kim Jong Un. According to reports, including reports by foreign governments, he is responsible for tasking and verifying the implementation of orders of censorship, including the crackdown on the flow of foreign information and media devices, and orders to abduct and detain DPRK citizens abroad suspected of seeking asylum.

Jong Yong Su is the minister of labor. In this capacity, he oversees the Ministry of Labor (MOL), which the Department of State identified as responsible for serious human rights abuses in the January 11, 2017, report. As that report notes, the MOL works together with the State Planning Commission (SPC) to implement an economic system based on forced labor. Through the combined efforts of the SPC and the MOL, the government compels lower-class North Koreans to join paramilitary forced labor brigades that essentially serve as slave labor for the regime. According to Human Rights Watch, these brigades work extended periods of time without pay. They are often forced to work up to 14 hours a day, six or seven days a week, with no compensation. In this position, Jong directs the day-to-day activities of the MOL, including direct supervision over the placement of workers in positions of forced labor.

Ri Thae-chol is first vice minister of the Ministry of People's Security (MPS) and a colonel general in the Korean People's Army. In the July 6, 2016, report, the Department of State identified the MPS as responsible for serious human rights abuses and censorship. Ri reports directly to the minister of people's security and communicates policies to the rest of the ministry through the chief of staff. Ri directly oversees the 50 bureaus of the MPS as they restrict the freedoms of expression and movement and operate labor camps known for abuse and torture.

Kim Kang Jin is the director of the **External Construction Bureau**, a DPRK government agency that manages the construction firms that send laborers from the DPRK to work in countries across the world. The UN special rapporteur on the situation of human rights in the DPRK noted in a February 2017 report that these laborers are reportedly kept under strict supervision by officials from the DPRK and are consequently unable to exercise freedoms of expression, movement, and peaceful assembly. The report further notes that these laborers are subject to "serious violations of international labour standards, including long working hours, delayed and below-minimum-wage payments and lack of safety measures." The European Alliance for Human Rights in North Korea noted in July 2016 that DPRK laborers sent abroad frequently worked exceedingly long shifts for six days a week, yet most of their pay was repatriated back to the DPRK government, rendering them "state-sponsored slaves." As director of this bureau, Kim sets policies that allow for dangerous working conditions, long hours, and withholding of pay. These directives create a system of forced labor, which constitutes a serious human rights abuse.

Ku Sung Sop (AKA Ku Young Hyok) is the North Korean consul general in Shenyang, China. Prior to serving in this capacity, Ku was the Ministry of State Security director for foreign counterintelligence. According to foreign government reports, Ku's primary responsibilities in China include surveillance and monitoring of overseas workers, who are forced to work long hours and have their pay withheld by the DPRK government, and supervising the forced repatriation of North Korean asylum seekers in China.

Kim Min Chol is a second secretary at the DPRK embassy in Vietnam and the Ministry of State Security safety representative. Kim's responsibilities at the embassy include hands-on participation in the forced repatriations from and disappearances in Vietnam of North Korean

asylum seekers from the DPRK. According to a foreign government, in 2013, he led the kidnapping of South Korean missionary Kim Jong Wook, who was later sentenced to hard labor in North Korea.

Chol Hyun Construction is a North Korean company, acting on behalf of the DPRK government, which exports workers from the DPRK to other countries, primarily Gulf States and Africa. According to media reports, Chol Hyun Construction requires its workers in Kuwait to log extremely long hours (on average, 14 hours per day) and confines its workers to their quarters when they are not working. The same report indicates these workers are paid meager salaries. The report explains workers receive roughly \$800-\$1000 per month, 40 percent of which is paid directly into a North Korean government bank account, 20 percent is withheld by the site supervisor for company operating costs, and another 10 percent is withheld for room and board expenses. The remaining \$165-\$200 per month belongs to the worker, but workers are often required to give their cash to the site supervisor for “safe-keeping.” These workers are also forbidden from leaving the work site and group housing facility without permission from the North Korean security officer assigned to the work site. A South Korean media outlet also reports that North Korean workers in the Middle East, including employees of Chol Hyun Construction are kept in slave-like conditions, including having salaries and passports withheld by DPRK security officials assigned as site supervisors, meager food rations, poor living conditions, and severe restrictions on their freedom of movement.

* * * *

c. Nonproliferation

(1) UN sanctions

On June 2, 2017, Ambassador Nikki Haley, U.S. Permanent Representative to the UN, delivered the U.S. explanation of vote at the adoption of UN Security Council Resolution 2356 on DPRK sanctions. Ambassador Haley’s statement is excerpted below and available at <https://usun.state.gov/remarks/7822>.

* * * *

The Security Council is sending a clear message to North Korea today: Stop firing ballistic missiles, or face the consequences. The members of this Council—including three of North Korea’s closest neighbors—agreed that North Korea’s missiles are a threat to international peace and security, and that the international community must respond to the threat. It is long past time for North Korea to see the writing on the wall. The international community is coming together to take action, and the pressure will not cease until North Korea complies fully with this Council’s resolutions.

North Korea’s provocative and illegal missile launches are a direct threat to the security of numerous countries, including my own. Missiles have already fallen perilously close to South Korea, Japan, and most recently, Russia. Each North Korean rocket has the potential to hit an airplane or ship, which threatens civilian lives. Each test ratchets up tensions in the region. But

despite all the risks, and the sanctions this Council has imposed so far, North Korea still chooses to keep escalating.

The reason that North Korea keeps launching these missiles is obvious: they openly say they want the ability to deliver their weapons of mass destruction over long distances to U.S., South Korean, and Japanese cities. That is why the regime's ballistic missile tests are increasing. With each launch, North Korea gains valuable technical data to make even more progress. But bit by bit, North Korea wants to extend its reach.

The Security Council has rightfully—and repeatedly—condemned these launches and required North Korea to suspend all activities related to its ballistic missile program. Foreign ministers gathered here one month ago to demand that North Korea stop. Today's resolution shows that these were not just words.

The United States will work tirelessly to make sure that the international community never gets used to North Korea's violations or looks the other way. And North Korea must understand that the international community will never accept the regime's development and testing of nuclear weapons.

Until North Korea reconsiders, all UN Member States must do their part to increase pressure. North Korea is a global threat that requires a global response. There is still a lot of room to improve implementation of this Security Council's sanctions on North Korea. This is why the United States renews its call on responsible states to sever diplomatic ties and cease illegal trade with North Korea. Countries must also do more to break up North Korean smuggling rings, and cut off the sources of funding North Korea uses to pay for the development of weapons of mass destruction and the means to deliver them.

The United States will continue to seek a peaceful, diplomatic resolution to this situation. We want a negotiated solution, but North Korea must fulfill its basic obligations by first stopping all ballistic missile launches and nuclear weapons testing, and taking concrete steps towards getting rid of its nuclear weapons program.

Our goal is not regime change. The United States has no wish to threaten the North Korean people or destabilize the Asia-Pacific region. And we have never closed the door to dialogue with North Korea.

But as we have said before, all options for responding to future provocations must remain on the table. Beyond diplomatic and financial consequences, the United States remains prepared to counteract North Korean aggression through other means, if necessary.

The United States is fully committed to defending ourselves and our allies against North Korean aggression. It is again up to North Korea to decide whether to stay on this dangerous path. As the Security Council showed today, future missile launches and nuclear tests are absolutely unacceptable. We hope North Korea sees this response, and chooses a more constructive path toward stability, security, and peace.

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On August 5, 2017, the UN Security Council adopted resolution 2371, strengthening sanctions on North Korea. Ambassador Haley delivered the U.S. explanation of vote, which is excerpted below and available at <https://usun.state.gov/remarks/7923>.

* * * *

Today the full Security Council has come together to put the North Korean dictator on notice. And this time, the Council has matched its words and actions.

The resolution we've passed is a strong, united step toward holding North Korea accountable for its behavior. Today, the Security Council increased the penalty of North Korea's ballistic missile activity to a whole new level.

North Korea's irresponsible and careless acts have just proved to be quite costly to the regime.

This resolution is the single largest economic sanctions package ever leveled against the North Korean regime. The price the North Korean leadership will pay for its continued nuclear and missile development will be the loss of one-third of its exports and hard currency.

This is the most stringent set of sanctions on any country in a generation.

These sanctions will cut deep, and in doing so, will give the North Korean leadership a taste of the deprivation they have chosen to inflict on the North Korean people.

Nuclear and ballistic missile development is expensive. The revenues the North Korean government receives are not going towards feeding its people.

Instead, the North Korean regime is literally starving its people and enslaving them in mines and factories in order to fund these illegal nuclear programs.

Even as famine looms on the horizon; even as the regime continues to ask for international assistance to cope with devastating floods and a possible drought later this year; their displays of aggression take precedence over their own people.

Even as we respond to the North Korean nuclear threat, the United States will continue to stand up for the human dignity and rights of the North Korean people.

It is the continued suffering of the North Korean people that should remind the Security Council that, while this resolution is a significant step forward, it is not nearly enough.

The threat of an outlaw, nuclearized North Korean dictatorship remains. The unimaginable living conditions of so many of the North Korean people are unchanged.

The North Korean regime continues to show that widespread violations of human rights go hand in hand with threats to international peace and security.

I thank each and every one of my colleagues who worked so hard to bring this resolution to a vote. I have previously pointed out that China has a critical role to play on matters related to North Korea. I want to personally thank the Chinese delegation for the important contributions they made to this resolution.

While the Security Council has done good work, the members of the Security Council—and all UN Member States—must do more to increase the pressure on North Korea.

We must work together to fully implement the sanctions we imposed today and those imposed in past resolutions.

The step we take together today is an important one. But we should not fool ourselves into thinking we have solved the problem. Not even close. The North Korean threat has not left us. It is rapidly growing more dangerous. We've seen two ICBMs fired in just the last month. Further action is required.

The United States is taking—and will continue to take—prudent defensive measures to protect ourselves and our allies. Our annual joint military exercises, for instance, are transparent, and defense-oriented. They have been carried out regularly and openly for nearly 40 years. They will continue.

Our goal remains a stable Korean peninsula, at peace, without nuclear weapons. We want only security and prosperity for all nations—including North Korea.

Until then, this resolution and prior ones will be implemented to the fullest to maximize pressure on North Korea to change its ways.

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The U.S. Mission to the UN published a fact sheet on August 5, 2017 regarding resolution 2371 strengthening DPRK sanctions. The fact sheet is excerpted below and available at <https://usun.state.gov/remarks/7924>.

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Resolution 2371 (2017), adopted unanimously by the United Nations Security Council on August 5, 2017, strengthens UN sanctions on North Korea in response to its two intercontinental ballistic missile (ICBM) tests conducted on July 3, 2017 and July 28, 2017. As such, this resolution sends a clear message to North Korea that the Security Council is united in condemning North Korea's violations and demanding North Korea give up its prohibited nuclear and ballistic missile programs.

Resolution 2371 (2017) includes the strongest sanctions ever imposed in response to a ballistic missile test. These measures target North Korea's principal exports, imposing a total ban on all exports of coal (North Korea's largest source of external revenue), iron, iron ore, lead, lead ore and seafood. Banning these exports will prevent North Korea from earning over a \$1 billion per year of hard currency that would be redirected to its illicit programs. North Korea earns approximately \$3 billion per year from export revenues. Additional sanctions target North Korea's arms smuggling, joint ventures with foreign companies, banks, and other sources of revenue.

Resolution 2371 (2017) includes the following key elements:

- **Condemns North Korea July 3 and July 28 ballistic missile tests** in the strongest terms, and reaffirms North Korea's obligations not to conduct any further nuclear tests or launches that use ballistic missile technology, to abandon all nuclear weapons and existing nuclear programs in a complete, verifiable and irreversible manner, to suspend all activities related to its ballistic missile program, and to abandon all other WMD programs.
- **Imposes several full sectoral bans** on exports North Korea uses to fund its nuclear and ballistic missile programs, namely:
 - A ban on its largest export, **coal**, representing a loss to North Korea of over \$401 million in revenues per year;
 - A ban on **iron and iron ore** exports, worth roughly \$250 million per year;
 - A ban on **seafood** exports, worth roughly \$300 million in revenue each year; and
 - A ban on **lead and lead ore** exports, worth roughly \$110 million per year;
- Imposes additional **restrictions on North Korea's ability to generate revenue and access the international financial system**, by:

- Adding new sanctions designations against North Korean individuals and entities that support the country's nuclear and missile programs, including the state-owned **Foreign Trade Bank (FTB)**, which acts as North Korea's primary foreign exchange bank, while protecting diplomatic, consular, and humanitarian activities.
 - Prohibiting **all new joint ventures** or cooperative commercial entities between North Korea and other nations, as well as ban additional investment in existing ones.
 - Banning countries from allowing in additional numbers of **North Korean laborers** who will earn revenue for the illicit programs.
- Requests the Security Council's North Korea Sanctions Committee to identify additional **conventional arms-related** and **proliferation-related** items to be banned for transfer to/from North Korea.
- Enables the Security Council's North Korea Sanctions Committee to **designate vessels** tied to violations of Security Council resolutions and prohibit their international port access.
- Takes steps to **improve sanctions enforcement**, including by asking **Interpol to publish Special Notices** on listed North Koreans for travel ban purposes.
- **Provides additional analytical resources** to the UN's Panel of Experts to enhance its capacity to monitor sanctions enforcement.
- Regrets North Korea's **massive diversion** of its scarce resources toward its development of nuclear weapons and a number of expensive ballistic missile programs and expresses its deep concern at the **grave hardship** to which the people in North Korea are subjected;
- Includes **sanctions exemptions** to make sure these measures do not impede foreign diplomatic activities in North Korea or legitimate humanitarian assistance.
- Reaffirms the Council's **support for the Six Party Talks**, calls for their resumption, reiterates its support for commitments made by the Six Parties, and reiterates the importance of maintaining peace and stability on the Korean Peninsula and in Northeast Asia.
- Expresses the Council's determination to take **further significant measures** if North Korea conducts another nuclear test or ballistic missile launch.

This resolution has two annexes. These are:

1. An annex of 9 North Korean individuals operating abroad as representatives of designated entities designated for targeted sanctions (asset freeze and travel ban);
2. Another annex of 4 North Korea commercial entities designated for an asset freeze.

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The UN Security Council imposed further sanctions on North Korea on September 11, 2017 when it adopted resolution 2375. Ambassador Haley's statement on that resolution is excerpted below and available at <https://usun.state.gov/remarks/7970>.

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North Korea's neighbors, its trading partners, and the entire international community are united against its dangerous and illegal actions. Today's resolution builds on what were already the deepest cutting sanctions ever leveled against North Korea. We've been down this road before. The Security Council has expressed its condemnation. We've leveled sanctions. But today is different. We are acting in response to a dangerous new development: North Korea's September 3 test of a claimed hydrogen bomb.

Today, we are saying the world will never accept a nuclear-armed North Korea. And today, the Security Council is saying that if the North Korean regime does not halt its nuclear program, we will act to stop it ourselves.

Over the years, we have learned many things about the North Korean regime. We have learned that it does not care about being a part of the community of decent, law-abiding nations. It has violated every United Nations resolution against it. We have learned that the North Korean regime doesn't care about its own people. It has denied them the most basic necessities to finance its weapons program. And we have learned that half-measures against the regime have not worked.

Previous efforts to bring North Korea to the negotiating table have failed. They have repeatedly walked back every commitment they have made. Today, the Security Council has acted in a different way. Today, we are attempting to take the future of the North Korean nuclear program out of the hands of its outlaw regime.

We are done trying to prod the regime to do the right thing. We are now acting to stop it from having the ability to continue doing the wrong thing. We are doing that by hitting North Korea's ability to fuel and fund its weapons program. Oil is the lifeblood of North Korea's effort to build and deliver a nuclear weapon. Today's resolution reduces almost 30 percent of oil provided to North Korea by cutting off over 55 percent of its gas, diesel, and heavy fuel oil. Further, today's resolution completely bans natural gas and other oil byproducts that could be used as substitutes for the reduced petroleum. This will cut deep.

Further, a large portion of North Korea's revenues come from exports, revenues they use to fund their nuclear program. Last month, we passed a resolution banning its coal and iron exports. Today's resolution bans all textile exports. That's an almost \$800 million hit to its revenue.

When these new stronger sanctions are added to those passed last month, over 90 percent of North Korea's publicly reported exports are now fully banned. Moreover, this resolution also puts an end to the regime making money from the 93,000 North Korean citizens it sends overseas to work and heavily taxes. This ban will eventually starve the regime of an additional \$500 million or more in annual revenues. Beyond the \$1.3 billion in annual revenues we will cut from North Korea, new maritime authorities will help us stop them from obtaining funds by smuggling coal and other prohibited materials around the world by ship.

Furthermore, this resolution prohibits all joint ventures with the regime, resulting in a significant amount of lost revenue. But more importantly, the regime can no longer obtain critically needed foreign investments, technology, and know-how needed for its commercial industries.

Finally, this resolution imposes asset freezes on the most central North Korean regime entities, affecting both the military and the government itself. In short, these are by far the strongest measures ever imposed on North Korea. They give us a much better chance to halt the regime's ability to fuel and finance its nuclear and missile programs.

But we all know these steps only work if all nations implement them completely and aggressively. Today's resolution would not have happened without the strong relationship that has developed between President Trump and Chinese President Xi, and we greatly appreciate both teams working with us. We have seen additional encouraging signs that other nations in Asia have stepped up to the plate. The Philippines has cut off all trade with Pyongyang. Thailand has drastically cut its economic ties with North Korea. And states much further away are also doing their part. Mexico recently declared the North Korean ambassador to its country persona non grata. Along with strictly enforcing sanctions, these are important steps toward complete international unity. They make clear that all nations can act to deny North Korea the funds to build its nuclear arsenal.

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The U.S. fact sheet on resolution 2375 is excerpted below and available at
<https://usun.state.gov/remarks/7969>.

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Resolution 2375 (2017), adopted unanimously by the United Nations Security Council on September 11, 2017, strengthens UN sanctions on North Korea in response to the North Korea nuclear test conducted on September 2, 2017. As such, this resolution sends a very clear message to North Korea that the Security Council is united in condemning North Korea's violations and demanding North Korea give up its prohibited nuclear and ballistic missile programs.

Resolution 2375 (2017) includes the strongest sanctions ever imposed on North Korea. These measures target North Korea's last remaining major exports by fully banning the export of textiles (nearly \$800 million each year) and preventing overseas workers from earning wages that finance the North Korean regime (over \$500 million each year), reduces about 30% of oil provided to North Korea by cutting off over 55% of refined petroleum products going to North Korea, and fully bans all joint ventures with North Korea to cut off foreign investments, technology transfers, and other economic cooperation with North Korea. The resolution also includes strong maritime provisions enabling countries to counter North Korean smuggling activities of prohibited exports by sea.

Resolution 2375 (2017) includes the following key elements:

Oil/Petroleum

- This resolution **reduces about 30% of oil provided to North Korea** by cutting off over 55% of refined petroleum products going to North Korea.
 - It will achieve this through imposing an annual cap of 2 million barrels per year of all refined petroleum products (gasoline, diesel, heavy fuel oil, etc.)
 - North Korea currently receives a total of about 8.5 million barrels of oil/petroleum: 4.5 million in refined form and 4 million in crude form.
- The resolution freezes the current amount of crude oil provided to North Korea by banning countries from providing additional crude oil beyond what China provides through the Dandong-Sinuifu pipeline.
- The resolution also bans the supply to North Korea of all natural gas and condensates—this will prevent North Korea from obtaining substitutes for refined petroleum products.

Textiles

- The resolution **bans all North Korean textile** exports.
- Textile exports—North Korea’s largest economic sector that the Security Council had not previously restricted—earned North Korea an average of \$760 million in the past three years.
- Combined with the previous Security Council resolutions, over 90% of North Korea’s publicly reported 2016 exports of \$2.7 billion are now banned (coal, textiles, iron, seafood), which does not include revenues from overseas workers.

Overseas Laborers

- This provision we adopt today will eventually **deny the regime another half billion dollars each year it takes from the nearly 100,000 North Korean citizens** working around the world to earn wages.
- In order to minimize business disruptions to existing contracts and work authorizations involving North Korean overseas workers, this provision allows existing authorizations to reach their original expiration dates but does not authorize any renewals.

Interdiction

- The resolution provides member states **new tools to stop high seas smuggling of prohibited products** (e.g., conventional arms, coal, textiles, seafood, etc.). North Korea has been smuggling coal and iron ore to other countries using very sophisticated evasion techniques by sea.
 - If flag states refuse to allow inspections of suspicious vessels, then the flag state is required to redirect the vessels to a port for inspection.
 - If a flag state or vessel does not cooperate with inspections, then the vessel can be designated for an asset freeze, denied port access, de-registered, and suffer other penalties.

Joint Ventures

- The resolution requires the **end of all joint ventures with North Korea**. This will not only starve the regime of any revenues generated through such arrangements, it will now stop all future foreign investments and technology transfers to help North Korea’s nascent and weak commercial industries.
- However, to protect civilian needs of the North Korean people and continue facilitating international commerce involving the North Korean port of Rajin, the China-DPRK hydroelectric power stations on the Yalu River and the Russia-DPRK Khasan-Rajin rail and port project to transshipment of Russian coal to other markets are exempted.

Designations

- The resolution imposes asset freezes on the **most important North Korean regime organs**: Organizational Guidance Department, Central Military Commission, and Propaganda and Agitation Department that run the DPRK government, military, and keep its people down.
- The resolution facilitates the listing of additional dual-use items and technology that could be used for WMD or conventional arms-related purposes that will be banned for transfer to and from North Korea.
- The resolution also facilitates a process to identify vessels caught smuggling prohibited North Korean goods to other countries.

On December 22, 2017, the Security Council again adopted new sanctions on North Korea in resolution 2397. Ambassador Haley's explanation of vote at the adoption of the resolution is excerpted below and available at <https://usun.state.gov/remarks/8239>.

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Today, for the tenth time, this Council stands united against a North Korean regime that rejects the pursuit of peace. The Kim regime continues to defy the resolutions of this Council, the norms of civilized behavior, and the patience of the international community. Their arrogance and hostility to anything productive has set their country on a destructive path.

Nine times before today, we have asked the North Korean regime to choose the path of peace. And if they do, we would welcome them back into the community of nations. But Pyongyang has chosen the path of isolation.

As we have in the past, we will continue to match the Kim regime's choice of aggressive actions with actions of international sanction. I commend the members of the Security Council for their unity and persistence in this sustained international defense of peace and security.

On November 29, Pyongyang launched an intercontinental ballistic missile. This was another attempt by the Kim regime to masquerade as a great power, while their people starve and their soldiers defect. But for the international community, this is an unprecedented challenge from a defiant state. So we have leveled an unprecedented response.

This resolution ratchets up the pressure on North Korea even further, building on our last resolution, which included the strongest sanctions ever imposed on them. Those sanctions fully banned textile exports from North Korea. They banned all joint ventures and all new work permits for overseas North Korean laborers. And, critical to the regime's ability to develop its nuclear and missile programs, the previous resolution cut off 55 percent of refined petroleum products going to North Korea.

Today, we cut deeper.

After North Korea's September nuclear test, this Council capped refined petroleum exports into North Korea. Today's resolution achieves an 89 percent total reduction of the Kim regime's ability to import gasoline, diesel, and other refined products. And should the North Korean regime conduct another nuclear or ballistic missile test, this resolution commits the Security Council to take even further action. It sends the unambiguous message to Pyongyang that further defiance will invite further punishment and isolation.

The September resolution banned all new permits for North Koreans who work abroad and send the majority of their earnings to Pyongyang. This is a source of over \$500 million each year to the Kim regime. Today's resolution goes further—it requires that countries expel all North Korean workers within 24 months.

Previous resolutions banned 90 percent of North Korea's exports. This resolution bans all remaining categories of major North Korean exports—a loss of nearly \$250 million in revenue to the regime.

Previous resolutions cracked down on smuggling of banned items like oil and coal. But sanctions evasion has continued. So this resolution closes the loopholes in the system and requires countries to seize and impound ships caught smuggling illicit goods.

The list goes on.

The unity this Council has shown in leveling these unprecedented sanctions is a reflection of the international outrage at the Kim regime's actions. But we're not the only ones who are appalled by the North Korean regime. We're not the only ones sacrificing for a solution—not even close.

At our last meeting on North Korea, I called on all nations to sever diplomatic and trade relations with North Korea. I reiterate that call today. For any nation that continues to support the Kim regime, I ask you to consider the nature of this regime. Consider this crisis through the eyes of the North Korean people.

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The U.S. fact sheet on resolution 2397 is excerpted below and available at
<https://usun.state.gov/remarks/8238>.

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In response to the November 29, 2017 intercontinental ballistic missile (ICBM) launch by North Korea, United Nations Security Council resolution (UNSCR) 2397 imposes strong new sanctions on North Korea's energy, export, and import sectors with new maritime authorities to help shut down North Korea's illicit smuggling activities. UNSCR 2397 builds on UNSCR 2375 (2017), which included the strongest sanctions ever imposed on North Korea, and prior resolutions. This resolution imposes the following measures:

1. **Refined Petroleum Products (OP5):** Reduces UNSCR 2375 annual cap on refined petroleum exports by 75% to allow a maximum of 500,000 barrels/year to North Korea.

- In 2016, North Korea imported 4.5 million barrels/year of refined petroleum.
- After the September nuclear test, the Security Council capped refined petroleum exports to North Korea at 2 million barrels.
- By reducing this cap to 500,000 barrels, North Korea's import of gasoline, diesel, and other refined products will be **cut by a total of 89%** from summer 2017.

2. **Crude Oil (OP4):** Strengthens UNSCR 2375 freeze on crude oil by establishing a 4 million barrels/year or 525,000 tons/year annual limit. Increases transparency of crude oil provided to North Korea by requiring supplying member states to provide quarterly reports to the 1718 Sanctions Committee on amounts of crude oil provided to North Korea.

3. **Commitment to Future Oil Reductions (OP27):** Commits the Security Council to reduce further petroleum exports to North Korea following another nuclear test or an ICBM launch, sending a strong new political signal to North Korea about future Security Council responses.

4. **Countering Maritime Smuggling (OPs 9-15):** Provides additional tools to crack down on smuggling and sanctions evasion, including a new requirement for countries to seize and impound ships caught smuggling illicit items including oil and coal.

5. **North Korean Overseas Workers (OP8):** Requires countries to expel all North Korean laborers earning income abroad immediately but no later than 24 months later (end of 2019).

- The North Korean regime is believed to be earning over \$500 million each year from heavily taxing the nearly 100,000 overseas North Korean workers, with as many as 80,000 working in China (about 50,000) and Russia (about 30,000) alone.
- Exempts the repatriation of North Korean defectors, refugees, asylum seekers, and trafficking victims who will face persecution and torture when repatriated by the North Korean regime.

6. Ban DPRK Exports (OP6): Bans all remaining categories of major DPRK exports.

- Previous Security Council resolutions banned North Korea's export sectors covering around 90% of its export revenue (e.g., coal, textiles, seafood, iron).
- Banning the remaining major export sectors—including food, agricultural products, minerals machinery, electrical equipment—will cut off \$200 million or more of annual export revenues.
- Revenues from these exports in 2016 constituted nearly 10% of total exports or \$264 million.

7. Ban DPRK Imports (OP7): Bans North Korea from importing heavy machinery, industrial equipment, and transportation vehicles, which constituted about 30% of North Korea's 2016 imports worth nearly \$1.2 billion. Exempts the provision of spare parts for civilian passenger aircraft for air safety reasons.

8. Protects Humanitarian and Diplomatic Activities in North Korea: Imposes new measures aimed at the North Korean regime and the elite by targeting industrial and other major economic activities while preventing North Korea from exporting food and agricultural products. Provides a number of exemptions aimed at protecting the delivery of humanitarian assistance to the North Korean people and not impeding the work of diplomatic and consular missions operating in North Korea.

9. Sanctions Designations (Annexes): Adds 16 new individuals and 1 entity connected to the financing and development of North Korea's nuclear and ballistic missile programs to the UN's sanctions list.

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(2) *U.S. sanctions*

(a) *E.O. 13687*

See *Digest 2015* at 645 for background on Executive Order 13687, "Imposing Additional Sanctions With Respect To North Korea." On January 11, 2017, OFAC designated seven individuals pursuant to E.O. 13687: Won Hong KIM; Yo Jong KIM; Il-Nam KIM; Hwi CHOE; Yong-Won JO; Byong Chol MIN; and P'il-Hun KANG. 82 Fed. Reg. 5646 (Jan. 18, 2017). On March 30, 2017, OFAC blocked the property and interests in property of one individual—Yong Su KIM—pursuant to subsection 1(a)(ii) of E.O. 13687, for being an official of the Government of North Korea. 82 Fed. Reg. 17,331 (Apr. 10, 2017). On June 1, 2017, OFAC designated SU-KWANG KIM pursuant to E.O. 13687 for being an official of the Government of North Korea. 82 Fed. Reg. 26,841 (June 9, 2017). On September 26, 2017, OFAC designated Su Nam PANG pursuant to both E.O. 13687 and E.O. 13810 (see section (d), *infra*). 82 Fed. Reg. 45,946 (Oct. 2, 2017). Also on September 26, 2017, OFAC designated Tong Chol KIM, Chol Man KO, Chun Hwan RI, Chun Song RI, So'k-min CH'OE,

Kyong Il KIM, and Ja Hyong KU pursuant to E.O. 13687 for being officials of the Government of North Korea. *Id.* On October 26, 2017, OFAC designated seven individuals—Yong Su JONG; Kyong-Chol JO; Kang Jin KIM; Sung Sop KU; Min Chol KIM; Thae Chol RI; and Yong Il SIN—pursuant to E.O. 13687. 82 Fed. Reg. 50,484 (Oct. 31, 2017). On December 26, 2017, OFAC designated Jong Sik KIM and Pyong Chol RI pursuant to E.O. 13687. 82 Fed. Reg. 61,813 (Dec. 29, 2017).

(b) *E.O. 13722*

See *Digest 2016* at 646 for background on Executive Order 13722, “Blocking Property of the Government of North Korea and the Workers’ Party of Korea, and Prohibiting Certain Transactions With Respect to North Korea.” On January 11, 2017, OFAC designated two entities pursuant to E.O. 13722: MINISTRY OF LABOR and STATE PLANNING COMMISSION. 82 Fed. Reg. 5646 (Jan 18, 2017). On March 30, 2017, OFAC designated several individuals and one entity pursuant to E.O. 82 Fed. Reg. 17,331 (Apr. 10, 2017). The individuals designated are: Chun Yong CHOE, Nam Ung KIM, Mun Chol KIM, and Tong-ho KIM; and the entity is PAEKSOL TRADING CORPORATION. On April 4, 2017, OFAC blocked the property and interests in property of one entity—KORYO CREDIT DEVELOPMENT BANK—pursuant to E.O. 13722. 82 Fed. Reg. 17,331 (Apr. 10, 2017).

On June 1, 2017, OFAC designated one individual—Song-hyok RI—and eight entities—SONGI TRADING COMPANY, INDEPENDENT PETROLEUM COMPANY, AO NNK—PRIMORNEFTEPRODUCT, KOREA COMPUTER CENTER, KOREA ZINC INDUSTRIAL GROUP, KOREAN PEOPLE’S ARMY, MINISTRY OF PEOPLE’S ARMED FORCES, and STATE AFFAIRS COMMISSION—pursuant to E.O. 13722. 82 Fed. Reg. 26,841 (June 9, 2017). On June 29, 2017, OFAC designated Hong Ri LI and DALIAN UNITY GLOBAL SHIPPING CO., LTD. pursuant to E.O. 13722. 82 Fed. Reg. 35,054 (July 27, 2017). On August 22, 2017, OFAC designated the following individuals pursuant to E.O. 13722: Mikhail Yur’evich PISKLIN (for operating in the energy industry in the North Korean economy); Andrey SERBIN (for operating in the energy industry in the North Korean economy); Irina Igorevna HUIISH (for links to Velmur Management PTE. LTD., also designated under E.O. 13722); Yupeng CHI, (for links to DANDONG ZHICHENG METALLIC MATERIAL CO., LTD.); Tong-chol KIM (for links to MANSUDAE OVERSEAS PROJECT GROUP OF COMPANIES). 82 Fed. Reg. 40,644 (Aug. 25, 2017). And OFAC also designated the following entities on August 22, 2017 pursuant to E.O. 13722: DANDONG ZHICHENG METALLIC MATERIAL CO., LTD. (for transacting with North Korea to benefit its WMD or missile programs); TRANSATLANTIC PARTNERS PTE LTD (for operating in the energy industry); VELMUR MANAGEMENT PTE LTD (for links to Transatlantic Partners); JINHOUI INTERNATIONAL HOLDINGS CO. LTD (for operating in the mining industry and other activities); DANDONG TIANFU TRADE CO., LTD (for transacting with North Korea to benefit its nuclear or missile programs); MANSUDAE OVERSEAS PROJECTS ARCHITECTURAL AND TECHNICAL SERVICES (PTY) LIMITED (for links to MANSUDAE OVERSEAS PROJECT GROUP OF COMPANIES; QINGDAO

CONSTRUCTION (for links to MANSUDAE OVERSEAS PROJECT GROUP OF COMPANIES and other designated entities).

On September 26, 2017, OFAC designated two entities pursuant to E.O. 13722: CENTRAL BANK OF THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA, and FOREIGN TRADE BANK OF THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA. 82 Fed. Reg. 45, 946 (Oct. 2, 2017). On October 26, 2017, OFAC designated three entities pursuant to E.O. 13722: CH’OLHYO’N OVERSEAS CONSTRUCTION COMPANY, EXTERNAL CONSTRUCTION BUREAU, and MILITARY SECURITY COMMAND. On November 21, 2017, OFAC designated several entities pursuant to E.O. 13722: KOREA SOUTH–SOUTH COOPERATION CORPORATION; MARITIME ADMINISTRATION OF THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA; MINISTRY OF LAND AND MARITIME TRANSPORTATION OF THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA.

(c) *E.O. 13382*

E.O. 13382 (“Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters”) also continued to be used in 2017 to sanction entities and individuals linked to North Korean WMD programs. On March 31, 2017, OFAC designated several individuals pursuant to E.O. 13382: Chol Su KANG (linked to KOREA RYONBONG GENERAL CORPORATION); Il-Kyu PAK (linked to KOREA PUGANG TRADING CORPORATION); Sung Nam JANG (linked to KOREA TANGUN TRADING CORPORATION); Chol Song JO (linked to KOREA KWANGSON BANKING CORP); Su Yong RI (linked to KOREA RYONBONG GENERAL CORPORATION); and Jang Su HAN (chief representative of Foreign Trade Bank). 82 Fed. Reg. 17,331 (Apr. 10, 2017). On June 1, 2017, OFAC designated one individual—Igor Aleksandrovich MICHURIN—and one entity—ARDIS-BEARINGS LLC—pursuant to E.O. 13382. 82 Fed. Reg. 26,841 (June 9, 2017). On June 29, 2017, OFAC designated Wei SUN pursuant to E.O. 13382 for links to Foreign Trade Bank. 82 Fed. Reg. 35,054 (July 27, 2017). On August 22, OFAC designated Ruben Ruslanovich KIRAKOSYAN pursuant to E.O. 13382 for links to North Korea proliferation. 82 Fed. Reg. 40,644 (Aug. 25, 2017). Also on August 22, OFAC designated three entities pursuant to E.O. 13382: GEFEST–M LLC (for links to KOREA TANGUN TRADING CORPORATION); MINGZHENG INTERNATIONAL TRADING LIMITED, (for links to FOREIGN TRADE BANK OF THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA; and DANDONG RICH EARTH TRADING CO., LTD (for links to KOREA KUMSAN TRADING CORPORATION). *Id.* On October 31, 2017, the State Department published its finding that the Korea Kuryonggang Trading Corporation is an alias of Korea Tangun Trading Corporation, and that the Korea Taeryonggang Trading Corporation is an alias of Namchongang Trading Corporation, both of which had been designated pursuant to Executive Order 13382. 82 Fed. Reg. 50,478 (Oct. 31, 2017).

(d) *E.O. 13810 (“Imposing Additional Sanctions with respect to North Korea”)*

On September 20, 2017, the President issued Executive Order 13810, entitled “Imposing Additional Sanctions With Respect to North Korea.” 82 Fed. Reg. 44,705 (Sep. 25, 2017).

E.O. 13810 was a response to, among other things, North Korea's intercontinental ballistic missile launches on July 3 and July 28, 2017 and its nuclear test on September 2, 2017. The text of E.O. 13810 is excerpted below.

* * * *

Section 1. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person 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 construction, energy, financial services, fishing, information technology, manufacturing, medical, mining, textiles, or transportation industries in North Korea;

(ii) to own, control, or operate any port in North Korea, including any seaport, airport, or land port of entry;

(iii) to have engaged in at least one significant importation from or exportation to North Korea of any goods, services, or technology;

(iv) to be a North Korean person, including a North Korean person that has engaged in commercial activity that generates revenue for the Government of North Korea or the Workers' Party of Korea;

(v) 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

(vi) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the effective date of this order. The prohibitions in subsection (a) of this section are in addition to export control authorities implemented by the Department of Commerce.

* * * *

Sec. 2. (a) No aircraft in which a foreign person has an interest that has landed at a place in North Korea may land at a place in the United States within 180 days after departure from North Korea.

(b) No vessel in which a foreign person has an interest that has called at a port in North Korea within the previous 180 days, and no vessel in which a foreign person has an interest that has engaged in a ship-to-ship transfer with such a vessel within the previous 180 days, may call at a port in the United States.

(c) The prohibitions in subsections (a) and (b) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the effective date of this order.

* * * *

On September 26, 2017, OFAC designated the following individuals pursuant to E.O. 13810: Chong-chol KWAK; Hui-bong RYOM; Mun Il PAK; Yong Il HO; Min KANG; Sang-ho KIM; Jong Man KIM; Hyok Chol KIM; Kyong Hwan MUN; Won Uk PAE; Bong Nam PAK; Hyo'k CHU; U'n-so'ng RI; Su Nam PANG; Sung Jun CHA; Sang Jun Ji; Kyong Hyok KIM; Chol Nam PAK; and Ho Nam RI. 82 Fed. Reg. 45,946 (Oct. 2, 2017). OFAC also designated the following entities under E.O. 13810 on September 26: AGRICULTURAL DEVELOPMENT BANK; CHEIL CREDIT BANK; HANA BANKING CORPORATION LTD; INTERNATIONAL INDUSTRIAL DEVELOPMENT BANK; JINMYONG JOINT BANK; JINSONG JOINT BANK; KORYO COMMERCIAL BANK LTD.; and RYUGYONG COMMERCIAL BANK. *Id.*

On November 21, 2017, OFAC designated one individual—Sidong SUN—and several entities—DANDONG DONGYUAN INDUSTRIAL CO., LTD., KOREA KUMBYOL TRADING COMPANY, YUSONG SHIPPING CO, DAWN MARINE MANAGEMENT CO LTD, KOREA DAEBONG SHIPPING CO, KOREA RUNGRADO RYONGAK TRADING CO, KOREA RUNGRADO SHIPPING CO, DANDONG HONGDA TRADE CO. LTD., DANDONG XIANGHE TRADING CO., LTD., and DANDONG KEHUA ECONOMY & TRADE CO., LTD.—as well as 20 vessels, all pursuant to E.O. 13810.

6. Terrorism

a. UN and other coordinated multilateral action

In large part, the United States implements its counterterrorism obligations under UN Security Council resolutions concerning ISIL, al-Qaida and Afghanistan sanctions, as well as its obligations under UN Security Council resolutions concerning counterterrorism, through Executive Order 13224 of September 24, 2001. Among the resolutions with which the United States has addressed domestic compliance through E.O. 13224 designations are Resolutions 1267 (1999), 1373 (2001), 1988 (2011), 1989 (2011), 2253 (2015), and 2255 (2015). Executive Order 13224 imposes financial sanctions on persons who have been designated in the annex to the 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 acting for or on behalf of, or providing material support for, or being otherwise associated with, persons designated under the order. See 66 Fed. Reg. 49,079 (Sept. 25, 2001); see also *Digest 2001* at 881–93 and *Digest 2007* at 155–58.

On July 20, 2017 Ambassador Michele J. Sison, U.S. Deputy Permanent Representative to the United Nations, delivered remarks following the vote by the Security Council to adopt Resolution 2368, renewing sanctions on designated associates

of ISIL and Al-Qaida. Ambassador Sison's remarks are excerpted below and available at <https://usun.state.gov/remarks/7905>.

* * * *

With today's vote, this Security Council is taking another important step to help defeat ISIS and Al-Qaida. Thank you to the co-sponsors of the resolution for your support.

For the United States, there is no higher priority. That is why we are leading a 72-member Coalition that is making great strides to liberate territory from the grip of ISIS.

The United States has supported the Iraqi government to push ISIS out of Mosul. ISIS' last strongholds in Syria are coming under intense pressure.

But even as ISIS is losing ground in Syria and Iraq, the threat is far from over. ISIS will continue looking to spread its ideology and radicalize new groups around the world. They will create new offshoots in new places. Fighters that trained with ISIS in Syria are now starting to return home.

The Security Council needs to show that it can adapt with these changing threats. That is the goal of today's resolution.

The provisions recognize the need to focus not just on ISIS, but also on its affiliates, wherever they may appear.

We also redoubled our commitment to enforcing these measures—the resolution urges more international cooperation to cut off terrorist funding, prevent the travel of terrorists, and stop these groups from acquiring arms.

And to help make sure these sanctions are being implemented fully and fairly, we reaffirmed our support for the 1267 Monitoring Team and its Ombudsperson.

As another important step, today the Security Council added in this resolution eight new individuals and entities to the 1267 sanctions list.

This includes ISIS leaders in Southeast Asia, foreign fighters from the Caucasus, illicit money exchange businesses, and ISIS-affiliated terrorist groups in Syria. And there will be more designations to come.

To make the best use of this tool, the Security Council must regularly add more names to the sanctions list of any new ISIS- or Al-Qaida-affiliated individual or group, wherever they are in the world.

Implementing these sanctions is essential, yet it's only one part of a broader strategy to defeat ISIS and the violent extremist ideology that feeds it.

All member states of the United Nations must work together to prevent groups from declaring allegiance to ISIS and becoming one of its affiliates.

We must mobilize action to address ex-ISIS fighters who return or relocate to other countries—we can't allow them to become a new threat elsewhere.

And we must do more—especially here at the UN—to help countries prevent and counter violent extremism before it takes root. To do so, it's essential we build strong partnerships with civil society, faith leaders, youth, and local communities.

ISIS and similar groups threaten not just our security, but our values, like tolerance, human dignity, and freedom. For this reason, in every region of the world, and people of all faiths, have come together to condemn terrorism.

The United States will continue to lead this effort. Today's unanimous vote reinforces this global resolve to defeat terrorism wherever it is found.

* * * *

b. U.S. targeted financial sanctions

(1) Department of State

(a) State Department designations

In 2017, 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. For an up-to-date list of State Department designations under E.O. 13224 by date, see <https://www.state.gov/j/ct/rls/other/des/143210.htm>.

On January 10, 2017, the Department of State announced the designation of Jamaah Ansharut Daulah ("JAD") as a Specially Designated Global Terrorist ("SDGT") under E.O. 13224. In the January 10, 2017 media note announcing the designation, available at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266763.htm>, the Department provided the following background on JAD:

JAD is a terrorist group based in Indonesia that was formed in 2015 and is composed of almost two dozen Indonesian extremist groups that pledged allegiance to ISIL leader Abu Bakr al-Baghdadi. ISIL is a U.S. Department of State-designated Foreign Terrorist Organization (FTO) and SDGT, and al-Baghdadi is a U.S. Department of State designated SDGT. In January 2016, four people were killed and 25 wounded following an attack by a suicide bomber and gunmen in central Jakarta. The attack was attributed to JAD militants financially supported by an Indonesian ISIL militant based in Syria.

Also on January 10, 2017, the Department announced the designation of Alexandra Amon Kotey under E.O. 13224 in a media note available at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266762.htm>. The media note includes the following on Kotey:

Alexandra Amon Kotey, a British national, is one of four members of an execution cell for the Foreign Terrorist Organization (FTO) and SDGT group, the Islamic State of Iraq and the Levant (ISIL). The notorious cell, dubbed "The Beatles" and once headed by now-deceased SDGT Mohamed Emwazi (also known as Jihadi John), is responsible for holding captive and beheading approximately two dozen hostages, including several Westerners. Among them: American journalists James Foley and Steven Sotloff, and American aid worker Peter Kassig. As a guard for the cell, Kotey likely engaged in the group's executions and exceptionally cruel torture methods, including electronic shock and

waterboarding. Kotey has also acted as an ISIL recruiter and is responsible for recruiting several UK nationals to join the terrorist organization.

On February 25, 2017, the Secretary determined that Alsayed Murtadha Majeed Ramadhan Alawi should be designated pursuant to E.O. 13224. 82 Fed. Reg. 15,548 (Mar. 29, 2017). He also made the determination to designate Ahmad Hasan Yusuf on February 25, 2017. *Id.* In a March 17, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/03/268504.htm>, the following information was provided about the designations of Yusuf and Alawi:

... This marks yet another step in our continued effort to aggressively target Iran's destabilizing and terrorism-related activities in the region. We will continue to stand with Bahrain in addressing these threats, even as we encourage the government to clearly differentiate its response to violent militia groups from its engagement with peaceful political opposition.

Alawi is affiliated with the Bahrain-based al-Ashtar Brigades (AAB). Yusuf is an Iran-based AAB senior member. AAB receives funding and support from the Government of Iran—a state sponsor of terrorism. AAB has claimed responsibility for numerous terrorist attacks—some of which have resulted in casualties—mainly against police and security targets in Bahrain. In March 2014, AAB conducted a bomb attack that killed two local police officers and an officer from the United Arab Emirates. AAB targets the security services of Gulf countries, such as Bahrain and Saudi Arabia.

On February 28, 2017, Shane Dominic Crawford was designated. 82 Fed. Reg. 16,466 (Apr. 4, 2017).

On March 13, 2017, the Secretary made the determination under E.O. 13224 to designate El Shafee Elsheikh and Anjem Choudary. 82 Fed. Reg. 16,653 (Apr. 5, 2017). On March 14, 2017, he made the determination with regard to Sami Bashur Bouras. *Id.* Also on March 14, 2017, the Secretary determined that Mark John Taylor met the criteria for designation under E.O. 13224. 82 Fed. Reg. 16,467 (Apr. 4, 2017). A March 30, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/03/269306.htm>, provides further information on the designations of Elsheikh, Choudary, Bouras, Crawford, and Taylor:

El Shafee Elsheikh traveled to Syria in 2012, joined al-Qa'ida's (AQ) branch in Syria, and later joined ISIS. In May 2016, Elsheikh was identified as a member of the ISIS execution cell known as "The Beatles," a group accused of beheading more than 27 hostages and torturing many more. Elsheikh was said to have earned a reputation for waterboarding, mock executions, and crucifixions while serving as an ISIS jailer.

Anjem Choudary is a British extremist with links to convicted terrorists and extremist networks in the UK, including the proscribed Al-Muhajiroun group. In September 2014, Choudary was arrested for pledging allegiance to ISIS and for

acting as a key figure in ISIS' recruitment drive. He was sentenced to prison in September 2016. Choudary has stated that he will continue his recruitment activities from prison.

Sami Bouras is a Swedish citizen of Tunisian descent who is a member of AQ and who has been involved with planning suicide attacks.

Shane Dominic Crawford is a citizen of Trinidad and Tobago and is currently believed to be a foreign terrorist fighter in Syria carrying out terrorist activity on behalf of ISIS, including acting as an English language propagandist for the group.

Mark John Taylor is a New Zealand national who has been fighting in Syria with ISIS since the fall of 2014. Taylor has used social media, including appearing in a 2015 ISIS propaganda video, to encourage terrorist attacks in Australia and New Zealand.

On March 23, 2017, the Secretary made the determination under E.O. 13224 to designate Mubarak Mohammed A Alotaibi. 82 Fed. Reg. 19,308 (Apr. 26, 2017). The April 27, 2017 State Department media note on the designation, available at <https://www.state.gov/r/pa/prs/ps/2017/04/270472.htm>, explains that Alotaibi "is the Syria-based deputy leader of Islamic State of Iraq and Syria's (ISIS) affiliate in Saudi Arabia..." On March 27, 2017, Tarek Sakr and Farah Mohamed Shirdon were designated. 82 Fed. Reg. 18,521 (Apr. 19, 2017). In an April 13, 2017 media note, available at <https://www.state.gov/r/pa/prs/ps/2017/04/270150.htm>, the State Department provided the following on Sakr: "Tarek Sakr is a Syrian-born Canadian citizen who has conducted sniper training in Syria and periodically travels to Turkey. Sakr has been linked to the Foreign Terrorist Organization (FTO) and SDGT al-Nusrah Front, al-Qa'ida's affiliate in Syria." The same media note also provides information on Farah Mohamed Shirdon: "Farah Mohamed Shirdon is a Canadian citizen who travelled to Iraq and Syria to fight with the FTO and SDGT the Islamic State of Iraq and Syria (ISIS). Shirdon is a prominent ISIS fighter and recruiter and has also been involved in fundraising."

On April 12, 2017, the State Department announced the designation of Abu Anas al-Ghandour pursuant to E.O. 13224. 82 Fed. Reg. 17,716 (Apr. 12, 2017). The April 6, 2017 State Department media note on the designation, available at <https://www.state.gov/r/pa/prs/ps/2017/04/269504.htm>, provides the following background on al-Ghandour:

Abu Anas al-Ghandour is a military commander for the Foreign Terrorist Organization and SDGT group, Hamas. He leads a Hamas brigade in Gaza and has been involved in many terrorist operations. Ghandour was involved in the 2006 attack on the Israel Defense Forces (IDF) outpost at the Kerem Shalom border crossing, which killed two IDF soldiers and wounded four others, and led to the kidnapping of dual French-Israeli citizen, Corporal Gilad Shalit. Ghandour has also served on the Hamas Shura Council and political bureau.

On April 20 2017, Marwan Ibrahim Hussayn Tah al-Azawi was designated by the State Department pursuant to E.O. 13224. 82 Fed. Reg. 27,754 (June 16, 2017). On April 20, 2017, the Secretary made the determination under E.O. 13224 to designate Majelis Mujahidin Indonesia (“MMI”). 82 Fed. Reg. 27,754 (June 16, 2017). In a June 12, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/06/271689.htm>, the following information about the designations was provided:

Marwan Ibrahim Hussayn Tah al-Azawi is an Iraqi ISIS leader connected to ISIS’s development of chemical weapons for use in ongoing combat against Iraqi Security Forces. ISIS has repeatedly used sulfur mustard in chemical weapons attacks in Syria as well as in Iraq.

Majelis Mujahidin Indonesia (MMI) is an Indonesia-based terrorist group formed in 2000 by Abu Bakar Bashir, leader of the designated Foreign Terrorist Organization (FTO) and SDGT group, Jemaah Islamiya (JI). The group has conducted attacks in Indonesia, including claiming responsibility for a May 2012 attack at the book launch of Canadian author Irshad Manji; the attack left three attendees hospitalized. MMI also has links to al-Qa’ida’s affiliate in Syria, the FTO and SDGT group al-Nusrah Front.

On May 9, 2017, Muhammad Ahmad ’Ali al-Isawi was designated. 82 Fed. Reg. 24,425 (May 26, 2017). On May 15, 2017, the Secretary made the determination to designate Hashem Safieddine under E.O. 13324. 82 Fed. Reg. 24,425 (May 26, 2017). A May 19, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/05/270982.htm>, provides background on the designations of Safieddine and al-Isawi:

The Kingdom of Saudi Arabia joined the United States in designating Hashem Safieddine. The Kingdom of Saudi Arabia designated Safieddine under its Law of Terrorism Crimes and Financing and Royal Decree A/44. As a result, any of his assets held in Saudi Arabia are frozen, and transfers through the Kingdom’s financial sector, are prohibited.

Hashem Safieddine is a senior leader in Hizballah, a Foreign Terrorist Organization (FTO) and SDGT entity supported by Iran. Safieddine is a key member of Hizballah’s executive council, which oversees Hizballah’s political, organizational, social, and educational activities. Hizballah is responsible for such terrorist attacks as the suicide truck bombings of the U.S. Embassy and U.S. Marine barracks in Beirut in 1983, the U.S. Embassy annex in Beirut in 1984, and the 1985 hijacking of TWA flight 847.

Muhammad al-Isawi, more commonly known as Abu Usama al-Masri, has been ISIS’ affiliate in the Sinai’s leader since the death of Abu Du’a al-Ansari in August 2016. Prior to being selected as leader of ISIS’ affiliate in the Sinai, he was the group’s media spokesman. He also spent time in an Egyptian prison before escaping during the 2011 Egyptian revolution. ISIS’ affiliate in the Sinai originally

operated under the name Ansar Bayt al-Maqdis, which was designated as an FTO in September 2014. The State Department amended the group's FTO designation to include ISIS' affiliate in the Sinai on September 30, 2015.

On June 1, 2017, the Secretary of State designated Mohammad Shafi Armar pursuant to E.O. 13224. 82 Fed. Reg. 27,753 (June 16, 2017). On the same day, he also designated Oussama Ahmad Atar. 82 Fed. Reg. 27,754 (June 16, 2017). In a June 15, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/06/271921.htm>, the designations of Armar, Atar, and Al Binali were explained as follows:

Mohammad Shafi Armar is a leader and head recruiter in India for the Foreign Terrorist Organization (FTO) and Specially Designated Global Terrorist (SDGT) group, ISIS. He has cultivated a group of dozens of ISIS sympathizers who are involved in terrorist activities across India, such as plotting attacks, procuring weapons, and identifying locations for terrorist training camps.

Oussama Ahmad Atar is a senior leader of ISIS's external operations efforts and has established a network to carry out attacks in Europe. He was a leading coordinator of the November 2015 Paris attacks and March 2016 attacks in Brussels. The Belgian-Moroccan national was responsible for recruiting, training, and sending at least some of the individuals to Paris to launch the November 2015 attacks, which killed and injured hundreds, including Americans. He also recruited and mentored two of the bombers involved in the March 2016 Brussels attacks that killed 32 and left many more wounded.

Mohammed Isa Yousif Saqar Al Binali is a senior member of ISIS. Binali departed Bahrain to join the terrorist group in 2014 and has since appeared in multiple ISIS propaganda videos calling on Bahrainis, specifically members of Bahrain's security forces, to join ISIS.

On June 26, 2017, the Secretary made the determination under E.O. 13224 to designate Mohammad Yusuf Shah. 82 Fed. Reg. 29,973 (June 30, 2017). A June 26, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/06/272168.htm>, provides information on Shah:

Mohammad Yusuf Shah, AKA Syed Salahuddin, is the senior leader of the militant group Hizbul Mujahideen (HM). In September, 2016, Salahuddin vowed to block any peaceful resolution to the Kashmir conflict, threatened to train more Kashmiri suicide bombers, and vowed to turn the Kashmir valley "into a graveyard for Indian forces." Under Salahuddin's tenure as senior HM leader, HM has claimed responsibility for several attacks, including the April 2014 explosives attack in Indian-administered Jammu and Kashmir, which injured 17 people.

In an August 16, 2017 media note, the Department of State announced the designation of Hizbul Mujahideen (“HM”) under E.O. 13224. The media note, available at <https://www.state.gov/r/pa/prs/ps/2017/08/273468.htm>, includes the following on HM:

Formed in 1989, HM is one of the largest and oldest militant groups operating in Kashmir. Hizbul Mujahideen is led by Specially Designated Global Terrorist Mohammad Yusuf Shah, also known as Syed Salahuddin. Hizbul Mujahideen has claimed responsibility for several attacks, including the April 2014, explosives attack in the state of Jammu and Kashmir, which injured 17 people.

The designation of HM was published in the Federal Register on August 17, 2017. 82 Fed. Reg. 39,151 (Aug. 17, 2017). On August 23, 2017, the State Department published the designation of Ahmad Alkhalid under E.O. 13224. 82 Fed. Reg. 40,057 (Aug. 23, 2017). The designation of Abu Yahya al-Iraqi was also published on August 23, 2017. *Id.* An August 17, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/08/273499.htm>, announced the designations of Ahmad Alkhalid and Abu Yahya al-Iraqi, providing the following information on the two ISIS leaders:

Ahmad Alkhalid is an ISIS bomb-maker responsible for the deaths of numerous civilians in Europe. He is the explosives chief of the terrorist cell that carried out the November 2015, attacks in Paris and the March 2016 attacks in Brussels. A Syrian national, Alkhalid traveled to Europe, where he helped plan the Paris attacks and manufacture the explosive belts used in that plot, which killed and injured hundreds of people, including a number of Americans. Following his return to Syria shortly before the attacks in Paris, Alkhalid continued to guide ISIS operatives in Europe on making the bombs used in the March 2016, Brussels attacks. Alkhalid is wanted internationally and a European warrant for his arrest has been issued.

Abu Yahya al-Iraqi, also known as Iyad Hamed Mahl al-Jumaily, is a senior ISIS figure who reports to ISIS leader and designated SDGT Abu Bakr al-Baghdadi. Al-Iraqi has reportedly played a key role in security for al-Baghdadi and oversees ISIS security in Iraq and Syria. ...

On August 17, 2017, the State Department issued a fact sheet, available at <https://www.state.gov/r/pa/prs/ps/2017/08/273500.htm>, identifying all the ISIS-related designations pursuant to E.O. 13224, including the recent additions of Alkhalid and al-Iraqi. As explained in the fact sheet:

The Department of State has designated over 30 ISIS leaders and operatives under Executive Order (E.O.) 13224, and will continue to target the group to deny it access to the U.S. financial system. These designations are part of a larger comprehensive plan to defeat ISIS that, in coordination with the 73-member

Global Coalition, has made significant progress toward that goal. This whole-of-government effort is destroying ISIS in its safe havens, denying its ability to recruit foreign terrorist fighters, stifling its financial resources, negating the false propaganda it disseminates over the internet and social media, and helping to stabilize liberated areas in Iraq and Syria so the displaced can return to their homes and begin to rebuild their lives.

The fact sheet also identifies the ISIS branches designated by the U.S. Department of State and other ISIS-related groups. On August 28, 2017, the Secretary designated Tony-Lee Thulsie. 82 Fed. Reg. 44,023 (Sep. 20, 2017). Brandon-Lee Thulsie was also designated on August 28, 2017. 82 Fed. Reg. 44,024 (Sep. 20, 2017). In a September 19, 2017 State Department media note available at <https://www.state.gov/r/pa/prs/ps/2017/09/274253.htm>, the following information was provided about the designations of Tony-Lee Thulsie and Brandon-Lee Thulsie:

In July 2016, Tony-Lee Thulsie and Brandon-Lee Thulsie were arrested during raids in South Africa for their links to ISIS. At the time of their arrest, the twin brothers had been plotting attacks targeting Jewish individuals and institutions and foreign embassies, including the U.S. Embassy in South Africa. Both Tony-Lee Thulsie and Brandon-Lee Thulsie attempted to travel to Syria to fight for ISIS and recruited others to join the terrorist group. Tony-Lee Thulsie also communicated with individuals linked to ISIS to discuss how to build and obtain explosive devices for the purpose of carrying out attacks.

(b) State Department revocation of, and amendments to, designations

The State Department continued to amend and revoke designations under E.O. 13224. On May 10, 2017, the Secretary of State determined that the Abu Nidal Organization no longer meets the criteria for designation under E.O. 13224 and revoked that designation. 82 Fed. Reg. 25,654 (June 2, 2017). On May 15, 2017, the Secretary concluded that there is a sufficient factual basis to find that al-Qa'ida in the Arabian Peninsula (and other aliases) uses the additional aliases Sons of Abyan, Sons of Hadramawt, Sons of Hadramawt Committee, Civil Council of Hadramawt, and National Hadramawt Council and amended the designation to include those aliases. 82 Fed. Reg. 28,731 (June 23, 2017). On May 16, 2017, the Secretary amended the designation of Hizballah to include the following new aliases: Lebanese Hizballah, also known as Lebanese Hezbollah, also known as LH. 82 Fed. Reg. 28,731 (June 23, 2017). A June 21, 2017 State Department media note available at <https://www.state.gov/r/pa/prs/ps/2017/06/272090.htm>, explains the amendments to the Hizballah and AQAP designations:

...Lebanese Hizballah ...is frequently used to refer to [Hizballah], as well as the Foreign Relations Department (FRD) and the External Security Organization (ESO), key components of the terror organization. The Department of State has

also amended the designation of al-Qa'ida in the Arabian Peninsula (AQAP) ...to add the aliases Sons of Abyan, Sons of Hadramawt, Sons of Hadramawt Committee, Civil Council of Hadramawt, and National Hadramawt Council.

...

Hizballah, which was originally designated as an FTO in 1997, operates through, among other parts of the group, its branches the FRD and the ESO, also known as the Islamic Jihad Organization. The FRD maintains Hizballah's public presence around the world. The branch is led by senior Hizballah member Ali Damush, designated by the Department of State as an SDGT in January 2017. The FRD is involved in covert operations around the globe, which include recruiting, fundraising and gathering intelligence on behalf of Hizballah.

Hizballah's ESO was established by now-deceased Hizballah leader Imad Mughniyah and was led by Talal Hamiyah as of September 2012. The branch is responsible for planning and carrying out Hizballah attacks outside of Lebanon. The attacks have primarily targeted Israelis and Americans.

Sons of Abyan, Sons of Hadramawt, Sons of Hadramawt Committee, Civil Council of Hadramawt, and National Hadramawt Council all serve as proxies or cover organizations for AQAP, which was designated as an FTO in 2010. AQAP uses these proxies to help govern the territories it controls, and to manage issues such as administration, economics, security, and building relationships with citizens.

On July 21, 2017, the State Department announced, in a media note available at <https://www.state.gov/r/pa/prs/ps/2017/07/272775.htm>, the amendments to the E.O. 13224 designation of Yarmouk Martyrs Brigade "to change the group's primary name to Khalid bin Al-Walid Army and to add new aliases." The media note provides background on the designation:

The Yarmouk Martyrs Brigade, formed in 2012, has staged attacks throughout Southern Syria, including several attacks targeting UN personnel. The group, which has pledged allegiance to ISIS, was designated by the Department of State as a SDGT entity on June 10, 2016. Near the time of the U.S. designation, the Yarmouk Martyrs Brigade changed its name to Khalid bin Al-Walid Army after merging with groups operating in Southern Syria. ISIS announced the group's name change and merger through its Amaq News Agency.

Khalid bin Al-Walid Army has also been listed on the UN Security Council 1267/1989/2253 ISIL (Da'esh) and al-Qaida sanctions list. The group's UN designation coincides with the UN Security Council's adoption of a resolution updating the UN Security Council 1267/1989/2253 ISIL (Da'esh) and al-Qaida sanctions regime and underscoring its continued importance in the global effort to defeat ISIS and al-Qa'ida.

The amendment to the designation of Yarmouk Martyrs Brigade was published in the Federal Register on July 26, 2016. 82 Fed. Reg. 34,732 (July 26, 2017).

A November 1, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/11/275241.htm>, announced the amendment of the designation of Abdallah Azzam Brigades (“AAB”) under E.O. 13224 to include additional aliases. 82 Fed. Reg. 50,928 (Nov. 2, 2017).

(2) OFAC

(a) OFAC designations

OFAC designated numerous individuals (including their known aliases) and entities pursuant to Executive Order 13224 during 2017. 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 82 Fed. Reg. 4967 (Jan. 17, 2017) (four individuals—Khaled SHARROUF, Neil Christopher PRAKASH, Oman ROCHMAN, and Bachrumsyah Mennor USMAN); 82 Fed. Reg. 9961 (Feb. 8, 2017) (four individuals—Yahya AL-HAJJ, Hasan Dehghan EBRAHIMI, Muhammad ‘Abd-al-Amir FARHAT, and Ali SHARIFI—and four entities—MAHER TRADING AND CONSTRUCTION COMPANY, MIRAGE FOR ENGINEERING AND TRADING, MIRAGE FOR WASTE MANAGEMENT AND ENVIRONMENTAL SERVICES SARL, and REEM PHARMACEUTICAL); 82 Fed. Reg. 12,276 (Mar. 1, 2017) (two individuals—Bassam Ahmad AL-HASRI and Iyad Nazmi Salih KHALIL); 82 Fed. Reg. 14,276 (Mar. 17, 2017) (one individual—Muhammad Hadi ‘Abd-al- Rahman Fayhan Sharban AL-’ANZI); 82 Fed. Reg. 16,474 (Apr. 4, 2017) (two individuals—Muhammad Bahrun Naim Anggih TAMTOMO and Muhammad Wanndy Bin Mohamed JEDI); 82 Fed. Reg. 18,343 (Apr. 18, 2017) (three individuals—Ali Ahmidah AL-SAFRANI, Hamma HAMANI, and Abd al Hadi ZARQUN); 82 Fed. Reg. 22,606 (May 16, 2017) (three individuals—Inayat ur RAHMAN, Ali Muhammad Abu TURAB, and Hayat Ullah Ghulam MUHAMMAD—and one entity—WELFARE AND DEVELOPMENT ORGANIZATION OF JAMAAT-UD-DAWAH FOR QUR’AN AND SUNNAH); 82 Fed. Reg. 23,981 (May 24, 2017) (two individuals—Khalid Ali Mabkhut AL-ARADAH and Hashim Muhsin Aydarus AL-HAMID); 82 Fed. Reg. 27,762 (June 16, 2017) (one individual—Attallah Salman ‘Abd Kafi AL-JABURI); 82 Fed. Reg. 28,226 (June 20, 2017) (one individual—’Umar AL-KUBAYSI—and one entity—AL-KAWTHAR MONEY EXCHANGE); 82 Fed. Reg. 28,546 (June 22, 2017) (one individual—Fared SAAL); 82 Fed. Reg. 28,938 (June 26, 2017) (one individual—Muhammad SALAH); 82 Fed. Reg. 34,745 (July 26, 2017) (one individual—Malik Ruslanovish BARKHANOEV); 82 Fed. Reg. 41,680 (Sep. 1, 2017) (one individual—Daniel Martin SCHNEIDER); 82 Fed. Reg. 44,026 (two entities—DART AIRLINES and KHORS AIRCOMPANY); 82 Fed. Reg. 48,591 (Oct. 18, 2017) (one entity—ISLAMIC REVOLUTIONARY GUARD CORPS); 82 Fed. Reg. 50,222 (Oct. 30, 2017) (eight individuals—Adil Abduh Fari Uthman AL-DHUBHANI, Abu Sulayman AL-ADANI, Sayf Abdulrab Salem AL-HAYASHI, Khalid AL-MARFADI, Nashwan al-Wali AL-YAFI’I, Khalid Sa’id Ghabish AL-UBAYDI, Bilal Ali Muhammad AL-WAFI, and Radwan Muhammad

Husayn Ali QANAN —and one entity—AL KHAYR SUPERMARKET); 82 Fed. Reg. 56,853 (Nov. 30, 2017) (two individuals—Reza HEIDARI and Mahmoud SEIF—and four entities—FORENT TECHNIK GMBH; PARDAZESH TASVIR RAYAN CO.; PRINTING TRADE CENTER GMBH; and TEJARAT ALMAS MOBIN HOLDING); 82 Fed. Reg. 58,275 (Dec. 11, 2017) (one individual, Abdullah Ibrahim AL-FAISAL).

(b) *OFAC de-listings*

On June 1, 2017, OFAC removed one individual—Abu NIDAL—and one entity—ABU NIDAL ORGANIZATION—from the SDN List. 82 Fed. Reg. 26,238 (June 6, 2017). Effective November 21, 2017, OFAC removed Talat Fouad QASEM from the SDN List. 82 Fed. Reg. 56,324 (Nov. 28, 2017).

c. **Annual certification regarding cooperation in U.S. antiterrorism efforts**

See Chapter 3 for discussion of the Secretary of State’s 2017 determination regarding countries not cooperating fully with U.S. antiterrorism efforts.

7. **Russia**

a. **CAATSA**

See section A.1.c(2), *supra*, for a discussion of the Iran-related provisions in the Countering America’s Adversaries through Sanctions Act of 2017 (“CAATSA”). See Chapter 1.B.2.d. for discussion of the President’s signing statement. Several provisions in CAATSA relate to Russia. On October 27, 2017, senior State Department officials held a special briefing on sanctions with respect to Russia’s defense and intelligence sectors under Section 231 of CAATSA. The briefing is excerpted below and the full transcript is available at <https://www.state.gov/r/pa/prs/ps/2017/10/275164.htm>.

* * * *

SENIOR STATE DEPARTMENT OFFICIAL ONE: Thank you. The Department of State today released guidance in accordance with the Countering America’s Adversaries Through Sanctions Act, which was adopted by the Congress on July 28th of this year and signed by the President on August 2nd. The guidance relates to Section 231 of the act, which mandates the administration specify those persons or entities that are part of or operating for or on behalf of the defense or intelligence sectors of the Government of the Russian Federation.

The intent of Congress and the administration is to use Section 231 of the act to respond to Russia’s malign behavior with respect to the crisis in eastern Ukraine, cyber intrusions and attacks, and human rights abuses.

This section of the act targets significant transactions with persons in the defense and intelligence sectors of the Russian Government, which could include the sale of advanced Russian weaponry around the world. The full guidance, [\[https://www.state.gov/t/isn/caatsa/index.htm\]](https://www.state.gov/t/isn/caatsa/index.htm) along with the listing of entities defining those sectors of the government, and frequently asked questions can be viewed online at the state.gov website.

* * * *

On October 26, 2017, the Secretary of State issued guidance identifying persons that are part of, or operate for or on behalf of, the defense and intelligence sectors of the Government of the Russian Federation for purposes of Section 231 of CAATSA. 82 Fed. Reg. 57,325 (Dec. 4, 2017). The 231(d) List includes:

- Admiralty Shipyard JSC
- Almaz-Antey Air and Space Defense Corporation JSC
- Dolgoprudny Research Production JSC
- Federal Research and Production Center Titan Barrikady JSC (Titan Design Bureau)
- Izhevsk Mechanical Plant (Baikal)
- Izhmash Concern JSC
- Kalashnikov Concern JSC
- Kalinin Machine Building Plant JSC (KMZ)
- KBP Instrument Design Bureau
- MIC NPO Mashinostroyenia
- Molot Oruzhie
- Mytishchinski Mashinostroitelny Zavod
- Novator Experimental Design Bureau
- NPO High Precision Systems JSC
- NPO Splav JSC
- Oboronprom OJSC
- Radio-Electronic Technologies (KRET)
- Radiotechnical and Information Systems (RTI) Concern
- Research and Production Corporation Uralvagonzavod JSC
- Rosoboronexport OJSC (ROE)
- Rostec (Russian Technologies State Corporation)
- Russian Aircraft Corporation MiG
- Russian Helicopters JSC
- Sozvezdie Concern JSC
- State Research and Production Enterprise Bazalt JSC
- Sukhoi Aviation JSC
- Tactical Missiles Corporation JSC

- Tikhomirov Scientific Research Institute JSC
- Tupolev JSC
- United Aircraft Corporation
- United Engine Corporation
- United Instrument Manufacturing Corporation
- United Shipbuilding Corporation
- Autonomous Noncommercial Professional Organization/ Professional Association of Designers of Data Processing (ANO PO KSI)
- Federal Security Service (FSB)
- Foreign Intelligence Service (SVR)
- Main Intelligence Directorate of the General Staff of the Russian Armed Forces (GRU)
- Special Technology Center Zorsecurity

On October 27, 2017, the State Department published guidance on sanctions with respect to Russia's defense and intelligence sectors under Section 231 of CAATSA. The guidance on Section 231 is excerpted below and available at <https://www.state.gov/t/isn/caatsa/275118.htm>.

* * * *

Summary

- The following guidance pertains to the Countering America's Adversaries Through Sanctions Act of 2017 ("CAATSA" or "the Act") (Pub. L. 115-44), which was adopted by the U.S. Congress July 28, 2017 and signed by President Trump August 2, 2017. The Administration will fully implement the Act consistent with the overall national security and foreign policy interests of the United States, as well as our specific policies regarding Russia and its external activities.
- On September 29, 2017, President Trump delegated the authority to implement Section 231 to the Secretary of State, in consultation with the Secretary of the Treasury. Section 231 requires the imposition of certain sanctions on persons determined to have knowingly engaged in a significant transaction, on or after the date the Act was enacted, with a person that is part of or operating for or on behalf of the defense or intelligence sectors of the Government of the Russian Federation.
- Pursuant to Section 231(d), the Department of State is today issuing guidance to specify persons that are part of, or operating for or on behalf of, the defense or intelligence sectors of the Government of the Russian Federation ("Section 231 Guidance" or "the Guidance").
- The Guidance names certain persons, but it is not a determination regarding imposition of sanctions. No asset freezes are being imposed on these named persons as a result of their inclusion in this Guidance, and inclusion in this Guidance does not, of itself, mean such persons are added to the Department of the Treasury's List of Specially Designated Nationals List and Blocked Persons or Sectoral Sanctions Identification List.

- The Act requires the imposition of five or more sanctions of the twelve listed in Section 235 of the Act beginning on or after January 29, 2018, with respect to persons determined to have engaged in conduct covered by this Section since enactment of the Act August 2, 2017. Such determinations will be made in a separate notice.

Questions and Answers

Q: How did you arrive at the Section 231 Guidance?

A: The Guidance is to specify, for the purposes of implementing Section 231, the persons—which can be individuals or entities—that are part of, or operating for or on behalf of, the defense or intelligence sectors of the Government of the Russian Federation. This Guidance was developed, and may in the future be amended or updated as circumstances warrant, based on a robust interagency process.

Q: Is the United States imposing sanctions on these persons by specifying them in this Guidance?

A: No. Specification in this Guidance only indicates that an individual or entity has been identified as part of, or operating for or on behalf of, the defense or intelligence sectors of the Government of the Russian Federation, for purposes of implementing Section 231(d). Some of the individuals or entities named, however, may also be currently subject to U.S. sanctions imposed under other authorities.

Q: Are all transactions with specified persons sanctionable?

A: No. The Act states that sanctions shall be imposed beginning on or after 180 days after enactment on persons that are determined to knowingly engage in a significant transaction with a person specified in the Guidance on or after the date of enactment of the Act.

Q: What is a “significant transaction?”

A: In determining whether a transaction is “significant” for purposes of Section 231 of the Act, the Department of State will consider the totality of the facts and circumstances surrounding the transaction and weigh various factors on a case-by-case basis. The factors considered in the determination may include, but are not limited to, the significance of the transaction to U.S. national security and foreign policy interests, in particular whether it has a significant adverse impact on such interests; the nature and magnitude of the transaction; and the relation and significance of the transaction to the defense or intelligence sector of the Russian government.

In this initial implementation stage, our focus is expected to be on significant transactions of a defense or intelligence nature with persons named in the Guidance. If a transaction for goods or services has purely civilian end-uses and/or civilian end-users, and does not involve entities in the intelligence sector, these factors will generally weigh heavily against a determination that such a transaction is significant for purposes of Section 231.

If a transaction is necessary to comply with rules and regulations administered by the Federal Security Service, or law enforcement or administrative actions or investigations involving the Federal Security Service, including rules and regulations administered by the Federal Security Service for the importation, distribution, or use of information technology products in the Russian Federation and the payment of any fees to the Federal Security Service for such licenses, permits, certification, or notifications, then these factors will weigh heavily against a determination that that such transaction is significant for purposes of this section.

Q: Are companies prohibited from conducting transactions with persons named in this Guidance?

A: The Act provides for certain sanctions, including on U.S. persons, in the event of a significant transaction. The Act does not provide for sanctions in cases in which transactions are not “significant.” Where possible, the United States intends to work with persons considering transactions with persons named in this Guidance to help them identify and avoid engaging in potentially sanctionable activity.

Q: Are you required to sanction allied or partner states that purchase Russian-origin military equipment, spare parts, and related supplies?

A: In implementing Section 231, the Department of State is mindful of the importance of unity and coordination with our allies and partners on these issues. The Act itself acknowledges the importance of these relationships, and these purposes, when providing in Section 212 that we “should continue to uphold and seek unity with European and other key partners on sanctions implemented against the Russian Federation, which have been effective and instrumental in countering Russian aggression in Ukraine.” Where possible, the United States intends to work with our allies and partners to help them identify and avoid engaging in potentially sanctionable activity while strengthening military capabilities used for cooperative defense efforts.

Q: What types of sanctions does the Act authorize?

Section 231 of the Act states that five or more of the sanctions described in Section 235 shall be imposed on persons determined to engage in a significant transaction with a person that is part of, or operates for or on behalf of, the defense or intelligence sectors of the Government of the Russian Federation. The sanctions described in Section 235 include, among others, prohibitions concerning property transactions, export license restrictions, Export-Import Bank assistance restrictions, debt and equity restrictions, visa ramifications for corporate officers, and United States government procurement prohibitions. The Act allows for sanctions on persons that engage in covered transactions as well as on the principal executive officer or officers of the sanctioned person (or a person performing similar functions and with similar authorities as such officer or officers).

* * * *

On October 31, 2017, senior administration officials provided a special briefing providing public guidance related to Sections 223, 225, 226, 228, 232, and 233 of CAATSA. A transcript of the briefing is available at

<https://www.state.gov/r/pa/prs/ps/2017/10/275229.htm> and excerpted below.

* * * *

SENIOR ADMINISTRATION OFFICIAL ONE: ... Since the August 2nd enactment of the Countering America’s Adversaries Through Sanctions Act, or CAATSA, we’ve been working with our interagency colleagues and in consultation with other partners and allies to prepare public guidance related to the act.

On October 26th, ... the Department of State released public guidance on the implementation of Section 231 of CAATSA, which relates to the defense and intelligence sectors

of the Russian Federation. Today, the department is taking the next step by releasing public guidance related to Sections 225 and 232 of the act. These sections relate to special Russian oil projects and Russian energy export pipelines.

The release of guidance today is not a sanctions action but a publication of information intended to provide clarity regarding plans for implementing the sanctions. That is a key point that I'd like to emphasize: We are not announcing sanctions designations today; we're providing the clarity that is so important to our allies and partners and to the private sector.

The department is informing Congress, key U.S. industry stakeholders, and our allies and partners of this guidance, and we have posted the full public guidance on state.gov. We consulted extensively with allies and partners about this guidance, as the law states that we should, and we will continue to work with our allies and partners in order to impose costs on Russia while seeking to avoid unforeseen negative impacts to others. Let me reiterate that the goal of these sanctions provisions is to remind the Russian Government of the costs associated with not fulfilling its commitments to Minsk and other malign activities. It is to pressure the Russian Government to change is calculus.

The Department of the Treasury's Office of Foreign Assets Control, or OFAC, also published guidance today for the sections that they take lead on, and I'll refer any questions about those sections to our Treasury colleague on the call, [Senior Administration Official Two], who also has an opening statement to read.

SENIOR ADMINISTRATION OFFICIAL TWO: ... [E]arlier this afternoon the Department of the Treasury's Office of Foreign Assets Control, or OFAC, published materials related to CAATSA, the statute that our State Department colleague referenced.

First among these materials is a Modified Directive 4 under OFAC's Russia sanctions program. OFAC originally published Directive 4 in September of 2014 pursuant to Ukraine/Russia-related Executive Order 13662. Section 223(d) of CAATSA requires the Secretary of the Treasury to modify Directive 4 within 90 days of the statute's enactment, which is today.

In keeping with that requirement, today Treasury modified Directive 4 to expand the scope of its prohibitions as set out in CAATSA. Previously, Directive 4 prohibited U.S. persons, including persons within the United States, from providing, exporting, or re-exporting, directly or indirectly, goods, non-financial services, or technology in support of exploration or production for deep water, 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 that would involve any person determined to be subject to the directive or any earlier version.

Modified Directive 4, which was issued today, contains an additional CAATSA prohibition that will come into effect on January 29th, 2018. Currently, Directive 4 will also prohibit U.S. persons, including persons within the United States, from providing, exporting, or re-exporting, directly or indirectly, goods, non-financial services, or technology in support of the exploration or production for deep water, arctic, offshore, or shale projects either initiated on or after January 29th, 2018 that have the potential to produce oil in any location. I emphasize that. That's one of the new areas that changed from "the Russian Federation area" to "in any location."

The other criteria is it's also in which any person determined to be subject to Directive 4 has either a 33 percent or greater ownership interest or ownership of a majority of voting interest. That's another new area that we're implementing from the statute.

Concurrent with Modified Directive 4, OFAC published FAQs related to the new prohibitions in the modified directive. The FAQs provide guidance on issues of probable interest to the regulated community.

In addition to the Modified Directive 4 and the FAQs related to it, OFAC also published FAQs related to CAATSA sections 223(a), 226, 228, and 233. These statutory provisions pertain to potential targets of sectoral sanctions, the imposition of sanctions with respect to Russian and other foreign financial institutions, sanctions with respect to certain transactions with foreign sanctions evaders, and sanctions with respect to investment and/or facilitation of privatization of state-owned assets by the Russian Federation.

OFAC focused on these statutory provisions because comments from foreign partners and allies, industry, and others indicated high interest in them relative to other parts of the statute. The FAQs provide guidance on a range of issues of probable interest to the regulated community and reflect broad consultation across the interagency, including with our colleagues at the State Department and with Congress.

* * * *

Also on October 31, 2017, the State Department issued a media note regarding the release of public guidance for CAATSA, which is excerpted below and available in full at <https://www.state.gov/r/pa/prs/ps/2017/10/275222.htm>. The text of Sections 231 and 235 of CAATSA is available at <https://www.state.gov/t/isn/caatsa/275115.htm>.

* * * *

The U.S. Department of State today released public guidance concerning energy sanctions relating to the Russian Federation, specifically Sections 225 and 232 of the Countering America's Adversaries Through Sanctions Act (CAATSA). Department of State guidance can be found at www.state.gov/e/enr/c77802.htm. This guidance is not a sanctions action; it is a publication of information intended to provide clarity regarding the implementation of sanctions.

The Department of the Treasury's Office of Foreign Assets Control (OFAC) today also published guidance for sections 223(a), 223(d), 226, 228, and 233 of CAATSA, which can be found at www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx.

The CAATSA sanctions were imposed pursuant to legislation reflecting an overwhelming bipartisan consensus of the U.S. Congress to deter aggressive behavior by the Russian government. We continue to call on Russia to honor its commitments under the Minsk agreements, to withdraw from the Crimean Peninsula, and to cease its malicious cyber intrusions.

We received and considered input from a wide range of interlocutors—foreign governments, industry associations, and individual companies—as we formulated guidance for these sections. We will work with our allies and partners in the implementation of these sanctions in order to impose costs on the Russian government, while seeking to avoid unforeseen negative impacts on others.

* * * *

The State Department public guidance on CAATSA Section 225, issued on October 31, 2017, is excerpted below and available at <https://www.state.gov/e/enr/275194.htm>.

* * * *

The Department of State is committed to fully implementing sanctions authorities in the Countering America's Adversaries Through Sanctions Act (CAATSA). We continue to call on Russia to honor its commitments that were made under the Minsk agreements and to cease its malicious cyber intrusions.

Sanctions under Section 4(b) of the Ukraine Freedom Support Act (PL 113-272) (UFSA), as amended by CAATSA, shall be imposed absent a determination that the sanctions are not in the national interest of the United States.

Sanctions under this provision will apply if the Secretary of State, in consultation with the Secretary of Treasury, determines that a foreign person knowingly makes a significant investment in a special Russian crude oil project on or after September 1, 2017.

The UFSA provides the definition for a "special Russian crude oil project." Under that Act, a "special Russian crude oil project" is a project intended to extract crude oil from:

- A. The exclusive economic zone of the Russian Federation in waters more than 500 feet deep;
- B. Russian Arctic offshore locations; or
- C. Shale formations located in the Russian Federation.

* * * *

Frequently Asked Question

If goods or services are provided in exchange for equity in an enterprise or rights to profits or revenue thereof, then could that be considered an "investment"?

Yes. "Investment" could include arrangements where goods or services are provided in exchange for equity in an enterprise or rights to a share of the revenue or profits of an enterprise.

* * * *

The State Department's public guidance on CAATSA Section 232, issued on October 31, 2017, is excerpted below and available at <https://www.state.gov/e/enr/275195.htm>.

* * * *

Section 232 sanctions are discretionary. In accordance with Sections 212 and 232 of the Act, the Secretary of State, in consultation with the Secretary of the Treasury, will coordinate with allies of the United States in imposing these sanctions. The intent of such sanctions would be to

impose costs on Russia for its malign behavior, such as in response to aggressive actions against the United States and our allies and partners.

Any implementation of Section 232 sanctions would seek to avoid harming the energy security of our partners or endangering public health and safety. Consistent with the Act (Section 257), it remains the policy of the United States to “work with European Union Member States and European institutions to promote energy security through developing diversified and liberalized energy markets that provide diversified sources, suppliers, and routes.”

For the purposes of Section 232, the focus of implementation would be on energy export pipelines that (1) originate in the Russian Federation, and (2) transport hydrocarbons across an international land or maritime border for delivery to another country. Pipelines that originate outside the Russian Federation and transit through the territory of the Russian Federation would not be the focus of implementation.

The focus of implementation of Section 232 sanctions would be on persons that the Secretary of State, in consultation with the Secretary of the Treasury, determines knowingly, on or after August 2, 2017 (1) made an investment that meets the fair market value thresholds in Section 232(a) and directly and significantly enhances the ability of the Russian Federation to construct energy export pipeline projects initiated on or after August 2, 2017, or (2) sells, leases, or provides to the Russian Federation goods or services that meet the fair market value thresholds in Section 232(a) and that directly and significantly facilitate the expansion, construction, or modernization of such energy export pipelines by the Russian Federation.

For the purposes of Section 232, a project is considered to have been initiated when a contract for the project is signed.

Investments and loan agreements made prior to August 2, 2017 would not be subject to Section 232 sanctions.

Implementation of Section 232 sanctions would not target investments or other activities related to the standard repair and maintenance of pipelines in existence on, and capable of transporting commercial quantities of hydrocarbons, as of August 2, 2017.

* * * *

b. *Sanctions in response to Russia’s actions in Ukraine*

On June 20, 2017, OFAC blocked the property and interests in property of 21 persons pursuant to E.O. 13660, “Blocking Property of Certain Persons Contributing to the Situation in Ukraine.” 82 Fed. Reg. 29,995 (June 30, 2017). At the same time, OFAC identified 20 entities in which AK Transneft OAO owns, directly or indirectly, a 50 percent or greater interest, subjecting those identified to the prohibitions of Directive 2 (as amended) of September 12, 2014, issued pursuant to E.O. 13662, “Blocking Property of Additional Persons Contributing to the Situation in Ukraine.” *Id.* In addition, OFAC designated ten persons pursuant to E.O. 13685, “Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to the Crimea Region of Ukraine.”

For background on E.O. 13660, “Blocking Property of Certain Persons Contributing to the Situation in Ukraine,” see *Digest 2014* at 646. For background on E.O. 13662 and Directives 1, 2, and 4, see *Digest 2014* at 647-49. For background on E.O. 13685, “Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to the Crimea Region of Ukraine,” see *Digest 2014* at 651-52. For background

on E.O. 13661, “Blocking Property of Additional Persons Contributing to the Situation in Ukraine,” see *Digest 2014* at 646-47.

OFAC amended Directives 1, 2, on September 29, 2017 and Directive 4 on October 31, 2017, consistent with section 223 of CAATSA. The amended Directives are available at <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#legal>.

c. *Russia Magnitsky*

For background on the Sergei Magnitsky Rule of Law Accountability Act of 2012 (“Magnitsky Act”), see *Digest 2013* at 505-06. On January 9, 2017, OFAC blocked the property and interests in property of five individuals pursuant to the Magnitsky Act: Gennady Nikolaevich PLAKSIN; Stanislav Evgenievich GORDIEVSKY, Andrei Konstantinovich LUGOVOI, Dmitri KOVTUN; and Alexander Ivanovich BASTRYKIN. 82 Fed. Reg. 4460 (Jan. 13, 2017). The Federal Register notice includes the following additional information about the January 9, 2017 Magnitsky Act designations:

Gennady Plaksin and Stanislav Gordievsky are being designated pursuant to Section 404(a) of the Magnitsky Act because they were involved in the criminal conspiracy uncovered by Sergei Magnitsky. Andrei Lugovoi and Dmitri Kovtun are being designated pursuant to Section 404(a) of the Magnitsky Act because they are responsible for the extrajudicial killing of Alexander Litvinenko for his activities seeking to expose illegal activity carried out by officials of the Government of the Russian Federation. Alexander Bastrykin is being designated pursuant to Section 404(a) of the Magnitsky Act for participating in efforts to conceal the legal liability for the detention, abuse, or death of Sergei Magnitsky.

Also on January 9, 2017, a State Department press statement, available at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266736.htm>, announced the submission to Congress of the annual report on implementation of the Magnitsky Act. The report includes the list of persons the State and Treasury Departments have determined meet the criteria set forth in the Act. As of the January 9, 2017 report, 44 persons had been listed. The list is available at <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20170109.aspx>.

On December 20, 2017, a State Department press statement, available at <https://www.state.gov/r/pa/prs/ps/2017/12/276712.htm>, announced the submission to Congress of the fifth annual report on implementation of the Magnitsky Act. The number of person on the list as of the submission of the fifth report was 49. The names may be found at https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20171220_33.aspx. Simultaneously, OFAC published the names added to the SDN List based on designation pursuant to the Magnitsky Act. 82 Fed. Reg. 61,366 (Dec. 27, 2017). The names added on December 20 are: Ramzan Akhmatovich

KADYROV, Ayub Vakhaevich KATAEV, Yulia MAYOROVA, Andrei PAVLOV, and Alexei Nikolaevich SHESHENYA.

Also on December 20, 2017, the State Department provided a special briefing by senior Department officials on the fifth annual Magnitsky report. The briefing is available at <https://www.state.gov/r/pa/prs/ps/2017/12/276721.htm> and excerpted below.

* * * *

SENIOR STATE DEPARTMENT OFFICIAL ONE: ...[T]he Secretary today delivered to Congress the fifth annual Russia Magnitsky report. As most of you know, this is required under the 2012 Magnitsky Act and is distinct from the Global Magnitsky report. The 2017 list for Russia Magnitsky includes five new names. These are Ramzan Kadyrov, Ayub Kataev, Andrei Pavlov, Yulia Mayorova, and Alexei Sheshenya.

Altogether, this brings to 49 names the list of individuals who have been designated across six rounds since 2012. Of the five that were listed today, two were listed under the gross violation of human rights provision and three were listed under the provision for involvement in the Magnitsky conspiracy itself. All the names are now public. Each is subject to both visa and financial sanctions. All of these designations require multiple credible sources of information to meet the criteria from the legislation. The individuals on the list have to meet statutory criteria that has to be given in annual reporting—a reporting requirement to Congress.

I would just underscore how important this step is. I think it underscores the United States continuing commitment to take seriously rule of law and human rights abuses inside the Russian Federation. Thank you.

* * * *

QUESTION: ... when the Magnitsky Act first took effect, it caused some tensions with the Russian Government, and there was that adoptions law that Putin signed into place. So would the addition of these additional names, including at least one person who is part of Putin's government by way of running one of the Russian republics—are you anticipating a negative reaction from the Kremlin? And are you taking any steps to try to mitigate this leading to a further deterioration of relations with Russia?

SENIOR STATE DEPARTMENT OFFICIAL ONE: ... I think at this point we've been at it long enough on Magnitsky that the Russians understand the nature of our concerns. I think they understand the rationale for the legislation, why it was put forward. This is a transparent process; it came through a transparent legislative process, and a process by which we make the designations comply with what's in the law.

How they respond to this—what we hope they will do is use this as an impetus to take seriously not only the circumstances involving Mr. Magnitsky's death, but that they will look in a more comprehensive way at some of the human rights abuses inside their own country. Beyond that, whatever they do that is punitive in nature—obviously, this administration is committed to seeing a stable and productive relationship with the Russian Federation. We believe that we have strategic interests in common in a lot of parts of the world; we want to pursue those interests.

And we continue to believe that a Russia that takes seriously the well-being and human rights of its own citizens will be an even more effective global partner.

* * * *

8. Global Magnitsky Act

On December 23, 2016, the Global Magnitsky Human Rights Accountability Act (Pub. L. 114–328, Subtitle F) (the “Global Magnitsky Act” or “Act”) was enacted, authorizing the President to impose financial sanctions and visa restrictions on foreign persons in response to certain human rights violations and acts of corruption. The administration is required by the Act to submit a report on implementation of the Act and efforts to encourage other governments to enact similar sanctions. The first report under the Global Magnitsky Act was published in the Federal Register on June 20, 2017. 82 Fed. Reg. 28,215 (June 20, 2017). Excerpts follow from the report.

* * * *

Sanctions

Although no financial sanctions were imposed under the Act during the 120 days since its enactment, the United States is actively seeking to identify persons to whom this Act may apply and collecting the necessary evidence to impose sanctions.

In addition, the Department of the Treasury has issued a number of sanctions designations related to human rights abuses and corruption under existing sanctions programs. Sanctions programs that feature one or both of these designation criteria include programs related to Belarus, Burundi, the Central African Republic, the Democratic Republic of Congo, Iran, Libya, North Korea, Russia, Somalia, South Sudan, Syria, Ukraine, Venezuela, and Zimbabwe, as well as the Sergei Magnitsky Rule of Law Accountability Act of 2012 (the “Magnitsky Act”).

Examples of Treasury Department designations issued in recent years consistent with the human rights- and corruption-related designation criteria of these programs are provided below. This is not an exhaustive list; rather, it illustrates designations that align with the Act’s focus on human rights and corruption.

Andrey Konstantinovich Lugovoy: On January 9, 2017, Russian national and member of the Russian State Duma Andrey Konstantinovich Lugovoy was designated under the Magnitsky Act, which includes a provision targeting persons responsible for extrajudicial killings, torture, or other gross human rights violations committed against individuals seeking to expose illegal activity by Russian government officials. Lugovoy was responsible for the 2006 extrajudicial killing of whistleblower Alexander Litvinenko in London, with Dmitriy Kovtun (also sanctioned) acting as his agent or on his behalf. Lugovoy and Kovtun were two of five individuals designated under the Magnitsky Act on January 9, 2017.

Evariste Boshab: On December 12, 2016, Evariste Boshab was designated under E.O. 13413 (“Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo”), as amended by E.O. 13671 (“Taking Additional Steps to Address the National Emergency With Respect to the Conflict in the Democratic Republic of the Congo”),

for engaging in actions or policies that undermine democratic processes or institutions in the Democratic Republic of the Congo (DRC). Boshab offered to pay DRC National Assembly members for their votes in favor of a bill to amend electoral law to delay elections and prolong President Joseph Kabila's term beyond its constitutional limit.

Kalev Mutondo: Also on December 12, 2016, Kalev Mutondo was designated under E.O. 13413, as amended by E.O. 13671, for engaging in actions or policies that undermine democratic processes or institutions in the DRC. Kalev supported the extrajudicial arrest and detainment of opposition members, many of whom were reportedly tortured. Kalev also directed support for President Kabila's "MP" political coalition using violent intimidation and government resources.

North Korean Ministry and Minister of People's Security: On July 6, 2016, the North Korean Ministry of People's Security was designated pursuant to E.O. 13722 ("Blocking Property of the Government of North Korea and the Workers' Party of Korea, and Prohibiting Certain Transactions With Respect to North Korea") for having engaged in, facilitated, or been responsible for an abuse or violation of human rights by the Government of North Korea or the Workers' Party of Korea. The Ministry of People's Security operates a network of police stations and interrogation detention centers, including labor camps, throughout North Korea. During interrogations, suspects are systematically degraded, intimidated, and tortured. The Ministry of People's Security's Correctional Bureau supervises labor camps (*kyohwaso*) and other detention facilities, where human rights abuses occur, such as torture, execution, rape, starvation, forced labor, and lack of medical care. A Department of State report issued simultaneously with these designations cites defectors who have regularly reported that the ministry uses torture and other forms of abuse to extract confessions, including techniques involving sexual violence, hanging individuals from the ceiling for extended periods of time, prolonged periods of exposure, and severe beatings. Choe Pu Il, the Minister of People's Security, was also designated for having acted for or on behalf of the Ministry of People's Security.

Joseph Mathias Niyonzima: On December 18, 2015, Joseph Mathias Niyonzima was designated under E.O. 13712 ("Blocking Property of Certain Persons Contributing to the Situation in Burundi") for being responsible for or complicit in or for engaging in actions or policies that threaten the peace, security, or stability of Burundi. Niyonzima supervised and provided support to elements of the Imbonerakure pro-government militia in Burundi, a group that has been linked to the arrest and torture of individuals suspected of opposing the Nkurunziza regime. He was also involved in plans to assassinate prominent opposition leaders.

Fahd Jassem al-Frej: On May 16, 2013, Syrian Minister of Defense Fahd Jassem al-Frej was designated pursuant to, among other authorities, E.O. 13572 ("Blocking Property of Certain Persons With Respect to Human Rights Abuses in Syria") for his role in the commission of human rights abuses in Syria. During his time as Syrian Minister of Defense, the Syrian military forces wantonly and capriciously killed Syrian civilians, including through the use of summary executions and indiscriminate airstrikes against civilians. Some of these airstrikes killed civilians waiting outside of bakeries.

The examples above demonstrate the Treasury Department's history of designating persons under the human rights- and corruption-related criteria of various sanctions authorities. Such designations under existing authorities strongly complement the intent of the Act. The individuals and entities referenced above were designated for "human rights abuses" and other broad criteria that provide significant flexibility in issuing human rights-related designations. While the human rights-related designation criterion found in the Act (*i.e.*, gross violations of internationally recognized human rights) is narrower in focus, will actively seek to

designate individuals and entities where sufficient information exists to meet the applicable evidentiary standard.

Visa Sanctions

Although no visa sanctions were imposed under the Act during the 120 days since its enactment, the Department of State is continuously reviewing available information in order to take appropriate actions with respect to visa ineligibilities. In addition, the Department of State continues to take action, as appropriate, to implement the authorities pursuant to which it can impose visa restrictions on those responsible for human rights violations and corruption, including Presidential Proclamation 7750, Presidential Proclamation 8697, and Section 7031(c) of the FY2016 State, Foreign Operations, and Related Programs Appropriations Act. In addition to those authorities, Presidential Proclamation 8693 establishes a mechanism for imposing visa restrictions on Specially Designated Nationals and Blocked Persons (SDNs) designated under certain E.O.s., as well as individuals designated otherwise for travel bans in UN Security Council Resolutions. The Department of State also continues to make visa ineligibility determinations pursuant to the Immigration and Nationality Act (INA), including Section 212(a)(3)(E)(iii), which makes individuals who have participated in acts of genocide or committed acts of torture, extrajudicial killings, and other human rights violations ineligible for visas.

Termination of Sanctions

No sanctions imposed under the Act were terminated in the 120 days since its enactment.

Efforts To Encourage Governments of Other Countries To Impose Sanctions Similar to Those Authorized by the Act

The United States is committed to encouraging other countries to impose sanctions that are similar to those provided for by the Act. The Department of State actively participates in global outreach, including the G-20 Denial of Entry Experts Network, a sub-group of the G-20 Anti-Corruption Working Group, in which countries share best practices among visa and immigration experts. Through this network, the United States has encouraged other G-20 members to establish and strengthen corruption-related visa sanctions regimes. We note that the United Kingdom recently enacted legislation similar to the Act, and we will be consulting closely with the UK government as we implement our respective laws. The Department of State also has ongoing bilateral human rights discussions with other key allies, including the European Union and its member states, Japan, the Republic of Korea, and Australia, and will be raising the possibility of their imposing sanctions similar to those authorized by this Act.

* * * *

On December 20, 2017, the President issued E.O. 13818, “Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption.” 82 Fed. Reg. 60,839 (Dec. 26, 2017). E.O. 13818 implements the Global Magnitsky Human Rights Accountability Act (“Global Magnitsky Act”). The order lists in an annex the initial designated persons whose property is blocked. Section 1 authorizes the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to designate those responsible for serious human rights abuse or who are government officials or entities engaged in corruption, as well as those who materially support or are otherwise linked to designated persons. The portion of Section 1 identifying who is subject to blocking is excerpted below.

* * * *

- (i) the persons listed in the Annex to this order;
- (ii) any foreign person determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General:
 - (A) to be responsible for or complicit in, or to have directly or indirectly engaged in, serious human rights abuse;
 - (B) to be a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or has directly or indirectly engaged in:
 - (1) corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery; or
 - (2) the transfer or the facilitation of the transfer of the proceeds of corruption;
 - (C) to be or have been a leader or official of:
 - (1) an entity, including any government entity, that has engaged in, or whose members have engaged in, any of the activities described in subsections (ii)(A), (ii)(B)(1), or (ii)(B)(2) of this section relating to the leader's or official's tenure; or
 - (2) an entity whose property and interests in property are blocked pursuant to this order as a result of activities related to the leader's or official's tenure; or
 - (D) to have attempted to engage in any of the activities described in subsections (ii)(A), (ii)(B)(1), or (ii)(B)(2) of this section; and
- (iii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General:
 - (A) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of:
 - (1) any activity described in subsections (ii)(A), (ii)(B)(1), or (ii)(B)(2) of this section that is conducted by a foreign person;
 - (2) any person whose property and interests in property are blocked pursuant to this order; or
 - (3) any entity, including any government entity, that has engaged in, or whose members have engaged in, any of the activities described in subsections (ii)(A), (ii)(B)(1), or (ii)(B)(2) of this section, where the activity is conducted by a foreign person;
 - (B) 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
 - (C) to have attempted to engage in any of the activities described in subsections (iii)(A) or (B) of this section.

* * * *

Section 2 also imposes visa sanctions on the persons designated. The annex lists: Mukhtar Hamid Shah; Angel Rondon Rijo; Dan Gertler; Maung Maung Soe; Yahya Jammeh; Sergey Kusiuk; Benjamin Bol Mel; Julio Antonio Juarez Ramirez; Goulнора Islamovna Karimova; Slobodan Tesic; Artem Yuryevich Chayka; Gao Yan; and Roberto Jose Rivas Reyes.

On December 21, 2017, pursuant to E.O. 13818, OFAC made additional designations of persons (two additional individuals and 37 entities) pursuant to E.O. 13818 for meeting criteria under E.O. 13818, including for involvement in serious human rights abuse, corruption, or for links to other designated persons. 82 Fed. Reg. 61,665 (Dec. 28, 2017). Background on the designations is available at <https://home.treasury.gov/news/press-releases/sm0243>. On the same day, Secretary Tillerson issued a press statement on implementation of the Global Magnitsky Act. That statement, available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/12/276723.htm>, follows:

Today, alongside the President and the Department of the Treasury, the Department of State took action against persons who have committed serious human rights abuse and engaged in corruption around the world. The Department is committed to protecting and promoting human rights and combatting corruption with all of the tools at our disposal. Today's actions advance our values and promote the security of the United States, our allies, and our partners. We must lead by example, and today's announcement of sanctions demonstrates the United States will continue to pursue tangible and significant consequences for those who commit serious human rights abuse and engage in corruption.

Also on December 21, 2017, senior administration officials held a special briefing on rollout of the Global Magnitsky sanctions. The transcript of the briefing, available at <https://www.state.gov/r/pa/prs/ps/2017/12/276734.htm>, is excerpted below.

* * * *

Today there have been three actions that have been taken: the first, there was an executive order signed by the President of the United States; second are sanctions actions taken by the Department of Treasury; and third is the submission of the annual report which details the implementation efforts of this report, have been delivered to Congress.

Very generally, I think we as an interagency over the last year have taken an expansive view of the implementation of the Global Magnitsky Act, engaging every diplomatic post and bureau here at the State Department. We've worked very closely with the United States intelligence and law enforcement community, various members of the interagency, especially the Department of the Treasury, who will be speaking a little bit later, NGOs, and of course with Congress.

Our objective was to leverage this new global tool to pursue tangible and significant consequences for the entire spectrum of those who commit human rights abuse and engage in corruption. We have sought to target those who will send a strong message to the international community and that the United States takes seriously our role in promoting international norms. We continue to use this tool without hesitation to target the most egregious actors in every corner of the globe and look to today's actions to set the standard for the future.

* * * *

SENIOR ADMINISTRATION OFFICIAL TWO: ... I'm with the Office of Foreign Assets Control. In the executive order announced today, the President sanctioned 13 human rights abusers, kleptocrats, and corrupt actors, and the Treasury Department has designated an additional 39 affiliated companies and individuals. I know that you have the press release by now with all the details, and I'll touch on just a few names.

The people targeted today ... include those responsible for a range of human rights abuses. For example, Yahya Jammeh, the former president of The Gambia, has been accused of creating a unit within the armed forces to terrorize, interrogate, and kill Gambian citizens whom he believed threatened his reign. In addition, Mukhtar Hamid Shah, the Pakistani surgeon, was a leader in an illicit organ-trafficking network involved in the kidnapping, detention, and removal of kidneys from Pakistani laborers.

We are also targeting the corrupt today. Today we sanctioned Dan Gertler, an international businessman and billionaire, who used his connections with the president of the Democratic Republic of the Congo, as well as other officials, to amass his fortune through hundreds of millions of dollars' worth of opaque and corrupt mining and oil deals.

In targeting these individuals today, Treasury has frozen their assets and restricted their ability to access the international financial system. Th[ese] sanctions send a strong message to those who profit from suffering and corruption that there is a steep price to pay for abusing human rights while also preventing them from abusing our financial system.

* * * *

First, is this the first time we've imposed sanctions under the Global Magnitsky Act? Yes, indeed it is. ... this statute was enacted a year ago and ... we have timed this with the delivery of our first Global Magnitsky Report to Congress. ...

Second, access to the international financial system. Yes, by virtue of the fact that OFAC sanctions not only block all assets under U.S. jurisdiction, meaning held by U.S. persons wherever located, but also prevent U.S. persons from dealing with persons designated today, to include individuals or companies. ... given the dominance of the U.S. financial system, it effectively shuts out many folks from the international system.

Third, the language about being generally prohibited. Yes, that language is rather legal, and it is designed to acknowledge any licenses, whether specific or general, or exemptions that may apply in individual cases.

* * * *

9. Targeted Sanctions Relating to Threats to Democratic Process and Restoration of Peace, Security, and Stability

a. Democratic Republic of Congo

On June 21, 2017, Ambassador Sison delivered the explanation of vote for the United States at the adoption of UN Security Council Resolution 2360 on the Democratic Republic of Congo sanctions regime and the mandate of the Group of Experts. The U.S. statement is excerpted below and available at <https://usun.state.gov/remarks/7873>.

* * * *

The resolution we adopted today reaffirms this Council's commitment to continue the work started by Michael Sharp and Zaida Catalan, two members of the Group of Experts for the Democratic Republic of the Congo, who tragically lost their lives in March of this year while on mission in the DRC.

By renewing the Group of Experts mandate, this resolution sends a clear message that this Council will continue to advance Michael and Zaida's work to advance peace and address human rights violations and abuses in the DRC.

This resolution also underscores the Council's commitment to take action against those who seek to harm UN personnel, including the Group of Experts. To the families of Michael and Zaida, the members of the groups of experts, MONUSCO personnel, and Special Representative Sidikou, let me say that our expressions of support and praise are just not enough. We know that you deserve our commitment to finding out the truth and holding those who target UN personnel accountable. Today, we took a small, but important, step to do that.

Just as importantly, this resolution is for the Congolese, who have witnessed far too much violence, corruption, and far too many human rights abuses. The gruesome reports coming out of the DRC, specifically from the Kasais, should propel us into action not only in the Security Council but also in the Human Rights Council. Just yesterday, we read reports that over 3,000 people have been killed in the Kasai region in the last eight months.

The DRC military has not just engaged in violence against civilians, it has actually filmed summary executions. We have heard numerous reports of villages being burned and looted, rape used as a weapon of war, and children being targeted and executed in their homes. Some 20,000 people have fled the Kasais since early April, and yet the DRC has rejected offers for international support to investigate the violence.

Zaida and Michael lost their lives seeking the truth in the Kasais. We cannot let that search end, particularly as the reports coming out of the region grow increasingly disturbing and the refugee flows continue unabated.

Mr. President, there will be no peace or security in the DRC without elections and the democratic transition of power. All parties, both the opposition and the government, must remain committed to the December 31 Agreement and take action to expedite the implementation of the agreement, including much needed confidence building measures.

This Council and the U.S. government stand ready to hold accountable those that foment violence, undermine peace, and increase instability in the DRC.

* * * *

b. Burma

See *Digest 2016* at 658-60 regarding termination of the national emergency with respect to Burma that provided the foundation for the Burma sanctions program. As a result of that termination, OFAC removed from the Code of Federal Regulations the Burmese Sanctions Regulations. 82 Fed. Reg. 27,613 (June 16, 2017).

While continuing to support the democratic transition in Burma in 2017, the United States also expressed concern with human rights abuses endured by Rohingya in Rakhine State. See October 23, 2017 State Department press statement, available at <https://www.state.gov/r/pa/prs/ps/2017/10/275021.htm>.**** The press statement outlines measures, in addition to existing restrictions on engagement with and military sales to Burma's armed forces, the United States is taking "in pursuit of accountability and an end to violence:"

- Since August 25, we have ceased consideration of JADE Act travel waivers for current and former senior leadership of the Burmese military;
- We are assessing authorities under the JADE Act to consider economic options available to target [persons] associated with atrocities;
- Pursuant to the Leahy Law, [we found that there is credible information that all units operating in Rakhine State, as well as their full chain of command, up to and including the commander-in-chief, were implicated in gross violations of human rights, and therefore, consider those units and individuals to be ineligible to receive U.S. assistance];
- We have rescinded invitations for senior Burmese security forces to attend U.S.-sponsored events;
- We are working with international partners to urge that Burma enables unhindered access to relevant areas for the United Nations Fact-Finding Mission, international humanitarian organizations, and media;
- We are consulting with allies and partners on accountability options at the UN, the UN Human Rights Council, and other appropriate venues; and
- We are exploring [options to promote accountability] available under U.S. law, including Global Magnitsky targeted sanctions.

c. Zimbabwe

On January 12, 2017, OFAC removed from the SDN List ZIMRE HOLDINGS LIMITED, an entity designated pursuant to Executive Order 13469, "Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe." On March 27, 2017, OFAC removed from the SDN List Theophilus Pharaoh GAMBE, whose property and interests in property were blocked pursuant to Executive Order 13391, "Blocking

**** Editor's note: Office of the Legal Adviser comments have been inserted in brackets.

Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe.” 82 Fed. Reg. 15,791 (Mar. 30, 2017). On April 12, 2017, OFAC removed from the SDN List Munacho Thomas Alvar MUTEZO, an individual designated pursuant to E.O. 13391. 82 Fed. Reg. 18,211 (Apr. 17, 2017).

d. Sudan

On January 13, 2017, President Obama issued E.O. 13761 “Recognizing Positive Actions by the Government of Sudan and Providing for the Revocation of Certain Sudan-Related Sanctions.” 82 Fed. Reg. 5331 (Jan. 18, 2017). Excerpts follow from E.O. 13761.

* * * *

I, BARACK OBAMA, President of the United States of America, find that the situation that gave rise to the actions taken in Executive Order 13067 of November 3, 1997, and Executive Order 13412 of October 13, 2006, related to the policies and actions of the Government of Sudan has been altered by Sudan’s positive actions over the past 6 months. These actions include a marked reduction in offensive military activity, culminating in a pledge to maintain a cessation of hostilities in conflict areas in Sudan, and steps toward the improvement of humanitarian access throughout Sudan, as well as cooperation with the United States on addressing regional conflicts and the threat of terrorism. Given these developments, and in order to see these efforts sustained and enhanced by the Government of Sudan, I hereby order:

Section 1. Effective July 12, 2017 and provided the criteria in section 12(b) of this order are met, sections 1 and 2 of Executive Order 13067 of November 3, 1997, are revoked, and Executive Order 13412 of October 13, 2006, is revoked in its entirety. The revocation of those provisions of Executive Order 13067 and of Executive Order 13412 shall not affect any violation of any rules, regulations, orders, licenses, or other forms of administrative action under those orders during the period that those provisions were in effect.

Sec. 2. Pursuant to section 908(a)(3) of TSRA, I hereby determine that it is in the national security interest of the United States to waive, and hereby waive, the application of section 908(a)(1) of TSRA with respect to Sudan.

Sec. 3. Pursuant to section 6(d) of CPSA, I hereby determine and certify that it is in the national interest of the United States to waive, and hereby waive, the application of sections 6(a) and (b) of CPSA.

* * * *

Sec. 10. On or before July 12, 2017, the Secretary of State, in consultation with the Secretary of the Treasury, the Director of National Intelligence, and the Administrator of the U.S. Agency for International Development, and based on a consideration of relevant and credible information from available sources, including nongovernmental organizations, shall provide to the President a report on whether the Government of Sudan has sustained the positive actions that gave rise to this order, including carrying out its pledge to maintain a cessation of hostilities in conflict areas in Sudan; continued improvement of humanitarian access throughout

Sudan; and maintaining its cooperation with the United States on addressing regional conflicts and the threat of terrorism. As much of the report as possible, consistent with sources and methods, shall be unclassified and made public.

* * * *

The same day the E.O. was issued, the State Department issued a press statement on progress in Sudan. The statement is available at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266945.htm>, and excerpted below.

* * * *

Six months ago, the United States began a comprehensive engagement plan with the Government of Sudan aimed at ending the government's offensive military operations, improving humanitarian access, ending Sudan's destabilizing role in South Sudan, countering terrorist groups, and ending the threat of the Lord's Resistance Army (LRA). Since then, Sudan has met our benchmarks and made significant progress toward these goals, as well as new commitments. As a result, the United States has decided to issue a General License lifting sanctions on U.S. trade and investment in Sudan. This is being done through a combination of actions, including immediate action by the Department of the Treasury to authorize expanded trade with and investment in Sudan, and the issuance by the President of an Executive Order that provides Sudan with a clear path to the permanent revocation of sanctions in six months if progress in these five areas continues. In addition, a number of waivers of statutory sanctions are needed to allow for this lifting of sanctions. Thus, the Secretary of State is waiving sanctions under the Darfur Peace and Accountability Act of 2006 today, while the Executive Order issued today by the President includes waivers under the Comprehensive Peace in Sudan Act of 2004 and the Trade Sanctions Reform and Export Enhancement Act of 2000.

Our engagement with Sudan under the plan has had multiple benefits for U.S. interests, the region, and the people of Sudan. It has had a positive effect on reducing conflict and addressing Sudan's humanitarian crisis. For example, in December, Sudan revised national regulations that govern humanitarian action, bringing them into line with international standards for the first time. Moreover, for the first time in five years, Sudan opened access for humanitarian aircraft to reach Golo, Central Darfur, and allowed a needs assessment to occur that will inform assistance efforts in Golo and other previously inaccessible areas. Regionally, Sudan has stopped providing arms to South Sudanese opposition groups, is cooperating with the United States to address the threat of the Lord's Resistance Army, and has begun working with the United States to combat wildlife trafficking. Finally, Sudan has become an important partner in countering the Islamic State in the Levant (ISIL) and other regional terrorist threats.

Despite these advances, there is still much more to be done to end Sudan's internal conflicts, ensure accountability for crimes of international concern, improve its human rights record, allow unfettered humanitarian access to vulnerable populations, and create space for greater political participation, civil society activity, and media freedom. The United States sees the progress made over the last six months as the beginning of a longer-term process of addressing these critically important issues. While the United States stands ready to reimpose

sanctions should there be backsliding, we are encouraged by the progress that has been made over the past six months, and will seek to build on this as we pursue important issues.

* * * *

Also on January 13, 2017, the State Department issued a fact sheet explaining the actions the United States was taking with regard to lifting sanctions on Sudan in response to the progress described above. The fact sheet follows and is available at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266946.htm>.

* * * *

Why is the United States lifting sanctions on Sudan now? Today's actions to lift sanctions on Sudan were the culmination of months of intensive bilateral engagement with Sudan. The United States and Sudan committed to focus on achieving progress in five key areas: ceasing hostilities in Darfur and the Two Areas, improving humanitarian access, ending negative interference in South Sudan, enhancing cooperation on counterterrorism, and addressing the threat of the Lord's Resistance Army (LRA). This process began in June 2016.

What have we achieved? Over a six-month period, Sudan made significant progress in each of these areas. Our frequent and robust engagement over this period gave us a forum to routinely address these issues, build new areas of cooperation, and use the incentive of sanctions relief as leverage to encourage Sudan to take positive steps like ceasing hostilities and committing to providing access for humanitarian relief to reach people in need of assistance. But we recognize a lot more work needs to be done.

How are sanctions being lifted? The Department of the Treasury's Office of Foreign Assets Control (OFAC) has announced an amendment to the Sudanese Sanctions Regulations (SSR) that will authorize all transactions prohibited by the SSR, as well as Executive Orders 13067 and 13412. In addition, the President is issuing a new Executive Order that provides a path for the permanent revocation of the sanctions in Executive Orders 13067 and 13412 in 180 days, provided that the Secretary of State publishes in the Federal Register on or before that date a notice stating that the Government of Sudan has sustained the positive actions that gave rise to the Executive Order and provides to the President a report on the Government of Sudan's progress.

What does that mean? During the next six months, U.S. persons will be authorized by OFAC to engage in transactions involving persons in Sudan; to import goods and services from Sudan; to export goods, technology, and services to Sudan; and to engage in transactions involving property in which the Government of Sudan has an interest. If the conditions in the Executive Order are met and the sanctions are permanently revoked in 180 days, U.S. persons will be able to engage in these transactions without needing OFAC authorization.

What next? This plan was carefully crafted to foster continued progress. As set forth above, the President's new Executive Order will provide for permanent revocation of the sanctions in Executive Orders 13067 and 13412 after a period of 180 days, provided the requisite conditions are met as described above. Moving forward, the United States will have additional tools to continue constructive engagement and apply pressure as necessary, in support of further

progress in the five key areas, as well as progress on improving human rights, opening political space, and addressing the root causes of conflict in Darfur and the Two Areas.

* * * *

And on January 13, 2017, the State Department also provided a background briefing on Sudan by senior administration officials. The transcript of that briefing is excerpted below and available in full at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266956.htm>.

* * * *

SENIOR ADMINISTRATION OFFICIAL ONE: Okay. So today's lifting of certain sanctions comes as a result of a sustained effort of intensive bilateral engagement with Sudan, and particularly sustained intensive engagement over the last six months that has focused on seeing progress from Sudan in five key areas. And ... where we have seen this type of progress is in the area of conflicts in Darfur in the two areas of Southern Kordofan and Blue Nile.

The Government of Sudan at the beginning of this process in June announced a unilateral cessation of hostilities, and the period of normal fighting, which begins in the beginning of December—the dry season—this year for the first time since 2011, we have not seen a government offensive in Darfur or the two areas. Secondly, the government has taken significant steps to reduce obstructions to humanitarian access and to improve the environment for humanitarian organizations operating throughout Sudan. Thirdly, Sudan has changed its previous policy and approach and has not, over the past six months, provided arms to armed groups in South Sudan. And fourthly, ... Sudan has partnered with the United States in working to eliminate the threat of the Lord's Resistance Army and encountering terrorism, in particular the threat posed by ISIL.

So the actions taken today...by the Treasury Department will remove the trade embargo with Sudan and unblock the assets of the Government of Sudan. The President has also issued an executive order that after six months, provided Sudan sustains progress in these areas that we have been engaging on and the Secretary of State issues a report to that effect, then the Executive Orders 13067 and 13412 that had imposed the sanctions will go away.

We recognize that while the recent progress made by Sudan is encouraging, there is still much that needs to be done to address the needs of the Sudanese people and to address our concerns. However, in six months we've moved closer to achieving our goals than we have in really the past 20 years. So in taking these steps today, we are well positioned to continue to engage productively with Sudan and to apply pressure as necessary in support of further progress in areas including areas of Sudan's human rights record, its ...restricted political space, and promoting democracy, and in addressing the root causes of the conflicts that have raged for years in Darfur and the two areas. So that in a nutshell is the actions taken and the rationale for that.

SENIOR ADMINISTRATION OFFICIAL TWO: If I could add a couple of things. This is [Senior Administration Official Two]. I just want to re-emphasize that this is the outcome of a comprehensive process of engagement. We've had twice-monthly committee meetings with the Sudanese Government for the last six months, and they've had clear benchmarks throughout the entire process. And on top of that, we also have been explaining that this is as much the beginning of a process as it is the end of a process. So the six months that we have been working with the Sudanese on this have been positive, and the steps we believe they have taken have been significant. But we also recognize that we have a long way to go and that this is the beginning of a longer process of smartening our sanctions in a way that will encourage continued achievements and steps in line with what has been made so far.

So one last note if I could, because we are at the end of an Administration. We also believe that this gives the new administration a lot more leverage. We've maximized leverage for them because we've handed them a large carrot and a large stick, and the carrot is that the new administration has the ability to make these sanctions relief permanent in six months, but they also have the ability to take them away. The general licenses we have put together can be removed if there's backsliding or if the progress doesn't continue. So with that, we think we're leaving the new administration in a very strong place to advance U.S. interests.

MODERATOR: Great, thank you. Any more remarks, or should we head over to questions?

SENIOR ADMINISTRATION OFFICIAL THREE: This is [Senior Administration Official Three]. I'm happy to ... just emphasize a ... couple technical information pieces. ...

Just to emphasize what [Senior Administration Official One] and [Senior Administration Two] said, ... all of the Darfur-related authorities, restrictions, and designations will remain through this, as well as the state sponsor of terror list restrictions. So these are the OFAC transactions non-Darfur would be authorized, but any other restrictions, export-related restrictions related to the state sponsor of terror list that other agencies administer, such as Commerce, would still be in effect. And as [Senior Administration Official Two] just said, I think it's important to distinguish between the general license that will take effect on Tuesday versus the executive order that would come into effect in six months potentially with regard to more permanently revoking the sanctions authority in this state. Under the general license, everybody will stay on the designated list, but there will be an authorization generally out there.

And so we would retain authority to revoke the general license at any time if there are complications. And then at that six-month window, as the new administration is assessing whether the progress has remained, that way we've given sort of an initial relief to the Government of Sudan that they can feel, but it's still a tentative one while we're assessing, and that allows us at the six-month period to either make that more permanent by removing the sanctions authority or not, and either revoking the general license or just recalibrating it based on the situation. So we try to provide continued incentive, but also maximum flexibility to adjust based on what's happening on the ground there at the time.

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SENIOR ADMINISTRATION OFFICIAL ONE: Well, let me say that Sudan has long expressed a desire to get out from under sanctions as well as other restrictions that the United States has imposed on Sudan going back 20 years. So, we have in the past few years looked for a way to engage with Sudan in a way that we could overcome some of the lack of trust of the past

and to come up with an approach that would get the Sudanese to address concerns we've had, mainly in how they treat their own people. That involves primarily ending the conflicts internally and allowing humanitarian assistance to reach their people. And their interest in achieving sanctions relief, bringing the two together, gave each party something that they could agree to work toward. So that's how we think we've gotten the Sudanese Government's agreement in this. They have something to gain. And because we've taken this in an incremental approach, they had enough confidence that this could be a successful approach.

So this is not the result just of an effort over the last six months, which, as my colleague has said, has been an extremely intensive engagement period, but goes back before that, even—or even to early 2015 when we began exploring with the Sudanese and them with us how we could achieve some breakthrough in the mutual interests that we had.

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SENIOR ADMINISTRATION OFFICIAL ONE: ... The executive order issued today requires that the Secretary of State, in consultation with the Secretary of the Treasury, with the administrator of USAID, with the Director of National Intelligence, and drawing on information from all sources, including specifically the NGO community, would have to issue a report as to whether Sudan had sustained the progress under the engagement we've had over the past six months during this upcoming six months.

If that report is positive, then the underlying executive orders, as [Senior Administration Official Three] has just explained, would go away and only the Darfur sanctions would remain – the designations under Executive Orders 13400.

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SENIOR ADMINISTRATION OFFICIAL THREE: ... I'll just note that the state sponsor of terrorism list and any trade restrictions based on that is a very different authority, so they're not really tied to the OFAC sanctions. They have their own trade restrictions, and much of that is administered by the Commerce Department. So while it's not common in the sense that, as you know, there's only three other countries on the list, so there's not a lot to have commonalities with, it's—they're really not tied. It's more ...that has its own restrictions and those restrictions are going to remain. And, I think as [Senior Administration Official One] noted, there's sort of different tracks going on here.

SENIOR ADMINISTRATION OFFICIAL ONE: Yeah. The other thing I will say is the sanctions that we have decided to give relief to are sanctions that have had an impact more on the people of Sudan, whereas the sanctions that are tied with the SST have more to do with the government and its security organs. We felt that the best place to start and engage on this was to do what would benefit most of the people of Sudan.

* * * *

SENIOR ADMINISTRATION OFFICIAL THREE: ...[I]n terms of the assets that are blocked by OFAC that are related to the Government of Sudan, those would be unfrozen. But I think it's important to note that's not the same as the state sponsor of terror list trade pieces on dual use. So that's a very different thing. That's not what's blocking assets.

But also, to the extent that that's not necessarily all of the assets going back to the Government of Sudan, there's a couple factors for that. One, those assets would be blocked under the OFAC sanctions if there was even a small percentage of interest by the Government of Sudan. So some assets may be unfrozen that aren't even predominantly the Government of Sudan and they wouldn't go back to them, it's just that they had an interest in it. And the other piece is that any assets that are blocked and already attached under any pending civil litigation or civil litigation that's already happened and assets have been taken as a result of that would not be going back as well.

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SENIOR ADMINISTRATION OFFICIAL ONE: ... [T]hey've fought to a stalemate, there has been since 2011 a dry season offensive every year in the two areas between the government and the SPLM-North, that fighting has raged year after year. This dry season, there has been no government offensive.

And in Darfur, yes, there was a major government offensive in the last dry season—last year, at the beginning of last year—and yes, the government took a lot of territory back. But there are still many armed elements that are in Jebel Marra and the government could have launched yet another offensive to try to take more territory, could have engaged in aerial bombardment of villages. They have not undertaken that.

So yes, the wars are not concluded. There is no signed cessation of hostilities agreement yet. But the point is that ... what we've tried to do is decrease the level of fighting. And by the government not launching its traditional dry season offensives, that, we think, has been a major accomplishment. We also continue to push all the parties to go back to the negotiating table to conclude a cessation of hostilities agreement and get on with negotiating the underlying political issues that have led to these conflicts.

* * * *

On July 11, 2017, President Trump issued Executive Order 13804, "Allowing Additional Time for Recognizing Positive Actions by the Government of Sudan and Amending Executive Order 13761." 82 Fed. Reg. 32,611 (July 14, 2017). The order extends the review period in E.O. 13761 for three months, from July 12, 2017 to October 12, 2017. On July 12, 2017, the State Department provided a background briefing by senior administration officials on Sudan sanctions. A transcript of the briefing is available at <https://www.state.gov/r/pa/prs/ps/2017/07/272558.htm> and is excerpted below.

* * * *

SENIOR ADMINISTRATION OFFICIAL ONE: ... Executive Order 13761, issued in January 13, provided for sanctions relief for Sudan with respect to certain sanctions if the Government of Sudan sustained positive actions that gave rise to this order. And basically, these actions, just to be clear so we're all on the same page, included maintaining a cessation of hostilities in the conflict areas in Sudan, continuing improvement of humanitarian access

throughout Sudan, and maintaining cooperation with the U.S. on both regional conflicts and the threat of counterterrorism in the context of regional conflicts. A key issue is countering the Lord's Resistance Army.

So the administration recognizes Sudan has made significant progress in these areas over the last six months, but given that a new administration came in in January and looking at where we've gone and where we will go, the administration decided that it needed more time to review Sudan's actions and to establish that the government has demonstrated sustained, positive actions across all the areas that are set out in the executive order. As a result, the President yesterday issued a new executive order that extended the review period for three months. The Government of Sudan, if it is assessed at the end of that review period to have sustained positive actions as we've been discussing, the United States will revoke the sanctions. But there was a feeling that the additional time was needed to ensure that, given the scope and gravity of this decision, we reached the proper outcome.

The administration is committed to sustaining this discussion as well as engaging with the Government of Sudan on other vital issues outside of the five-track arrangement, including intensifying our ongoing and fairly intense already dialogue on improving Sudan's human rights and religious freedom record, and also to ensure that, like we are on track with that throughout the globe, committed to the full implementation of UN Security Council resolutions on North Korea. And I'm sure that [Senior Administration Official Two] will have more to say on that if there's questions.

A couple of other things I'd like to note: In that throughout the course of the extended review period, the OFAC license that was issued in January remains in effect, and what that does essentially is it authorizes U.S. persons to engage in transactions involving Sudan, authorizes imports and exports, and engage in transactions that involve property related to the Government of Sudan. So this general license allows these actions that had been prohibited under previous executive orders as it has for the last six months, and as we go forward—additional three months of the review period, this will stay in place.

One other thing I'd like to note before we go into questions is that the administration looked at all relevant and credible information in terms of where we've assessed where we're going to date, and that this decision was reached through a senior-level process, interagency process, that took the views of the Department of State, the Treasury, the intelligence agencies, as well as USAID and others who have an interest and focus on these issues. But it was the President who made the final decision based on ...the recommendations of the senior levels of the interagency....

* * * *

We welcomed what Sudan has done to bring itself more in line with international standards and integrate its economy in the marketplace. We want to have a positive relationship going forward; we've made that clear throughout the process, and we hope that Sudan will continue. And again, the key focus, I think, for the Sudanese has been working to achieve the full revocation of sanctions. And if, at the end of the three months, which is a relatively short extension, and I think one where we can actually make some additional progress, the stated intent, as our statement indicates, is to lift the sanctions.

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SENIOR ADMINISTRATION OFFICIAL ONE: ... We decided ... as an administration, that more time was needed to assess this issue.

As we note, there has been some significant progress made across the five tracks. On the question of humanitarian access, there's been progress in our ability to get to different places on ensuring that the access of some additional materials has happened. ... Humanitarian access has always been a real problem, and I think we've succeeded in reversing a number of longstanding impediments. The extended review period is going to let us do even more, and we want to make sure that our principle—which is unfettered humanitarian access in all contexts—is something that we could go forward with with the Government of Sudan, and that restrictions on travel and other issues are—that are inconsistent with the freedom of movement are addressed and overcome.

* * * *

Effective October 12, 2017, the interagency group directed by E.O. 13761 to monitor Sudan's progress made the determination that the Government of Sudan had sustained its positive actions and that the criteria in E.O. 13761 had been met, resulting in the lifting of certain economic sanctions relating to Sudan. 82 Fed. Reg. 47,287 (Oct. 11, 2017). Excerpts follow from the Federal Register notice of the determination regarding Sudan sanctions.

* * * *

Section 12(b) of Executive Order 13761, as amended by section 1(c) of Executive Order 13804, states that sections 1, 4, 5, 6, and 7 of that Executive Order are effective on October 12, 2017, provided that the Secretary of State, in consultation with the Secretary of the Treasury, the Director of National Intelligence, and the Administrator of the U.S. Agency for International Development, has published a notice in the Federal Register on or before that date, stating that the Government of Sudan has sustained the positive actions that gave rise to the Executive Order, and that the Secretary of State has provided to the President the report described in section 10 of that Executive Order.

The Secretary of State, in consultation with the Secretary of the Treasury, the Director of National Intelligence, and the Administrator of the U.S. Agency for International Development, hereby states that the Government of Sudan has sustained the positive actions that gave rise to Executive Order 13761 of January 13, 2017. The Secretary of State has also provided to the President the report described in section 10 of Executive Order 13761, as amended.

As a result, the criteria set forth in section 12(b) of Executive Order 13761, as amended, have been satisfied, and sections 1, 4, 5, 6, and 7 of Executive Order 13761, as amended, are effective on October 12, 2017.

* * * *

Effective October 12, 2017, sections 1 and 2 of Executive Order (E.O.) 13067 of November 3, 1997, “Blocking Sudanese Government Property and Prohibiting Transactions With Sudan” and all of E.O. 13412 of October 13, 2006, “Blocking Property of and Prohibiting Transactions With the Government of Sudan” were revoked, pursuant to E.O. 13761 as amended by E.O. 13804. 82 Fed. Reg. 49,698 (Oct. 26, 2017). The Federal Register notice of the lifting of sanctions imposed under Sections 1 and 2 of E.O. 13067 and E.O. 13412 lists the individuals and entities removed from the SDN List. *Id.*

e. South Sudan

On September 6, 2017, OFAC designated multiple individuals and entities pursuant to E.O. 13664 of April 3, 2014, “Blocking Property of Certain Persons With Respect to South Sudan.” 82 Fed. Reg. 42,879 (Sep. 12, 2017). The individuals are: Malek Reuben RIAK RENGU; Michael Makuei LUETH; and Paul Malong AWAN. The entities are: ALL ENERGY INVESTMENTS LTD; A+ ENGINEERING, ELECTRONICS & MEDIA PRINTING CO. LTD.; and MAK INTERNATIONAL SERVICES CO LTD. The State Department issued a press statement on the sanctions on South Sudanese officials and companies on September 6, 2017. That statement is excerpted below and available at <https://www.state.gov/r/pa/prs/ps/2017/09/273836.htm>.

* * * *

Today, the Department of the Treasury announced targeted sanctions on two South Sudanese government officials and one former official for their roles in threatening the peace, security, or stability of South Sudan, and three companies that are owned or controlled by one of those individuals. Treasury also released a Financial Crimes Enforcement Network Advisory alerting U.S. financial institutions to the possibility that certain South Sudanese senior political figures may try to use the U.S. financial system to move or hide proceeds of public corruption.

The measures taken today against Malek Reuben Riak Rengu, Michael Makuei Lueth, and Paul Malong Awan make clear that the U.S. Government will impose consequences on those who expand the conflict and derail peace efforts. The United States stands ready to impose other measures against those responsible for undermining the peace, security, or stability of South Sudan. As the Advisory demonstrates, the United States is committed to increasing scrutiny on those who enrich themselves through corruption while the South Sudanese people suffer through economic hardship and a dire humanitarian crisis.

Six million people in South Sudan—half of the population—face life-threatening hunger while more than four million people have been displaced from their homes, including two million refugees. This is a man-made crisis, and one the Government of South Sudan can stop. We continue to make clear to South Sudan’s leaders that they must honor their declared ceasefire, revive the 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan by engaging meaningfully with opposition parties, bring an end to atrocities, stop the

harassment of aid workers, stem human rights abuses, cooperate fully with the United Nations Mission in South Sudan, and take action against corruption. We urge all parties to engage constructively and seriously in the upcoming Intergovernmental Authority on Development High-Level Revitalization Forum for the South Sudan peace process.

* * * *

f. Central African Republic

As discussed in *Digest 2014* at 663-64, the President issued E.O. 13667, “Blocking Property of Certain Persons Contributing to the Conflict in the Central African Republic,” in 2014. On April 12, 2017, OFAC blocked the property and interests in property of the following individuals pursuant to E.O. 13667: Abdoulaye HISSENE and Maxime MOKOM. 82 Fed. Reg. 18,211 (Apr. 17, 2017). On December 13, 2017, OFAC designated Okot LUKWANG and Musa HATARI under E.O. 13667 (for links to the Lord’s Resistance Army). 82 Fed. Reg. 60,275 (Dec. 19, 2017).

g. Côte d’Ivoire

As discussed in *Digest 2016* at 665-66, the President terminated the national emergency declared with respect to Côte d’Ivoire in E.O. 13396, “Blocking Property of Certain Persons Contributing to the Conflict in Côte d’Ivoire.” Effective November 13, 2017, OFAC removed from the Code of Federal Regulations the Côte d’Ivoire Sanctions Regulations as a result of the termination of the national emergency on which the regulations were based. 82 Fed. Reg. 52,209 (Nov. 13, 2017).

h. Libya

On April 19, 2016, the President issued a new executive order relating to Libya, E.O. 13726, “Blocking Property and Suspending Entry into the United States of Persons Contributing to the Situation in Libya.” On April 13, 2017, OFAC blocked the property and interests in property of Hamma Hamani pursuant to E.O. 13726 and based on his ties to ISIL.

The UN Security Council adopted resolution 2362 on oil smuggling in Libya, expanding interdiction authority to additional oil products. On November 16, 2017, Ambassador Sison delivered remarks at a UN Security Council briefing on Libya sanctions. Her remarks are excerpted below and available at <https://usun.state.gov/remarks/8115>.

* * * *

Finally, turning to sanctions, we want to focus on the challenge of illegal smuggling of crude oil and petroleum products from Libya. This Council, at the Government of National Accord's request, has repeatedly condemned these illicit transactions. Earlier this year, the Council designated two vessels, the *Capricorn* and the *Lynn S*, for their involvement in illegal fuel smuggling. These vessels remain sanctioned. Therefore, we remind all Member States, particularly those in the Mediterranean and the Middle East, that these vessels must not be permitted to enter their ports. We also reiterate that Flag States of these vessels must fulfill their obligation to direct the ships not to load, transport, or discharge their cargo.

Now looking ahead, the United States believes that now is a crucial opportunity for Libyans to make real progress toward political reconciliation. SRSG Salamé and the international community are aligned behind this objective. Now is the moment for Libya's leaders to engage in good faith with SRSG Salamé.

The United States will work to mobilize the international community against anyone that disrupts the UN process. But we hope that Libyans will be able to put their differences aside for the sake of their country's future. It is long past time for Libya to re-build its institutions and its economy. The United States urges all Libyans—in the East, West, and South—to come together in a shared effort to ensure Libya's security and prosperity.

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i. Balkans

On January 17, 2017, OFAC blocked the property and interests in property of Milorad DODIK pursuant to E.O. 13304, "Termination of Emergencies With Respect to Yugoslavia and Modification of Executive Order 13219 of June 26, 2001." 82 Fed. Reg. 8262 (Jan. 24, 2017).

10. Transnational Crime

Executive Order 13581, "Blocking Property of Transnational Criminal Organizations," was signed in 2011. On February 16, 2017, OFAC removed from the SDN List two individuals previously designated under E.O. 13581—Estelle SNYMAN and Brian WEEKES. 82 Fed. Reg. 43,658 (Sep. 18, 2017). On April 6, 2017, OFAC removed from the SDN List two individuals—Siobhan Ann HANRAHAN and Donna Maria MACBAIN—previously designated pursuant to E.O. 13581. 82 Fed. Reg. 43,454 (Sep. 15, 2017). On May 16, 2017, OFAC removed Raffaella FERRARI from the SDN List, a person designated under E.O. 13581. 82 Fed. Reg. 47,604 (Oct. 12, 2017). On June 6, 2017, OFAC removed Monica Elizabete BOTTCHER from the SDN List, another person previously designated under E.O. 13581. 82 Fed. Reg. 47,603 (Oct. 12, 2017). On June 21, 2017, OFAC removed Mary Ann DRISCOLL from the SDN List, also designated under E.O. 13581. 82 Fed. Reg. 47,603 (Oct. 12, 2017). Mohammed Saeed AJILY and Mohammed Reza REZAKHAH were designated under E.O. 13581 along with several Iran-related designations pursuant to E.O. 13382. 82 Fed. Reg. 33,943 (July 21, 2017).

On August 22, 2017, OFAC removed Marie BOIVIN and Ruth FERLOW from the SDN List, two individuals previously designated under E.O. 13581. On October 4, 2017,

OFAC removed from the SDN List three individuals—Robert Paul DAVIS, Rosanne Phyllis DAY, and, Gerard Alphonsus HUMPHREYS—and one entity—MANX RARE BREEDS LTD.—who were previously designated under E.O. 13581. 82 Fed. Reg. 47,789 (Oct. 13, 2017). On October 26, 2017, OFAC removed from the SDN List 24 entities (related to the PACNET GROUP) and one aircraft, listed in the Federal Register notice, which had been designated under E.O. 13581. 82 Fed. Reg. 50,485 (Oct. 31, 2017).

On December 22, 2017, OFAC removed from the SDN List five individuals—Almanbet Mamadaminovich ANAPIYAEV, Artur BADALYAN, Vadim Mikhaylovich LYALIN, Temuri Suleimanovich MIRZOYEV, and Vladimir Viktorovich VAGIN—and three entities—THE BROTHERS’ CIRCLE, FASTEN TOURISM LLC, and MERIDIAN JET MANAGEMENT GMB—whose property and interests in property were blocked pursuant to Executive Order 13581. 82 Fed. Reg. 61,662 (Dec. 28, 2017). Also on December 22, 2017, OFAC designated four individuals pursuant to E.O. 13581, all for ties to the entity “Thieves-in-Law,” which was simultaneously designated: Yuri Viktorovich PICHUGIN; Ruben Albertovich TATULIAN; Alimzhan Tursunovich TOKHTAKHUNOV; Vladimir Anatolyevich TYURIN. 82 Fed. Reg. 61,662 (Dec. 28, 2017). In addition to THIEVES-IN-LAW, OFAC designated NOVYI VEK—MEDIA and VESNA HOTEL AND SPA. *Id.* OFAC also updated the SDN List for several persons, whose property and interests in property continue to be blocked under E.O. 13581. *Id.*

11. Malicious Activities in Cyberspace

See *Digest 2016* at 666-67 for background on E.O. 13757, “Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities,” and *Digest 2015* at 677-78 for background on E.O. 13694. On September 14, 2017, OFAC designated the following individuals pursuant to E.O. 13694: Sadegh AHMADZADEGAN (for causing a significant disruption to the availability of a computer or network of computers); Ahmad FATHI (for links to ITSec Team, a person designated under E.O. 13694); Hamid FIROOZI (also for links to ITSec Team); Omid GHAFFARINIA (for causing a significant disruption to the availability of a computer or network of computers); Sina KEISSAR (for causing a significant disruption to the availability of a computer or network of computers); Nader SAEDI, (for causing a significant disruption to the availability of a computer or network of computers); Amin SHOKOHI, (also for links to ITSec Team). 82 Fed. Reg. 44,026 (Sep. 20, 2017). OFAC simultaneously designated ITSEC TEAM pursuant to E.O. 13694. *Id.*

B. EXPORT CONTROLS

Export Control Litigation

As discussed in *Digest 2016* at 667-68, the United States prevailed in the district court in *Goldstein v. Department of State*, No. 15-0311, which dismissed a challenge to amendments to the International Traffic in Arms Regulations (“ITAR”) regarding what

constitutes “brokering activities” under the Arms Export Control Act (“AECA”). On appeal, the U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal. Excerpts follow from the opinion.

* * * *

The question before us is whether the law firm has standing to seek to enjoin the State Department from enforcing its regulations governing arms brokering. The firm has failed, however, to demonstrate its standing to seek pre-enforcement relief: it has not “suffered an ‘injury in fact[]’ that is (a) concrete and particularized and (b) actual or imminent” *Sabre, Inc. v. U.S. Dep’t of Transp.*, 429 F.3d 1113, 1117 (D.C. Cir. 2005) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000)). It is true that a plaintiff is not required “to expose himself to liability before bringing suit to challenge the basis” for an enforcement action by the government. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). After all, a plaintiff can seek pre-enforcement review when the threat of enforcement is “sufficiently imminent.” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). But there is something fundamental to a pre-enforcement challenge that is missing here. There must be some desired conduct by the plaintiff that might trigger an enforcement action in the first place. . . . But here, we have no facts from which to conclude that the law firm risks incurring any liability by failing to register with the State Department. Indeed, Goldstein offers only vague and general descriptions of legal activities that the firm intends to undertake, none of which the State Department views as brokering, as the Department has made abundantly clear on its website and, more particularly, at oral argument before this court. Unsurprisingly, then, the State Department has shown no intention of enforcing the brokering regulations against Goldstein’s law firm.

The 2013 regulation is straightforward: “[A]ctivities by an attorney that do not extend beyond the provision of legal advice to clients” are not brokering activities. 22 C.F.R. § 129.2(b)(2)(iv). The State Department understands all of the activities Goldstein has described to fit under that umbrella. As government counsel explained at oral argument, Goldstein has “given no indication that” his firm does anything “extend[ing] beyond” legal advice. Oral Arg. Tr. 30:3-10. In the State Department’s view, then, there is no reason to believe that Goldstein’s firm engages in brokering activities within the meaning of Part 129. As long as the firm merely provides the legal services Goldstein describes, it faces no material risk of enforcement from the State Department. His firm therefore need not fear that it will have to disclose confidential client information or otherwise take steps to register.

True, an attorney like Goldstein *could* provide legal advice in a manner that constituted brokering, but the State Department has explained that the only such situation it has identified is when an attorney acts as a “finder” by, for example, helping clients to identify or locate foreign counterparties for proposed transactions. *See* Oral Arg. Tr. 38:10-14 (government counsel explaining that “the only example . . . that the Agency has been able to identify” of an attorney providing legal advice in a manner that implicates the brokering regulation involves the use of that “legal advice to steer a client towards a particular buyer or a particular seller”). The law firm simply has alleged no facts suggesting that it intends to act as a finder in any capacity. Moreover, Goldstein has expressly denied that his firm has any plan or desire to do so. *See* Appellant’s Br. 24; *see also* Oral Arg. Tr. 38:14-16.

The law firm's fear that it may be the target of Department enforcement seems to be based on a misunderstanding of the letter that Goldstein received from the State Department after his firm filed suit, in which the Department advised that Goldstein's proposed activities would be exempt "as long as" the foreign parties had already been identified. J.A. 40. Focusing on the "as long as" language, the firm argues that it must be subject to the requirements of Part 129 because it "often" provides these services *before* its clients have identified the foreign parties to proposed transactions. Appellant's Reply Br. 5 ("Defendants argue 'Plaintiff has not adequately alleged that he has engaged in or will engage in any conduct regulated as brokering activity[] under part 129.' ... But Plaintiff has repeatedly stated that it regularly provides legal advice to clients on transactions where the clients have not identified all parties to the transactions.").

The letter, however, did not state that *all* legal advice on international arms transactions in which foreign parties are unidentified *necessarily* constitutes brokering. On the contrary, the "as long as" language in the State Department's letter simply creates a limited safe harbor: when an attorney provides ordinary legal services to a client in a situation where the foreign party has been identified, it is especially clear that the attorney is not helping to "find" the foreign party to the transaction—and thus not engaging in brokering activities. If the foreign party has not been identified, that merely leaves open the possibility that the attorney *may* be acting as a finder. But the State Department does not take the position that attorneys engage in brokering every time they provide legal advice relating to transactions with foreign parties not yet identified. *See* Appellees' Br. 27 ("[P]laintiff mistakenly assumes that *all* advice on transactions in which the foreign parties are not identified constitutes brokering."). Rather, its view is that attorneys must go outside the bounds of providing proper legal counsel, and instead must actually undertake brokering measures. Contrary to Goldstein's argument, then, the plaintiff's stated intention to provide legal advice to clients on transactions where foreign parties are unidentified does not imply that it would face an enforcement action for failing to register under Part 129.

Goldstein may not have provided the State Department with enough information to make an official and binding determination that any *particular* transaction of his would fall outside the definition of brokering. *See* 22 C.F.R. § 129.9. But taken as a whole, the State Department's 2013 regulation explicitly removing the provision of legal advice from the definition of brokering activities, the Department's letters to Goldstein, and its representations at oral argument demonstrate that, in the Department's view, the firm is *not* subject to regulation as a broker based on the firm's proposed activities. Therefore, because the firm alleges that it intends only to provide legal advice and denies that it will act as a finder (or collect a contingency fee) in the process, it has not shown that it faces a meaningful risk that the State Department will seek to enforce Part 129 against it, either by forcing it to register or by penalizing it for failure to register. Without any credible threat of enforcement, the firm has no injury to speak of that would afford it standing to seek to enjoin enforcement of that regulation in court.

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Cross References

U.S. Passports Invalid for Travel to North Korea, **Ch. 1.A.3.**

Terrorism, **Ch. 3.B.1.**

Organized crime, **Chapter 3.B.5.**

Cuba, **Ch. 9.A.2.**

Zimbabwe, **Ch. 9.B.7.**

Schermerhorn (state sponsor of terrorism requirement under the FSIA), **Ch. 10.A.4.**

Burma atrocities, **Ch. 17.C.1.**

DPRK, **Ch. 19.B.7.a.**

Iran, **Ch. 19.B.7.b.**

CHAPTER 17

International Conflict Resolution and Avoidance

A. MIDDLE EAST PEACE PROCESS

The Middle East “Quartet”—represented by the United States Secretary of State, the Foreign Minister of the Russian Federation, the UN Secretary General, and the EU High Commissioner—met on July 22, 2017 and issued a joint press statement, available at <https://www.state.gov/r/pa/prs/ps/2017/07/272809.htm>. The July 22, 2017 statement follows.

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The Envoys of the Middle East Quartet from the Russian Federation, the United States, the European Union and the United Nations are deeply concerned by the escalating tensions and violent clashes taking place in and around the Old City of Jerusalem.

They strongly condemn acts of terror, express their regret for all loss of innocent life caused by the violence, and hope for a speedy recovery to the wounded.

Noting the particular sensitivities surrounding the holy sites in Jerusalem, and the need to ensure security, the Quartet Envoys call on all to demonstrate maximum restraint, refrain from provocative actions and work towards de-escalating the situation.

The Envoys welcome the assurances by the Prime Minister of Israel that the status quo at the holy sites in Jerusalem will be upheld and respected.

They encourage Israel and Jordan to work together to uphold the status quo, noting the special role of the Hashemite Kingdom as recognized in its peace treaty with Israel.

The Quartet Envoys reiterate that violence deepens mistrust and is fundamentally incompatible with achieving a peaceful resolution of the Israeli-Palestinian conflict.

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The Quartet envoys issued another joint statement on September 28, 2017, which appears below and at <https://www.state.gov/r/pa/prs/ps/2017/09/274494.htm>.

* * * *

The Envoys of the Middle East Quartet from the Russian Federation, the United States, the European Union, and the United Nations welcome efforts, including those of Egypt, to create the conditions for the Palestinian Authority to assume its responsibilities in Gaza.

They urge the parties to take concrete steps to reunite Gaza and the West Bank under the legitimate Palestinian Authority. This will facilitate lifting the closures of the crossings, while addressing Israel's legitimate security concerns, and unlock international support for Gaza's growth, stability, and prosperity, which is critical for efforts to reach lasting peace. The Quartet envoys stand ready to engage with Israel, the Palestinian Authority, and the region in support of this process.

The Envoys emphasize that the grave humanitarian situation in Gaza, most notably the crippling electricity crisis and its impact on health, social, and economic well-being of the population, must be addressed. The Quartet encourages the international community to act accordingly.

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See Chapter 9 for a discussion of the U.S. decision to recognize Jerusalem as the capital of the State of Israel and relocate the United State Embassy to Israel to Jerusalem.

B. PEACEKEEPING AND CONFLICT RESOLUTION

1. Peacekeeping Reform

Ambassador Nikki Haley, U.S. Permanent Representative to the United Nations, addressed a UN Security Council thematic briefing on UN peacekeeping operations on April 6, 2017. Ambassador Haley's remarks are excerpted below and available at <https://usun.state.gov/remarks/7753>.

* * * *

I'd like to thank the Secretary-General for taking the time to come and talk to us about peacekeeping, and more importantly for his efforts and willingness to look at peacekeeping reform in a way that we can make it more effective for those that need it.

... [T]here is a collective effort to reform peacekeeping so that it does do more for people on the ground in a way that's not only just efficient, but in a way that's effective. ...

If you ask the average person what the UN does, they'll most likely say peacekeeping. The blue helmet is the most recognizable symbol of how the UN extends its presence and shows its value in the world. With over 100,000 total personnel and a budget close to \$8 billion, peacekeeping is the UN's most powerful tool to promote international peace and security.

We recognize, in particular, the courage of those men and women who risk their lives serving in peacekeeping missions. And we pay tribute to the over 3,500 peacekeepers who have lost their lives to keep others safe. By pooling troops and resources from many countries, peacekeeping helps share the burden of promoting global security.

When peacekeeping works well, we see countries that have been able to end internal conflicts, reestablish democratic political processes, and develop their own capacities to protect their people.

That being said, I think we can all agree that peacekeeping is far from perfect. Many of the Council's past discussions on reform have focused on operations and efficiency issues. And that is all extremely important. Those efforts need to continue.

But when I think about UN peacekeeping, I go back to what I learned as a young accountant. Go back to the basics, ensure there are measurables, and accountability. We need to work smarter. We need to show results. We need to find value. And not just financial value, we need to focus on what the original intent was. Are we actually on track in accomplishing that intent, and are we meeting the needs of the people?

Because we cannot continue these massive missions forever, we need to focus on the people that we are supposed to be lifting up—the peacekeepers who lack the support or the direction they need, and the taxpayers who pay the bills.

The simple fact is that in many cases, UN peacekeeping is just not working.

In Darfur, a 17,000-strong force designed for yesterday's challenges is not built for the needs of today. In South Sudan, where UN staff helped save hundreds of thousands of civilians, these vulnerable people have no hope of returning to a normal life. In the Democratic Republic of the Congo, the government uses the UN to neutralize only the armed groups that it wants to, leaving others untouched.

Outside of Africa, we have our mission in Kosovo, which, if we're honest with ourselves, has no real reason for being. The risk is creating an artificial, subsidized peace that discourages real, homegrown resolutions to these crises.

That is why we need this kind of honest, strategic review. We invite Council members to join us in evaluating each of our peacekeeping missions as their mandates are renewed. Our goal is to identify those missions that lack the underlying political conditions for a resolution—which numerous studies have concluded, is central to mission success. To help guide us, we have developed a set of principles we think missions should be held to.

We have already touched on the first principle, which is that missions must support political solutions.

The mission in South Sudan, for example, involves a government entangled in a civil war. At this time, there is no credible political path to peace. The government lacks incentive to end the conflict and has made the job more difficult for our peacekeepers. We can't manage our

way out of this problem. While it may be easier to accept and prolong the status quo, we're not doing ourselves, or the people on the ground, any favors. The Council must commit to putting its political pressure to bear on non-cooperative governments.

The second principle is also fundamental: We need host country cooperation. This is not to say that the Council should shy away from countries where it is not welcome or forego its Charter-mandated right to intervene when needed. But we need to acknowledge that, time and again, missions have failed to help those on the ground when host governments choose to obstruct them.

In Darfur, the government sought to restrict our peacekeepers from day one. It delayed visas, prevented freedom of movement and delayed customs clearance for food and equipment. The mission has suffered, which means the people on the ground have suffered.

Third, peacekeeping mandates must be realistic and achievable. Mandates should be targeted to the challenges facing the country and given the resources and the capabilities to do the job. At the same time, we must avoid mission creep.

It is common practice for missions to gradually snowball over time as they pick up more and more tasks and staff. What we end up with is a monster mission with unclear priorities and reporting lines.

In Lebanon, for instance, the mission does critical work to maintain stability along the Blue Line. But beyond these core monitoring tasks, the mission does everything from publishing magazines to providing a navy.

Fourth, we must have an exit strategy. We should agree early on what success looks like, and how to achieve it, and how to set the country or region on the path to independence from the mission. These strategies should be considered at the earliest stages of mission planning and should be central to the UN's regular reporting.

Finally, we must be willing to adjust mandates, both when situations improve, and when they fail to improve. Lifting up the people of these regions must be our objective. When this is achieved, institutional inertia cannot be allowed to prolong operations. And when circumstances fail to progress, we must be willing to draw down or restructure the mission and look at other ways to bring about stability.

We have already begun to apply these principles to MONUSCO. The mission is working in a country where it is increasingly clear that the government is preying on its own people. Recent reporting revealed that the state was responsible for human rights violations, including the killing of 480 civilians. And yet we ask our peacekeepers to support this same government. This is why the changes we made to MONUSCO's mandate last week were so critical. From now on, we will focus on the protection of civilians and support for democratic transition of power. We will develop an exit strategy, and we will demand real accountability from troop contributing countries.

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2. Syria

On July 7, 2017, the State Department provided a special briefing with a senior State Department official on the latest ceasefire in Syria. The ceasefire was arranged by delegations from the United States, Jordan, and Russia and was set to begin on July 9.

The transcript of the briefing, available at <https://www.state.gov/r/pa/prs/ps/2017/07/272433.htm>, is excerpted below.

* * * *

SENIOR STATE DEPARTMENT OFFICIAL: ... So this ceasefire agreement was reached today in Amman, Jordan. It's part of our ongoing discussions that we, the U.S., have had with Russia and with Jordan over the past few weeks and months about de-escalating the violence in southern Syria. ... I should say this is an important step, but it is a first step in what we envision to be a more complex and robust ceasefire arrangement and de-escalation arrangement in southwest Syria, certainly more complex than ones that we have tried in the past.

...[A]s Secretary Tillerson noted today in Hamburg, there's a lot of discussions ahead of us still, including about some very important elements, including how to monitor the ceasefire, the rules that would govern the southwest de-escalation area, ... the presence of monitors. All of this will be the subject of ongoing talks.

So we see this ceasefire that was announced today as an interim step. The idea is it should create a better environment to discuss a broader and more comprehensive southwest de-escalation area in greater detail. We felt that a ... near-term ceasefire was important because the violence in the southwest, although historically, over the course of the conflict, ... it has been less than other parts of Syria, the violence has steadily increased in the south since February, with both the Syrian regime and opposition defenses threatening to derail any potential for progress there.

So as we began these talks with Russia and Jordan on the southwest, we began pursuing an initiative to lock in what had been a relatively quiet south to stop the violence there, to avoid an escalation of violence, and to see that tamping down of violence as an interim step to create a better environment for a broader and more detailed arrangement.

Now, this has been weeks if not months of discussions, and I expect there's many weeks of discussions ahead of us. It's a multi-step process and there's a lot of elements to it. One of the important elements that we concluded last week was that we were able to come to agreement—the U.S., Russia, and Jordan—on a map of the line of conflict in the southwest. So that is essentially the line of contact between regime forces and opposition forces, and we came to agreement on that map, and once that map was agreed, there was no reason at that point for any of the violence to continue, and given the imperative of stopping the violence as soon as possible, it was followed with this initiative that was announced today.

Now, the agreement ...[is] essentially an undertaking to use our influence, the Jordanians, their influence, the Russians to use their influence with all of the sides of the conflict to stop the fighting, to essentially freeze the conflict. It ... sort of previews additional steps that we think we're going to have to take to strengthen and solidify that ceasefire, and those steps would include potential deployment of monitoring forces to the area, and as Secretary Tillerson noted, that's something that we're close to an understanding on but we're not in a position to announce in detail on that yet; and also formation of an effective monitoring cell, an arrangement by which the parties could participate and monitor the details of the ceasefire and violations.

So it's our expectation that we'll continue the discussions with all the parties, certainly with the Russians and the Jordanians, in the weeks ahead about a more detailed arrangement. And in the meantime, we're hopeful that this agreement will get the violence largely under control.

Now, I want to add a little bit more, which is that in the past, we have pursued efforts towards a nationwide ceasefire, and those have been extraordinarily difficult in large part because the environment, circumstances in different parts of Syria are so profoundly different.

So as we began these discussions with the Russians and the Jordanians some months ago, we made a conscious decision to focus on one part of the conflict initially, and that was the southwest. For a variety of reasons, it seemed like a more manageable part of ... a very, very complicated battle space inside of Syria. That doesn't preclude a desire on our part to look at other parts of Syria in the coming weeks and months, and certainly it's a positive signal. I think, as Secretary Tillerson made ... in Hamburg today, which is it's a positive signal about the capacity of the United States and Russia to work in a positive way on something practical where we do have some measure of overlapping perspectives about the course of events.

So it's a very complicated battle space. We are starting with fairly modest ambitions to focus on this one part of Syria, to begin the focus on the southwest of Syria with an effort to stop the violence there and to gradually, as our discussions proceed, to solidify an arrangement that can, number one, end the principal driver of misery for Syrians in that part of the country—the ongoing violence, to set the stage for a more auspicious environment for what we ultimately hope is a productive political process that can—that could lead to a more substantial and permanent resolution of the underlying conflict.

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On the question of Astana, Astana's a separate process. This effort that we've announced today and the discussions that we've had with the Russians and the Jordanians more generally has not been a part of the Astana process. The U.S. attends those Astana meetings as an observer. We're not a participant. The southwest area, as we have discussed it and conceptualized it with Russia and Jordan, is a separate process. So a separate process of delineating the maps and a separate set of negotiations about the details of the ceasefire and eventually the details of the broader de-escalation arrangements.

Astana, since it has started, ... the U.S. has been an observer. We've said publicly that to the extent that it contributes to de-escalation of violence or reduction of violence nationwide and ultimately saving Syrians' lives, we're supportive of that effort. We obviously have concerns about Astana, not least of which is the role of Iran as a guarantor of that process, and that will continue. Our concerns about Iran's role in Astana, our concerns about Iran more generally inside of Syria will continue to inform our approach to all of these discussions going forward.

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SENIOR STATE DEPARTMENT OFFICIAL: The basis of the whole understanding is obviously that each side, each party to it uses its influence with those parties on the ground with which we have relationships. So we and Jordan, in particular, have good relationships with the Southern Front, with the principal armed factions in southwest Syria, and we maintain fairly constant contact with those parties and definitely pursued this in large measure because we had a sense that they themselves were supportive of a ceasefire. I think the armed factions and the

civilians and the opposition in general throughout most of Syria is dreadfully tired of the violence and is looking for an opportunity where a credible ceasefire—an enduring ceasefire—could be implemented.

So you raise a good point; there's been ceasefires in the past. At the end of the day, this is Syria. It's a very complicated battle space and there are a lot of spoilers on the ground, and we're effectively dependent upon outside parties with influence to ensure the compliance of those with whom they have influence. In the case of the Russians, obviously, that's principally the regime forces; in the case of the U.S., Jordan, it's the forces of the opposition. But again, there are spoilers on the ground. There is the regime, which we hope under Russian pressure will comply. There are jihadis from al-Qaida and from Daesh even in southwest Syria, although smaller in number, that may well have a vested interest in spoiling the ceasefire.

So we're moving ahead both because I think we're morally bound where there's an opportunity to bring about a ceasefire to save people's lives and to de-escalate the violence, but we're trying to do it in a way where we come up with a more detailed de-escalation arrangement, including monitoring arrangements that are more robust and more credible and can lead to a more durable ceasefire.

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Here we have a situation where one of the toughest pieces of these discussions is the thing that we accomplished last week when we agreed on the line of contact between regime and opposition forces. That's not something we had really been able to do in the past. And once that had been done, once we had agreement between us, Jordan, and Russia about where the line of contact was, effectively—and we had a sense from the parties that both sides of the conflict wanted the violence to end, at that point there was no reason for it to continue.

You had a growing level of violence in that part of Syria, north of Daraa in particular, and yet the contact line didn't shift demonstrably. So it became pointless to continue the violence at that point because all it meant was death and destruction but no gains, no demonstrable gains by either side. So at that point there was a certain logic in implementing the ceasefire immediately, and then as quickly—and it's obviously incumbent on us to move as quickly as possible—to try to get in place arrangements that can ensure that it can be durable.

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On November 11, 2017, the Presidents of the United States and the Russian Federation issued a joint statement on Syria. The joint statement follows, and is available at <https://www.state.gov/r/pa/prs/ps/2017/11/275459.htm>

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President Trump and President Putin today, meeting on the margins of the APEC conference in Da Nang, Vietnam, confirmed their determination to defeat ISIS in Syria. They expressed their satisfaction with successful U.S.-Russia enhanced de-confliction efforts between U.S. and Russian military professionals that have dramatically accelerated ISIS's losses on the battlefield in recent months.

The Presidents agreed to maintain open military channels of communication between military professionals to help ensure the safety of both U.S. and Russian forces and de-confliction of partnered forces engaged in the fight against ISIS. They confirmed these efforts will be continued until the final defeat of ISIS is achieved.

The Presidents agreed that there is no military solution to the conflict in Syria. They confirmed that the ultimate political solution to the conflict must be forged through the Geneva process pursuant to UNSCR 2254. They also took note of President Asad's recent commitment to the Geneva process and constitutional reform and elections as called for under UNSCR 2254.

The two Presidents affirmed that these steps must include full implementation of UNSCR 2254, including constitutional reform and free and fair elections under UN supervision, held to the highest international standards of transparency, with all Syrians, including members of the diaspora, eligible to participate. The Presidents affirmed their commitment to Syria's sovereignty, unity, independence, territorial integrity, and non-sectarian character, as defined in UNSCR 2254, and urged all Syrian parties to participate actively in the Geneva political process and to support efforts to ensure its success.

Finally President Trump and President Putin confirmed the importance of de-escalation areas as an interim step to reduce violence in Syria, enforce ceasefire agreements, facilitate unhindered humanitarian access, and set the conditions for the ultimate political solution to the conflict. They reviewed progress on the ceasefire in southwest Syria that was finalized the last time the two Presidents met in Hamburg, Germany on July 7, 2017.

The two presidents, today, welcomed the Memorandum of Principles concluded in Amman, Jordan, on November 8, 2017, between the Hashemite Kingdom of Jordan, the Russian Federation, and the United States of America. This Memorandum reinforces the success of the ceasefire initiative, to include the reduction, and ultimate elimination, of foreign forces and foreign fighters from the area to ensure a more sustainable peace. Monitoring this ceasefire arrangement will continue to take place through the Amman Monitoring Center, with participation by expert teams from the Hashemite Kingdom of Jordan, the Russian Federation, and the United States.

The two Presidents discussed the ongoing need to reduce human suffering in Syria and called on all UN member states to increase their contributions to address these humanitarian needs over the coming months.

In addition, President Trump noted that he had a good meeting with President Putin. He further noted that the successful implementation of the agreements announced today will save thousands of lives.

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On November 11, 2017, senior administration officials provided another special briefing on Syria, this one regarding the joint statement by the President of the United States and the President of the Russian Federation, excerpted above. The briefing transcript is available at <https://www.state.gov/r/pa/prs/ps/2017/11/275463.htm> and excerpts follow.

* * * *

SENIOR STATE DEPARTMENT OFFICIAL ONE: Great. ... So let me provide some background, ... on the joint statement on Syria that issued today following the discussion between President Trump and President Putin on the margins of the APEC conference.

And this statement really builds on months of fairly intense discussions with the Russians and a lot of behind-the-scenes diplomacy led by Secretary Tillerson with the support of our military teams. And another round of those discussions took place last week in Amman and made some progress on some of the areas underlying the joint statement that issued today. And Secretary Tillerson and Foreign Minister Lavrov were able to close some gaps that remained over the course of the discussion on the margins of APEC.

I would describe these discussions with the Russians as quite intense, difficult, but also professional and ultimately constructive. And we've been able in recent months to work through some extremely difficult issues on Syria, which remains one of the most complex foreign policy challenges we confront.

So let me break down the statement with some background. ...[S]hortly after taking office Secretary Tillerson set forth a vision for a new U.S. approach on Syria really grounded in three key elements. First, we must and we will prioritize the defeat and the enduring defeat of ISIS...

... Secretary Mattis, during a coalition meeting in Brussels earlier this week, ...noted that 95 percent now of the territory once held by ISIS is now freed, and our partners are continuing to secure more territory each day.

Second, ... we must work to consolidate these military gains through stabilization assistance and critically de-escalate the civil war in Syria. The underlying civil war threatens American interests by driving extremism, increasing Iranian influence, undermine the security of Syria's neighbors including Israel, Jordan, Lebanon, Iraq, and Turkey, and increasing refugee flows.

In April, the Secretary discussed a vision for de-escalation zones during a Moscow visit with President Putin, and that overall vision has really defined subsequent international diplomacy on Syria. It resulted in a reduction of violence throughout the country and unprecedented pressure on ISIS and beginning to set the conditions now for a meaningful political process.

...[T]hird ..., we must facilitate UN-led efforts to effect a political resolution to the conflict. ...[I]t remains our view that a new and stable Syria ... and a more stable region will ultimately require new leadership in Damascus and the departure of President Assad from the scene. This must occur, however, as part of a political process that allows the entirety of the Syrian people, including the millions displaced by this horrific conflict, to determine their future free from threat, intimidation, and all foreign interference, and ultimately through UN-supervised and organized parliamentary and presidential elections.

...[P]hase one is really the defeat of ISIS. It's hard to see Syria stabilizing when ISIS retains a so-called caliphate in what used to be about a third of the country. The second phase, and working in parallel, is to establish de-escalation zones and bring down the levels of violence in the country, with the third phase then leading to the political process to ultimately end the overall civil war.

So the joint statement approved today by President Trump and President Putin codifies areas of agreement in each of these three areas. It also does not sugarcoat differences that remain, and we still have work to do as we emerge from the primary focus on ISIS to the next phase of

the campaign, locking in de-escalation areas to set conditions for a meaningful political process through Geneva to take hold.

The statement also reflects our view, as the President discussed earlier today, that despite our many differences with Russia, our two countries are capable of working together on difficult problems where interests converge and our doing so is profoundly in our national security interest. Perhaps nowhere is that more true than in Syria. The reality on the ground in Syria and those with influence is something we must take account of when developing our own approaches. We have made clear we will not work with the Assad regime, we will not obviously work with the Iranians who share fundamentally divergent interests from ours, therefore we must find opportunities to work with Russia where we can, seek to narrow differences where possible, mindful of the gaps that will inevitably remain.

So turning to the details of the statement, I'll discuss each of the three areas I just outlined: military deconfliction to accelerate pressure on ISIS, strengthening the southwest ceasefire and de-escalation zones, and agreeing on key principles of the Geneva-based political process.

So the first area—...deconfliction and the counter-ISIS campaign. As the campaign against ISIS has progressed, coalition-backed and Russian-backed forces have increasingly converged on the battlefield, necessitating a greater degree of operational deconfliction to prevent accidents and unintended escalations of force. Over the past 10 months we've worked to strengthen professional military channels of communication with Russia at the tactical and operational levels. This is to ensure that we can protect our people and our partner forces and focus maximum focus where it belongs, on the defeat of ISIS.

While not without challenges, these arrangements have served its purpose to date, thanks to the leadership of Secretary Mattis, General Dunford, General Votel, and our commanders in theater—Lieutenant General Steve Townsend [until] around September and now Lieutenant General Paul Funk, who recently assumed command. And they're doing a great job, a remarkable job, and we remain closely latched up between military and diplomatic channels as the campaign has dramatically accelerated over the past year.

So today, importantly, President Trump and President Putin expressed their satisfaction with these arrangements and confirmed that they would continue until ... the final defeat of ISIS ... is achieved. The joint statement reflects our shared commitment and agreement from the highest levels that military discussions and deconfliction channels has remained professional, served to avoid misunderstandings, and maximized the pressure on ISIS.

And this pressure on ISIS cannot be overstated. For the first time, the end of the physical caliphate, the so-called ISIS caliphate from where terror attacks were planned and launched around the world, is clearly in sight. While this will not end the threat of the ISIS, it is a significant milestone in the campaign and the result of the accelerants put in place at the direction of the President and Secretary Mattis earlier this year.

The statement also affirmed understandings that these deconfliction arrangements as well as de-escalation areas are interim measures to create conditions under which terrorists can be defeated, military gains consolidated, our partner forces can be secure, and the political process can advance pursuant to UN Security Council Resolution 2254....

Both U.S. and Russia finally, as the statement states, are firmly committed to the territorial integrity of Syria, a principle the presidents affirmed today in the joint statement. De-escalation zones, for example, and deconfliction arrangements are designed to reduce violence

and create conditions for Syrians to return to their homes and a political process to take hold. They are not aimed at partitioning Syria or dividing Syria into spheres of influence.

The second area of the statement is the de-escalation of the civil war and de-escalation zones, particularly the southwest. The presidents welcomed and endorsed, importantly, the U.S.-Russia-Jordan Memorandum of Principles, what we call the MOP, for de-escalation in southwest Syria. And this document was initialed on Wednesday night, November 8th, in Amman, Jordan. This understanding builds on and expands the July 7th ceasefire arrangement finalized during the last meeting between President Trump and President Putin in Hamburg, Germany, in July.

So the memorandum builds on the ceasefire arrangement really in three important areas. Let me just break them down.

First, the memorandum initialed in Amman earlier this week gives greater definition to the rules and mechanisms to monitor and strengthen the ceasefire and related efforts like humanitarian assistance. And while not perfect, the ceasefire that was put in place in July has largely held. Violence in this area has been significantly reduced, and thousands of Syrian families have returned to their homes. The presidents also recognized the work of U.S., Jordanian, and Russian military and diplomatic professionals and what we call the Amman Monitoring Center, which maintains contact with the many actors on the ground to prevent violations of the ceasefire and address them when they occur.

Second, the memorandum initialed in Amman and endorsed by the presidents today reflects the trilateral commitment that existing governance and administrative arrangements in opposition-held areas in the southwest will be maintained during this transitional phase. In other words, the opposition is not surrendering territory to the regime, deferring those questions of longer-term political arrangements to the political process under UN Security Council Resolution 2254. So this is an important principle that the memorandum initialed in Amman memorializes and the presidents confirmed.

Third and perhaps most important, the MOP ... enshrines the commitment of the U.S., Russia, and Jordan to eliminate the presence of non-Syrian foreign forces. That includes Iranian forces and Iranian-backed militias like Lebanese Hizbollah as well as foreign jihadis working with Jabhat al-Nusrah and other extremist groups from the southwest area. These ... extremists groups and these foreign-backed militias ... have used the Syrian conflict over the last five years to increase their presence in this part of Syria, which has undermined the ceasefire and poses a threat to Jordan and Israel. So we think this principle is quite important and it is enshrined in the agreement reached this week.

So on this last point specifically, the Russians have agreed to work with the Syrian regime to remove Iranian-backed forces a defined distance from opposition-held territory as well as the borders of the Golan in Jordan. For our part, we have agreed to work with Jordan and the opposition to reduce and ultimately eliminate the presence of foreign jihadis such as those fighting with Jabhat al-Nusrah from opposition-controlled territory. The bottom-line principle is that all foreign terrorists and militia fighters must leave these areas and ultimately leave Syria altogether.

The third part of the statement is focused on the political solution, the long-term solution to the conflict. So finally, the statement reflects agreement that there is no military solution to the Syrian conflict; the conflict can only be resolved long-term through peaceful political negotiations, which, as the statement says, must, must be grounded in Geneva and the Geneva-based political process. So the presidents reaffirmed their commitment to the blueprint for a political transition outlined in UN Security Council Resolution 2254, and that means negotiation

under UN auspices in Geneva to draft a new constitution and hold UN-supervised elections to the highest international standards with the Syrian diaspora. That means the millions of Syrians who have been displaced in this terrible civil war will be eligible to vote, as the statement states very clearly.

The statement also expresses Assad's recent commitments...—the Geneva process, constitutional reform, and elections—and importantly makes clear that those commitments must be grounded in Security Council Resolution 2254.

The statement affirms that the political process, including constitutional reform and elections, therefore, must occur under the detailed blueprint outlined in the Security Council resolution through UN-led negotiations in Geneva and culminate in UN-supervised elections.

... We have started to see signs that the Russians and the regime wanted to draw the political process away from Geneva to a format that might be easier for the regime to manipulate. Today makes clear and the statement makes clear that 2254 and Geneva remains the exclusive platform for the political process, which, as the statement reaffirms, is the only way, long term, to end the Syrian civil war.

So the goal of the Geneva process under the auspices of Staffan de Mistura is to move as quickly as possible towards a new constitution and especially UN-supervised parliamentary and presidential elections. And at the end of this political process, as I stated at the opening, Syria and the broader region cannot be stable nor can there be any significant reconstruction assistance to regime-held areas, importantly, so long as Assad remains in power.

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On November 26, 2017, the State Department issued a press statement on the Riyadh conference of the Syrian opposition. The statement appears below and at <https://www.state.gov/r/pa/prs/ps/2017/11/275886.htm>.

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The United States notes the successful conclusion of the Riyadh II conference of the Syrian opposition and its work to bring together a diverse array of groups to form a unified delegation that can enter into substantive negotiations in the upcoming round of UN sponsored talks in Geneva.

The United States commends the role of Saudi Arabia, the organizer of the Syrian Opposition Conference in Riyadh. We congratulate the new Negotiating Committee and its General Coordinator Nasr Hariri, as they prepare to embark on the discussions that can ultimately lead to a political solution to the conflict.

The process that can bring this about must include full implementation of UNSCR 2254, including constitutional reform and free and fair elections under UN supervision, held to the highest international standards of transparency, with all Syrians, including members of the diaspora, eligible to participate.

The Geneva process, as it gains traction towards constitutional reform and UN-supervised elections, should include the broadest spectrum of Syrian citizens, including all groups with representation and influence on the ground who express commitment to a new Syria as outlined

in UNSCR 2254. The formation of the unified delegation for this round of UN-led Geneva talks is a positive step in that direction. We hope that all parties to the talks in Geneva will display the seriousness and flexibility to find a solution that can bring an end to this conflict and to the suffering of the Syrian people. We call in particular upon the Syrian regime now to enter into substantive negotiations in Geneva on the basis of UNSCR 2254.

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On December 15, 2017, the State Department issued a press statement on the recent round of talks on Syria in Geneva. The statement follows and is available at <https://www.state.gov/r/pa/prs/ps/2017/12/276634.htm>.

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We commend United Nations Special Envoy for Syria Staffan de Mistura and his team for their efforts in the latest round of Syria talks in Geneva. We also note the constructive participation of the Syrian opposition delegation, which stands in contrast to the obstructionism and procrastination of the Syrian regime delegation. We support de Mistura's call for the regime's supporters to use their leverage to urge the regime to participate fully in tangible negotiations with the opposition in Geneva. The United States urges all parties to work seriously toward a political resolution to this conflict or face continued isolation and instability indefinitely in Syria. All parties interested in resolving the conflict must commit to Geneva as the only venue for the Syrian political process and work to ensure all Syrian participants are ready to engage constructively and substantively on implementing UNSCR 2254 as the blueprint for a political resolution. The Syrian people deserve an end to this conflict.

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3. Mali

On July 31, 2017, the State Department issued a press statement on the situation in Mali. That statement follows and is available at <https://www.state.gov/r/pa/prs/ps/2017/07/272954.htm>.

The United States condemns recurring violations of the ceasefire that have occurred in Mali between signatory armed groups to the 2015 Algiers Peace Accord. We urge the parties to end hostilities immediately and to strictly comply with their obligations under international humanitarian law and to respect human rights, particularly with respect to civilians and prisoners. We are greatly disturbed at reports of reprisal killings of civilians and the discovery of unmarked gravesites in the areas of conflict. We welcome the inquiries led by the UN

peacekeeping mission, the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). If the allegations prove true, the perpetrators must be brought to justice.

We applaud efforts to bring the parties together to agree to a cessation of hostilities, and we deplore the parties' failure to do so. We call on all parties to redouble their efforts to abide by the ceasefire and fully implement the Algiers Peace Accord. The United States stands with the people of Mali as they work to build a country that is peaceful, prosperous, and united. The United States also supports the efforts of the Group of Five Sahel states (Burkina Faso, Chad, Mali, Mauritania, and Niger) in creating a Joint Force and undertaking other actions to address threats that destabilize Mali and other parts of the sub-region and make lasting peace that much more elusive.

On September 20, 2017, U.S. Deputy Representative to the United Nations Michele Sison delivered remarks at a ministerial meeting on the implementation of the Mali Peace Agreement. Ambassador Sison's remarks are excerpted below and available at <https://usun.state.gov/remarks/7989>.

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We all desire for peace to take root in Mali. But no level of international engagement can secure peace for Mali alone. The signatory parties to the peace agreement, especially the Malian government, must drive the effort to bring peace. Indeed, the only sure path to stability is a full commitment to implementation, especially the return of stable, legitimate, and inclusive governance to the center and north.

The recent fighting in July by signatory armed groups in the Kidal and Menaka regions signaled a further breakdown in political will to implement the agreement. We applaud that they have agreed to a thirty-day ceasefire in early September but implore them to take their ongoing dialogue seriously and honor and implement the peace agreement, all of which requires a durable cessation of hostilities.

In adopting Resolution 2374, the Security Council made clear there are consequences for those who obstruct efforts to create the peace that the people of Mali deserve.

This resolution serves as a powerful message and warning to parties on all sides of the conflict that they may be sanctioned for undermining the peace process, and strengthens the hands of those who work constructively towards a sustainable peace in Mali.

MINUSMA plays an equally important role in creating an enabling environment for peace in Mali. We thank all the MINUSMA troop and police contributing countries for their dedication to international peace and stability and the sacrifices they have made. Indeed, far too many peacekeepers have lost their lives in service to their duties. We are grateful for the ultimate sacrifices they have made for the Malian people.

This is why, as member states, we must energize our efforts to ensure that MINUSMA has the troops and equipment it needs to accomplish its mission. We urge contributing countries to honor pledges to get the mission closer to its force ceiling.

We recognize French leadership in addressing the threats in the Sahel through Operation Barkhane. We are also very proud of the logistics support that the U.S. military provides to this Operation in close collaboration with our French allies.

We encourage the Government of Mali to promote stability by enhancing reform of its security forces, addressing allegations of impunity for human rights violations, as well as increasing northern participation and building these forces' counter-terrorism capability.

That terrorist threat continues to exacerbate insecurity in Mali and more frequently crosses into neighboring countries, something of great concern to us all. We understand the interest of Sahelian leaders in devising a solution to address this transnational threat in the region. The United States stands with Mali and other African and international partners to counter the growing terrorist threats in the Sahel—through the G5 Sahel Joint Force and other mechanisms.

We are committed to supporting the African-led and -owned G5 Joint Force through bilateral security assistance. But we do not support UN funding, logistics, or authorization for the force. We will continue to seek to identify new bilateral opportunities to provide specific support and encourage all nations to do the same. We have already provided approximately \$840 million in assistance to G5 member states since 2012.

As we have said before, the Malian signatories are the ultimate arbiters of their own future. A more durable peace is only in reach for those who extend a hand to it. We are here to support those with the courage to do so.

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4. Democratic Republic of the Congo

As discussed in *Digest 2016* at 755, the United States welcomed the December 31, 2016 signing of a political compromise agreement by the Government of the Democratic Republic of Congo ("DRC") and opposition party leaders. On March 28, 2017, the State Department issued a press statement on the lack of progress on the political agreement in the DRC. That statement follows and is available at <https://www.state.gov/r/pa/prs/ps/2017/03/269230.htm>.

The United States is disappointed by lack of progress in implementation of the December 31 Saint-Sylvestre Political Agreement in the Democratic Republic of the Congo. We are concerned by the inability of both the Government of the DRC and the leaders of the opposition Rassemblement coalition to make the compromises necessary to enact pre-agreed provisions of the agreement, including the appointment of a Prime Minister.

The formation of a new government, as prescribed by the agreement, would pave the way for elections and the DRC's first peaceful, democratic transfer of power through the expressed will of the Congolese people. The U.S. commends the tireless efforts of the DRC's Council of Catholic Bishops (CENCO) in mediating this initiative, strongly supports a continuing role for CENCO in the process, and seconds CENCO's public appeal for both sides to redouble efforts to overcome points of disagreement. Failure to move ahead with the accord clearly

thwarts the will of the Congolese people and jeopardizes the progress achieved thus far.

The United States urges government and opposition leaders to refrain from any statements or actions that could incite violence or unrest.

5. South Sudan

On February 17, 2017, the joint statement of the Troika (the United States, the United Kingdom, and Norway) on South Sudan was issued as a State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/02/267700.htm>. The statement, below, supports the African Union High Level Implementation Panel (“AUHIP”) peace process.

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The Troika (Norway, the United Kingdom and the United States) expresses its continued support for the African Union High-Level Implementation Panel (AUHIP) peace process, led by former South African President Thabo Mbeki. In support of the AUHIP-brokered Roadmap Agreement signed by both the Government of Sudan and the opposition, the Troika urges the signatories to honor the Agreement by concluding comprehensive cessations of hostilities and engaging in an inclusive political dialogue. The Government of Sudan must now create an environment that is conducive to freedom of expression and political participation by both armed and unarmed opposition in Sudan.

The Troika is also encouraged by the Government of Sudan’s decision to accept the United States’ proposal to support humanitarian assistance to South Kordofan and Blue Nile states (the “Two Areas”). The U.S. proposal is intended to facilitate humanitarian assistance to affected populations in the Two Areas, in line with AUHIP efforts for broader negotiated humanitarian access. The Troika urges the Sudan People’s Liberation Movement-North to swiftly accept this proposal and facilitate the delivery of life-saving assistance to those in need in the Two Areas.

The ongoing unilateral ceasefires are a significant step toward peace throughout Sudan. However, in order to realize sustainable peace, all parties must engage in a political process. The Troika also encourages continued engagement by the armed movements from Darfur with the AUHIP peace process. We call on the Sudan Liberation Movement—Abdul Wahid Al Nur to cease hostilities and immediately engage with the AUHIP peace process. The Troika also encourages the Government of Sudan to make progress on addressing the root causes of the conflict.

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On March 30, 2017, the State Department issued as a media note a further statement of the Troika on South Sudan. The statement follows and is available at <https://www.state.gov/r/pa/prs/ps/2017/03/269328.htm>.

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The members of the Troika (Norway, the United Kingdom, and the United States) reiterate their strong support for the combined efforts of the African Union (AU), Intergovernmental Authority on Development (IGAD), and United Nations to end the conflict in South Sudan, and join in their recent calls on all armed parties, including the Government of South Sudan, the Sudan People's Liberation Movement in Opposition, and other armed groups, to commit to a ceasefire. The Troika welcomes the recent commitment by President Kiir to IGAD leaders to announce a unilateral ceasefire by government forces, and it calls upon him to ensure that his order is carried out immediately and in full effect.

The Troika underlines that the dire humanitarian crisis in South Sudan is the direct result of the conflict and demands that all parties cease violence against humanitarian workers and obstruction of humanitarian assistance. Military offensives and the obstruction of lifesaving assistance must stop immediately in order to end the suffering and severe food shortages inflicted upon millions across South Sudan.

The Troika reiterates that there is no military solution to this conflict and that a durable end to the conflict will require a political process involving all the principal parties. An inclusive national dialogue, deemed credible by the South Sudanese people, could provide a means to redress root causes of conflict and build a true national consensus. As President Kiir committed in announcing the planned national dialogue, it should supplement, and not replace, the core elements of the Agreement on the Resolution of the Conflict in the Republic of South Sudan.

The Troika endorses the ongoing efforts of AU High Representative Alpha Konar and UN Special Envoy Nicholas Haysom to encourage all parties to end fighting and engage in peaceful dialogue. It also fully supports Joint Monitoring and Evaluation Commission Chairperson Festus Mogae's work towards a truly inclusive and effective process to implement the Agreement. In addition, the Troika endorses the work of the UN Mission in the Republic of South Sudan, and the deployment of its Regional Protection Force. Lastly, the Troika notes the importance of breaking the cycle of impunity, and encourages further progress by the AU toward the rapid establishment of the Hybrid Court for South Sudan.

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The Troika issued another joint statement on April 6, 2017 regarding the opening of a humanitarian corridor from Sudan to South Sudan. The April 6 statement is excerpted below and available at

<https://www.state.gov/r/pa/prs/ps/2017/04/269520.htm> .

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The members of the Troika (Norway, the United Kingdom, and the United States) welcome the Government of Sudan's opening of the border crossing into Bentiu, in South Sudan, for the delivery of humanitarian food assistance to areas gravely affected by the conflict and suffering from famine and severe food insecurity. This border crossing will allow for a second access route for emergency food assistance, along with the already open Kosti-Renk river corridor. The

Troika also recognizes the Government of Sudan's efforts to facilitate the flow of food assistance through Port Sudan.

The Troika notes Sudan has accepted over 365,000 South Sudanese refugees, including more than 60,000 South Sudanese who have entered Sudan in the first three months of 2017, and encourages the government to ensure continued humanitarian access to these refugee communities. The Troika also welcomes the Sudanese government's decision to donate food from their own food reserves to people in need in South Sudan.

The Troika calls on the Government of South Sudan to coordinate with the World Food Program and partners providing vital assistance. The Troika urges the government and all armed groups to allow full and safe humanitarian access to reach communities in need, and to ensure that food and other commodities are not diverted from the intended beneficiaries.

The Troika recommends the opening of additional land and water routes between Sudan and South Sudan so that communities in both countries can benefit from open trade and the efficient and swift movement of humanitarian goods and personnel.

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On July 9, 2017, the State Department issued a press statement on the South Sudan conflict on the 6th anniversary of South Sudan's independence. The statement follows, and is available at <https://www.state.gov/r/pa/prs/ps/2017/07/272441.htm>.

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The birth of South Sudan in 2011 was marked by hope for a peaceful and prosperous future. The American people, like many around the world, celebrated as the South Sudanese forged a free and independent nation following years of strife. Six years later, on the occasion of South Sudan's independence, the promise of 2011 has been supplanted in 2017 by a continuing civil war and devastating humanitarian crisis affecting millions.

The conflict that broke out in December 2013 set South Sudan on a precarious course, causing immense suffering, creating divisions and holding the country back. We deeply regret that the second chance made possible by the formation of the Transitional Government of National Unity in April 2016 was squandered. Following the collapse of the permanent ceasefire in July 2016, the armed conflict expanded across the country and the parties to the conflict remain unwilling to return to the negotiating table. The consequences have been dire: two million people displaced inside South Sudan, nearly two million people displaced as refugees outside of South Sudan, and six million people facing life-threatening hunger.

The United States remains deeply committed to a stable and inclusive South Sudan, and stresses once again that there is no military solution to this conflict. On this day meant to celebrate South Sudan's creation, we call upon South Sudan's leaders and all parties to end this self-destructive violence, to return to political dialogue, and to help South Sudan realize its full potential.

We extend our best wishes to the people of the Republic of South Sudan on the sixth anniversary of the nation's independence. The United States will stand with the people of South Sudan and with all leaders who are working for peace, stability, and justice.

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On July 20, 2017, the Troika issued another joint statement, this time with the EU, on South Sudan, which follows and is also available at <https://www.state.gov/r/pa/prs/ps/2017/07/272747.htm>.

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The members of the Troika (Norway, the United Kingdom, and the United States) and the European Union condemn the continuing violence in South Sudan, especially the Government of South Sudan's current offensive against SPLM-In Opposition (SPLM-IO) forces near Pagak, as well as ongoing road ambushes and attacks by the SPLM-IO. The Pagak offensive is a clear violation of the unilateral ceasefire declared by President Salva Kiir on May 22, and calls into question the government's commitment to reach peace through the National Dialogue, notwithstanding the sincere efforts undertaken by the leaders of the Steering Committee.

The Troika and EU repeat and endorse the June 12 call by the leaders of the Intergovernmental Authority on Development (IGAD) for President Kiir to ensure that his forces respect the unilateral ceasefire, for the armed opposition groups to reciprocate the ceasefire, and for all groups to allow the unfettered delivery of humanitarian assistance to all those in need. We also welcome IGAD's announcement of a High-Level Revitalization Forum for the South Sudan peace process. We call upon IGAD to expeditiously convene the Forum, and to include the current principal parties to the conflict. Likewise, we urge all parties to fully participate in the Forum. The Troika and EU agree with IGAD that the Forum should focus on achieving a ceasefire and resuming political dialogue that focuses on updating the agreement's timelines and other provisions that are now obsolete in light of the expansion of conflict since 2015.

The proliferation of violence, displacement, and food insecurity renders any discussion of elections in the foreseeable future as an unnecessary diversion from the primary goals of achieving peace and reconciliation. South Sudan's leaders, neighbors, and regional and international partners must first focus on achieving peace in order to create the conditions needed to hold credible elections. To achieve these urgent goals, we look forward to the prompt revitalization of an inclusive and credible peace process by IGAD; such progress would be required in order for the Troika and EU to commit further resources to institutions designed to implement the agreement.

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On December 13, 2017, the Troika issued another joint statement calling on all parties to participate in the High Level Revitalization Forum ("HLRF") for peace in South Sudan. The statement follows and is available at <https://www.state.gov/r/pa/prs/ps/2017/12/276582.htm>.

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On Monday, December 18, the Intergovernmental Authority on Development (IGAD) will convene the High-Level Revitalization Forum (HLRF) for the Agreement on the Resolution of the Conflict in South Sudan (the Agreement). The members of the Troika (Norway, the United Kingdom, and the United States) have made clear that the HLRF is a unique and critical opportunity to make progress towards peace. The humanitarian, economic, security, human rights, and political situation continues to deteriorate with devastating consequences for the people of South Sudan. Over half the population now lacks enough food to feed themselves and a third of the population has fled their homes, causing the largest refugee crisis in Africa. This situation is intolerable to the region and the international community. It cannot continue.

The region and the international community have repeatedly called for all parties to the conflict to participate in the HLRF constructively and in a spirit of compromise and inclusion. The members of the Troika fully expect the Government of South Sudan to adhere to its repeated public and private commitments to participate in the HLRF in good faith, and with the immediate goal of stopping the fighting. Although it is a member of IGAD, the Government is also a party to the conflict. To achieve a sustainable peace, no party to the conflict can have undue influence or a veto on the process, including the Government. The opposition also bears responsibility for coming to the table without preconditions. All parties must engage sincerely and make concessions in the national interest; otherwise, the conflict and suffering will continue.

The Troika fully supports IGAD's continuing effort to build peace and, in particular, the tireless work undertaken by IGAD Special Envoy Ismail Wais to bring the parties together. The Troika views the HLRF as the essential, inclusive forum to advance peace; other efforts and fora must support the HLRF, or risk diverting attention and focus and delaying progress. IGAD's ability to solve this crisis depends on unity of purpose amongst its members, and we urge the IGAD countries to speak with one voice. As the Troika has previously stated, the HLRF and its outcome must be genuinely inclusive and reflect the political reality of South Sudan today. The Troika reiterates its intent to stand with IGAD in its efforts to make progress toward peace and effective implementation of the Agreement, and its readiness to take action against those who obstruct the process.

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On December 21, 2017, the Troika issued a joint statement welcoming the agreement on a cessation of hostilities, protection of civilians, and humanitarian access in the conflict in South Sudan. The State Department media note containing the joint statement is available at <https://www.state.gov/r/pa/prs/ps/2017/12/276737.htm> and excerpted below.

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On Thursday, December 21, the parties to the conflict in South Sudan signed the Agreement on Cessation of Hostilities, Protection of Civilians, and Humanitarian Access in Addis Ababa. The members of the Troika (Norway, the United Kingdom, and the United States) congratulate the parties on their willingness to compromise for the benefit of the people of South Sudan and hope that they immediately take action to make good on that agreement. The Troika fully supports the continuing effort by the Intergovernmental Authority on Development (IGAD) to build peace through the High Level Revitalization Forum (HLRF).

We would like to recognize in particular the meaningful contributions of the Chairperson of the African Union Commission, Moussa Faki, the Prime Minister of Ethiopia, Hailemariam Desalegn Boshe, and the members of the IGAD Council of Ministers. We further recognize the tireless work undertaken by IGAD Special Envoy Ismail Wais and the High Level Facilitators to bring the parties together and the inclusion of a number of civil society organizations and women representatives at the Forum. The Troika calls on all the parties to implement the Agreement immediately including the parties' obligations regarding humanitarian access. We are encouraged by the strong statements from the African Union and IGAD making clear their intent to hold the parties accountable. The Troika calls on the parties to reconvene urgently to address the important security and governance arrangements that are essential for peace.

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6. Colombia

As discussed in *Digest 2016* at 745-52, the UN Security Council established an observer mission to assist with implementation of the Colombia peace agreement. On September 14, 2017, Ambassador Sison provided the U.S. explanation of vote following the adoption of UN Security Council Resolution 2377 on the United Nations Verification Mission in Colombia. Ambassador Sison's statement is excerpted below and available at <https://usun.state.gov/remarks/7973>.

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The United States also warmly welcomes the continued support of the Security Council to Colombia. The Government of Colombia has made critical progress in implementing the final peace accord with the FARC. As a result of the parties' commitment and the support of the United Nations, the FARC has peacefully laid down their arms. The last containers with all of those weapons are now in the hands of the United Nations, and the government has already begun the process of reintegrating the former combatants into society.

Colombia has shown the world that commitment to political process and a shared future—along with strong, unified support from the Council and the international community—can bring success in peacebuilding. Colombia is an example for the region and for the world.

But now Colombia faces the challenge of consolidating that peace. The threat to that peace is serious, and it comes in the form of lack of infrastructure, basic services, and rule of law in conflict-affected areas formerly occupied by the FARC, creating a haven for criminal activities, drugs, and violence. Yet we remain focused on building on the gains made and creating the conditions for peace to prosper.

In particular, today's resolution advances the readiness of the second political mission in helping to address these challenges. We stand ready to partner with Colombia and support the Security Council in the hard work ahead. Additionally, we welcome the announcement of the Government of Colombia and the National Liberation Army, the ELN, of a temporary bilateral ceasefire. The United States joins other members of the Council in expressing our interest in considering how this temporary bilateral ceasefire could be supported by the work of the UN

Verification Mission in Colombia. We look forward to hearing the Secretary-General's recommendations on the way forward in the coming days.

With our vote today, the United States underscores that we stand with Colombia—as a steadfast partner and as a friend. The United States has stood with Colombia through times of great challenge, and we continue to stand with you in this moment of hope and opportunity.

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7. Accountability of UN Officials and Experts on Missions

U.S. Counselor to the UN Emily Pierce delivered remarks at a Sixth Committee meeting on October 6, 2017 on criminal accountability of UN officials and experts on missions.

Ms. Pierce's remarks are excerpted below and available at

<https://usun.state.gov/remarks/8026>.

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The critical issue of criminal accountability for UN officials and experts on mission goes to the heart of the credibility of the United Nations in carrying out its essential work around the world, as well as to the public's confidence in its ability to protect and serve. The United States reiterates its firmly held belief that UN officials and experts on mission should be held accountable for the crimes they commit.

The history of this agenda item is well known in this chamber. Years ago, in the wake of shocking allegations of sexual exploitation and abuse by UN peacekeepers, the General Assembly issued a call for a zero tolerance policy and began a discussion of criminal accountability. In his first 9-plus months in office, the Secretary-General has demonstrated strong leadership in addressing the scourge of sexual exploitation and abuse within the Organization, prioritizing the dignity of victims and promoting transparency, accountability, and prevention efforts. We appreciate the Secretary-General's February 2017 report, which outlined a new approach to accomplishing these protection endeavors, as well as the efforts of Member States, the Security Council and the General Assembly to maintain prioritization of this issue. We look forward to continuing to engage with the all facets of the UN on implementing reforms.

While this agenda item originated in those allegations of sexual exploitation and abuse committed by peacekeeping troops, our work necessarily takes a broader view both in scope of criminal activity and across the whole of the United Nations. It is noteworthy that of the 20 referrals made to the UN in 2017, as outlined in Annex I of the Secretary-General's report A/72/205, only two of them related to allegations of crimes involving sexual exploitation and abuse. Similarly, of the 27 referrals made in 2016 identified in the same annex, only two of those involved allegations of crimes involving sexual exploitation and abuse. We must not lose sight of the need to promote accountability for all crimes committed by UN officials and experts on mission, including financial and other crimes, like fraud, corruption, and theft.

The United States thanks the Secretariat, in particular the Office of Legal Affairs, for its three reports on this important topic. We appreciate in particular the demonstrated efforts OLA has made to implement the General Assembly's request for more follow up with Member States

to which referrals of criminal allegations have been made when no response has been received. In several recent cases identified in Annex 1 to A/72/205, such additional efforts appear to have made a difference, prompting states to respond. In addition, we consider Annex II, which contains information on notifications received from states with respect to investigations or prosecutions of crimes allegedly committed by UN officials or experts on mission, a positive step towards enhanced transparency on the scope of the issues that this Committee is studying.

The Secretary-General's report A/72/121, compiling information from across the UN system relating to policies and procedures regarding credible allegations that reveal that a crime may have been committed by UN officials or experts on mission, paints a complex picture that even a well-trained lawyer may find challenging to navigate, let alone the person in a remote village who is trying to report and follow up on allegations of fraud or corruption. We look forward to discussing with delegations possibilities for enhancing the clarity and coherence of these policies and procedures across the United Nations to promote efficiency and reduce redundancies, if any.

In his latest report on special measures for sexual exploitation and abuse, the Secretary-General again encouraged Member States to discuss creation of an international convention to address any jurisdictional gaps that might prevent Member States from seeking criminal accountability for actions by their nationals while serving the UN. The United States remains open to consideration by this Committee of whether a convention could play a useful role inclosing legal gaps, particularly jurisdictional gaps that may prevent accountability for serious crimes by UN officials and experts on mission. In this regard, we recognize the continued efforts of the Secretariat in compiling the jurisdictional information submitted by Member States. We believe this information should aid this Committee in its consideration of an international convention, although we note that more information is still needed from Member States in order to have a well-informed discussion, in particular about the domestic laws of those Member States who have said they face legal challenges to holding their nationals to account for criminal acts committed while serving with the UN abroad.

As we look toward the further consideration by this Committee of the report of the Group of Legal Experts next year in the 73rd session, it is important that this Committee have a full picture of obstacles in the domestic legal landscape so that we may more deeply consider the possible impact and form of a potentially legally-binding instrument. Having a better understanding of the scope and nature of the issue would also help the Committee to examine other approaches or solutions that may be more effective in addressing obstacles to accountability in UN missions.

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C. CONFLICT AVOIDANCE AND ATROCITIES PREVENTION

1. Burma

On October 24, 2017, Deputy Assistant Secretary of State W. Patrick Murphy, Special Representative and Policy Coordinator for Burma, held a special briefing. The transcript of the briefing is available at <https://www.state.gov/r/pa/prs/ps/2017/10/275069.htm> and excerpted below.

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MR MURPHY: ... Burma has preoccupied us quite significantly since August 25th when armed attacks took place on security forces, and the ensuing humanitarian crisis is of epic proportions. Many of the challenges in Burma have preoccupied us for decades, but this current crisis has been quite devastating. I had a very good morning joined by colleagues from our refugee bureau and USAID with the members of the Senate Foreign Relations Committee, as we did a couple of weeks ago with their counterparts on the House side of Congress.

Let me give you a few top lines of our discussion today, where we are with regards to our actions addressing the crisis, and then take your questions. Burma's long struggle defied authoritarian rule to transition to a democratic society. The terrible Rakhine State crisis has exacerbated longstanding suffering of Rohingya and other populations, and threatens this peaceful transition as do other challenges the elected civilian authority inherited just 16 months ago. Our efforts seek to end the violence, support the displaced and their return home, and address the conditions that sparked this colossal population movement. We also want accountability for atrocities.

As we announced here last night, we have identified new and ongoing actions to hold responsible those who have committed violence, including the following measures, and let me share them with you: suspending travel waivers for military leaders; assessing existing authorities to consider options to target individuals responsible for atrocities; finding that all units and officers involved in operations in northern Rakhine State are ineligible for U.S. assistance programs; rescinding invitations for Burmese security leaders to travel to U.S.-sponsored programs; maintaining a longstanding arms embargo; consulting on accountability options at the United Nations, the Human Rights Council, and other venues; and pressing for access for the UN Fact-Finding Mission—a mission that we helped support the establishment of.

There is also a need to address long-term causes of instability in Rakhine State. We support Burma in implementing the recommendations of the Kofi Annan Rakhine Advisory Commission to take on underdevelopment, lack of services, access to justice, and a citizenship process for all people in Rakhine State.

At the same time, Burma's overall success is very important for the peoples of Burma, for the region, indeed, for U.S. national interests. We will continue to work with the democratically-elected civilian leadership, Burma's diverse populations and other stakeholders inside the country, and the region on this crisis and other daunting challenges in the post-military era of that country.

Today, as I said, we testified before the Senate and several weeks ago before the House. There have been many questions there about how best to describe the appalling treatment of Rohingya. I want to be very clear: We are not shying away from the use of any appropriate terminology. We have a deliberative process to examine facts and a policy to support the pursuit of additional information to make such determinations, thus our support, for example, for the UN Fact-Finding Mission.

In the meantime, as Secretary of State Tillerson said, the violence has been characterized by many as ethnic cleansing. Our Ambassador to the United Nations Haley has said that ...actions appear to be a brutal, sustained campaign to cleanse the country of an ethnic minority.

There is no question in our minds that atrocities have been committed, and we will work with the international community and Burmese stakeholders to pursue all means available to hold accountable those responsible for these acts.

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MR MURPHY: ... Our effort now is to stop the violence and to pursue accountability, so the terminology is really not a factor for us. We know that violence has been committed and acts associated with atrocities have been undertaken, and we are pursuing and encouraging voices in the international community and inside Burma to provide the information necessary to come about with the measures leading to accountability. We view that, I think, as our most important priority.

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Also on October 24, 2017, Ambassador Sison delivered remarks at a UN side-event on atrocities against Rohingya. Ambassador Sison's statement is excerpted below and available at <https://usun.state.gov/remarks/8042>.

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As we are all too well aware, thousands of individuals continue to cross the border from Burma into Bangladesh, as the Under-Secretary-General has just noted. And there are now more than 603,000 individuals who have fled since August 25, the majority of them self-identifying as Rohingya. ... [W]e need to remember that when we discuss the atrocities which have occurred in northern Rakhine State in Burma, we remember that we are talking about real people. Real human beings. Men, women, and children. Real people who deserve to have their dignity and their worth recognized as we all agreed to 72 years ago. Real people who have gone through unimaginable traumas from which it will be difficult for them to recover. Witnessing the killing of children, witnessing or being subjected to rape, torture—their struggle has been, and continues to be, very, very real. It is for those people—and in recognition of their suffering—that we are here today.

We welcome the statements of the Government of Burma in recent weeks, and we sincerely hope those words will transform into real action. It is time to stop all violence in the country and to restore the rule of law, encourage unity and tolerance amongst the country's various ethnic and religious groups, and to work with the international community, including the UN, to find a real resolution to the current crisis.

We again, and unequivocally, condemn all acts of violence in Burma. But no violent act relieves the Burmese security forces of their duty—their duty to restore the rule of law and to ensure the safety and security of all individuals in Burma without discrimination. It is clear that the Burmese security forces continue to fail in this duty in Rakhine State, where there is a continued lack of law and order. There must be accountability for abuses and atrocities, both for those who committed them and those who ordered them.

Yesterday, the U.S. State Department identified new and ongoing actions to pursue accountability for those who have committed violence and abuses, including, among other

measures, suspending travel waivers for military leaders; assessing authorities under the JADE Act to consider economic options available to target individuals associated with atrocities; finding that all units and officers involved in operations in northern Rakhine State are, pursuant to the Leahy Law, ineligible for U.S. assistance programs; rescinding invitations for Burmese security leaders to attend U.S.-sponsored events; maintaining an embargo on military sales; consulting with partners on accountability options at the UN, the Human Rights Council, and at other venues; pressing the Government of Burma to allow access to the UN Fact-Finding Mission; and exploring accountability mechanisms under U.S. law, including Global Magnitsky targeted sanctions.

The Government of Burma should allow immediate, unfettered access for UN agencies and other humanitarian groups to provide aid and assistance to all affected populations in Rakhine State. Allowing full access, as I mentioned, for the UN Fact Finding Mission to all parts of the country to do its important work and allowing the international media unrestricted access to report facts from the ground—this is all vital.

We have publicly recognized—and will continue to recognize—the generosity of Bangladesh as hosts to such a large number of refugees. And we encourage the government of Bangladesh to allow a more extensive role for UNHCR in the country that draws upon UNHCR’s unique mandate and expertise in refugee protection. And we also note the efforts of the government of Indonesia to promote access and encourage de-escalation of violence in Burma.

We welcome State Counselor Aung San Suu Kyi’s commitment that refugees will be able to return home. We encourage the Government of Burma to work closely with UNHCR and other appropriate UN agencies throughout the process. So the Government of Burma must also ensure that conditions on the ground allow for the safe, dignified, and voluntary return of all those who have fled the violence in their country or who are internally displaced. While we welcome increased cooperation between Bangladesh and Burma, we encourage both sides to work with the international community to agree to an appropriate and workable mechanism to govern those returns.

Finally, while our immediate efforts must focus on this humanitarian and human rights crisis, failure to address the long-term causes of instability in Rakhine—deep-rooted discrimination and economic deprivation—will only result in a replay of this tragedy, we fear, in the future. It is thus crucial that we support Burma in implementing the recommendations of the Rakhine Advisory Commission, led by former UN Secretary-General Kofi Annan, to address underdevelopment, shortcomings in services, access to justice, and a citizenship process for all people in Rakhine State.

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On November 22, 2017, Secretary Tillerson issued a statement on efforts to address the crisis in Burma’s Rakhine State. That statement includes the conclusion that the situation in northern Rakhine state constitutes ethnic cleansing against Rohingya. The statement is excerpted below and available in full at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/11/275848.htm>.

* * * *

I visited Naypyitaw, Burma on November 15, where I met separately with State Counsellor Aung San Suu Kyi and the Commander-in-Chief of the Armed Forces, Senior General Min Aung Hlaing. I reaffirmed the United States' strong commitment to Burma's successful democratic transition as the elected government strives to implement reforms, bring peace and reconciliation to the nation, and resolve a devastating crisis in Rakhine State. Our first priority is to relieve the intolerable suffering faced by so many. In response to the dire situation, I announced last week an additional \$47 million in humanitarian assistance for those affected by the Rakhine State crisis, bringing the total amount spent in response to this crisis to more than \$87 million since August of this year.

Burma's response to this crisis is vital to determining the success of its transition to a more democratic society. As I said in Naypyitaw, the key test of any democracy is how it treats its most vulnerable and marginalized populations, such as ... Rohingya and other minority populations. Burma's government and security forces must respect the human rights of all persons within its borders, and hold accountable those who fail to do so.

I reiterate the United States' condemnation of August 25 attacks on security forces by the Arakan Rohingya Salvation Army (ARSA). Yet no provocation can justify the horrendous atrocities that have ensued. These abuses by some among the Burmese military, security forces, and local vigilantes have caused tremendous suffering and forced hundreds of thousands of men, women, and children to flee their homes in Burma to seek refuge in Bangladesh. After a careful and thorough analysis of available facts, it is clear that the situation in northern Rakhine state constitutes ethnic cleansing against Rohingya.

Those responsible for these atrocities must be held accountable. The United States continues to support a credible, independent investigation to further determine all facts on the ground to aid in these processes of accountability. We have supported constructive action on the Rakhine crisis at the UN Security Council and in the UN General Assembly's Third Committee. The United States will also pursue accountability through U.S. law, including possible targeted sanctions.

We support the Burmese government's commitment to create the conditions necessary for all refugees and internally displaced people to return to their homes safely and voluntarily, and welcome recent exchanges between the governments of Burma and Bangladesh on repatriation. Support by Burma's military for these government efforts is crucial. This is a difficult and complex situation. Many stakeholders must work together to ensure progress.

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Also on November 22, 2017, senior State Department officials provided a special briefing on the situation in Burma. The briefing is transcribed at <https://www.state.gov/r/pa/prs/ps/2017/11/275855.htm> and excerpted below.

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SENIOR STATE DEPARTMENT OFFICIAL ONE: ... I wanted to start off here this morning by drawing your attention to the Secretary's statement which was just released this morning regarding his recent trip to Burma and our continued efforts with the international community to address the crisis there in Rakhine State. As you no doubt have already seen, the Secretary notes in his statement his recent visit to Naypyidaw, the capital of Myanmar, on November 15th, where we met separately with both State Counsellor Aung San Suu Kyi and the commander in chief of the armed forces, Senior General Min Aung Hlaing.

The Secretary reaffirmed the United States' strong commitment to Burma's successful democratic transition as the elected government strives to implement reforms there and bring peace and reconciliation to the country, and also to resolve the devastating crisis in Rakhine State. Of course, our first priority is to relieve the intolerable suffering faced by so many, and in response to that situation, the Secretary, while he was in Burma, announced additional humanitarian assistance of \$47 million for those affected by the crisis, bringing our total to \$87 million spent since August of this year.

Burma's response to the crisis, the Secretary has noted, is vital to determining the success of its transition to a more democratic society, and that the key test of any democracy is how it treats its most vulnerable and marginalized populations, such as ...Rohingya and other minority populations. Burma's government and security forces must respect the human rights of all persons within its borders and hold accountable those who fail to do so.

The Secretary reiterated his condemnation of ...the attacks on security forces on August 25th by the Arakan Rohingya Salvation Army, or ARSA, but he noted that no provocation can justify the horrendous atrocities that ensued. The abuses by some among the Burmese military, security forces, and local vigilantes caused tremendous suffering and forced hundreds of thousands, as we know, of men, women, and children to flee their homes in Burma to seek refuge in Bangladesh.

After a careful and thorough analysis of the available facts, the Secretary has noted that it is clear that the situation in northern Rakhine State constitutes ethnic cleansing against Rohingya. He has also noted that those responsible for these atrocities must be held accountable, and that the United States continues to support a credible, independent investigation to further determine all of the facts on the ground to aid the process of accountability. We have supported constructive action on the Rakhine State crisis at the UN Security Council and in the UN General Assembly's Third Committee, and will also pursue accountability through U.S. law, including possible targeted sanctions.

Of course, the Secretary has been clear and consistent in noting our support for the Burmese Government's commitment to create conditions necessary for all the refugees and internally displaced persons to return to their homes safely and voluntarily, and we welcome the recent exchanges between the governments of Burma and Bangladesh on the ability to repatriate these individuals voluntarily.

We note that support by ... Burma's military for the government efforts in this regard is crucial, and that this is a difficult and complex situation that many stakeholders have to work together to address.

And I'll just note further from the Secretary's statement that the efforts by the United States on this crisis have focused first on ending the violence; second on ensuring a path for repatriation for those displaced; third, expanding access for humanitarian assistance and the

media in Rakhine State; seeking accountability for reported atrocities; and supporting longer-term solutions for the root causes of tensions and conflict in Rakhine State.

And I'll just note here that this is a very complex and long-running tragedy that's not the first time that we've faced these kinds of crises with Rohingya in Rakhine State and with other ethnic groups in Rakhine State, although it is certainly the most dramatic and numerous number of refugees that we've seen.

I think, on the repatriation of refugees, we understand that both Burma and Bangladesh are close to reaching an agreement on a process for voluntary repatriations of displaced persons, and we have been noting positive comments from officials of the civilian government in Burma in this regard recently. We also note that support for these processes by Burma's military will be crucial, and that we're committed to working with Burma and others in the region to help the government and its people work through this crisis.

And now I'd like to turn it over to [Senior State Department Official Two] for his additional comments.

SENIOR STATE DEPARTMENT OFFICIAL TWO: Thank you. I'd like to stress just a few points. First of all, the determination and the description included in the press release was done after very careful and thorough analysis at the request of the Secretary. We believe it's a very accurate description of the situation. It underscores the gravity and the urgency of the situation. We continue to urge all the parties to end the cycle of violence and to restore the rule of law, and we want to emphasize the need for remediation, returns, and accountability. Thank you.

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SENIOR STATE DEPARTMENT OFFICIAL TWO: Yes. The term "ethnic cleansing" is not defined in the context of either international law or domestic law. However, it is a descriptive term, and it carries with it, again, the sense of urgency. So it does not require any new obligations, but it does emphasize our concern about the situation and the importance of remediation, and to reverse the ethnic cleansing and make sure people can go home voluntarily and live their lives in dignity.

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SENIOR STATE DEPARTMENT OFFICIAL ONE: ... One thing that we anticipate is that the sort of determination that this ethnic cleansing has occurred will increase pressure on the parties to try to reach an accommodation about repatriation of people who are displaced, and also pressure on the military in Burma and the civilian government to work quickly to respond to events on the ground.

As far as actions by the U.S. Government, I think the determination, it doesn't in any way take away from our continued efforts to pursue outside objective and sort of rigorous investigation of the facts on the ground to find out what happened and to get more information about what's actually happened on the ground, and also to look at accountability for abuses and atrocities that have been perpetrated on the ground, including looking at the possibility of targeted sanctions for those responsible, if we should be able to reach those conclusions.

So I think all of our efforts that were ongoing before this determination are continuing, but the fact of the determination, as [Senior State Department Official Two] mentioned, has highlighted and reinvigorated the attention and the urgency on the issue.

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SENIOR STATE DEPARTMENT OFFICIAL ONE: ... So I think on the issue of sanctions the story of Burma is a long-running and complicated story. And basically, the civilian government has been in power there in this power-sharing arrangement that's uniquely set out in the Burmese constitution for about 18 months. The U.S. Government is very much interested in supporting the civilian government's transition. We believe that the advent of a successful transition to a civilian government will be beneficial to all of the ethnic groups that are involved in long-running conflicts throughout the country, including in Rakhine State, but also in Kachin State and Shan State. There are a lot of displaced persons around Burma. There is the longest-running civil war in modern history going – continuing there, in effect, and the government is engaging in a peace process to try to bring together the various of the 135 different ethnic groups in that country to try to resolve some of these long-running conflicts that are causing a lot of suffering throughout the country.

I think the issue of the broad-based sanctions which the Secretary spoke to I think quite eloquently in his press conference in Naypyidaw, when we were in Burma, ...the broad-based economic sanctions, at the time they were levied, were aimed at bringing pressure on the military junta in Burma to bring about this transition of power which has now occurred. And the key to continuing the success of that transition is to allow the economy to develop, to get a peace process going that can put some of these conflicts behind, in the rearview mirror, and to try to allow the country to move forward ... on peaceful development.

So I think the idea of again levying broad-based economic sanctions is not something that we think is going to be very productive either for getting at accountability or for the broader set of purposes that the U.S. is trying to achieve in Myanmar. So on the issues of other legal processes, I'll defer to [Senior State Department Official Two] on those.

SENIOR STATE DEPARTMENT OFFICIAL TWO: ... unlike the term "ethnic cleansing," the terms "crimes against humanity" and "genocide" are specific crimes under international law and there is very serious legal consequences, and in the end it's really a court that has to decide that, as we've just seen with the verdict against Mladic in Bosnia. So we would need to do a much more—much deeper analysis, much more extensive legal analysis. This determination in no way prejudices any further analysis we're doing, and we will continue to evaluate the situation and analyze the situation. But at this time, there's no determination of crimes against humanity or genocide.

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SENIOR STATE DEPARTMENT OFFICIAL ONE: ... one thing that it's important to remember is that this current crisis was touched off by attacks that were perpetrated on August 25th by the Arakan Rohingya Salvation Army against more than 20 military posts inside of Myanmar, and that the reaction to that, to those attacks by that extremist terrorist group was what touched off the exodus of people from Myanmar. So I don't think people have stood by. I think there's been a lot of efforts by many governments and many organizations to try to stem the

outflow, to help people who are suffering, to work with the Government of Myanmar to try to figure out how to respond to this crisis.

The discussions that we had in Burma reinforced the point as well that the attacks by this Arakan Rohingya Salvation Army on August 25th actually occurred on the exact same day that the report and recommendations from the Kofi Annan commission – which was an international advisory body that was brought in by the Burma Government to try to make recommendations about how to resolve – over the longer term – all of the ethnic tensions, in particular also in Rakhine State, and there are a number of ethnic groups there that have been traditionally repressed and treated badly and have grievances. So I think one of the things that we want to focus on is try to relieve the current crisis, but also make sure that we, in doing so, leave the government in a position for it to be able to get back to the recommendations that were in the Kofi Annan report, which the U.S. Government fully supports.

I think in the meantime, the focus ... has to be on getting humanitarian aid and assistance to the people who are suffering in – both within Burma, because there are a number of displaced people there, but also especially those in Bangladesh in these camps; support the Burma and Bangladeshi governments on their negotiations and processes they're developing to get people to be able to go back, make sure that we can make sure they can return in a secure environment; and then pursue the investigation and the accountability tracks that the Secretary has spoken about so often.

... We already have a number of sanctions in place against the Burmese military with regard to visa sanctions coming from the 2008 JADE Act, so we have a number of sanctions in place already. And we have limits on our engagement stemming from those sanctions' limits on our engagement with the Burmese military, but I think we're looking at additional sanctions targeting individuals responsible for specific acts of violence, which would go beyond the current JADE Act sanctions, and we're looking at those currently.

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SENIOR STATE DEPARTMENT OFFICIAL ONE: ... we certainly feel that the civilian government in Burma has responsibility for working to try to resolve this crisis. Certainly, there's been a lot of discussions with the civilian government about this issue. We were recently in Asia with President Trump at the East Asia Summit and the U.S.-ASEAN Summit, where Aung San Suu Kyi was present, and engaged in conversations with her there as well as did all of the other leaders that were gathered. Most recently there's been a meeting of the foreign ministers of Asia and Europe that was held in Naypyidaw, in Burma, just this week, and again, all of the leaders – foreign ministers of the Asian and European countries were meeting there and had the chance to engage the civilian government – the officials and Aung San Suu Kyi herself – on the crisis.

So I think she's been very much engaged, and her government's been very much engaged in trying to find solutions, working on ways of allowing for humanitarian access without fomenting additional violence and unrest, also working with the Government of Bangladesh to pursue this agreement on repatriation, and I think – I mentioned the unique situation with the power-sharing arrangement there in Burma. I mean, there are a lot of things that the civilian government just frankly doesn't control under the current constitution, and she is going to have to work with the military on those areas such as borders, security, access to certain parts of the country that are in conflict. Those areas are all controlled by the military.

So it's not a situation that is completely under her authority, but certainly, we are counting on her to show leadership and also to work through the civilian government with the military to address the crisis. And I think she has been speaking out. Certainly, the whole effort behind the Kofi Annan commission came from the civilian government and was pushed by them, although it wasn't universally popular inside the country. So I think she has been doing as much as she could to try to, before the crisis, address sort of longer-term problems in Burma through the peace process and the Annan recommendations, but also since the crisis to do what she can to promote a resolution.

I think we need to continue to support her in that and keep pushing the civilian government in Burma and the military, frankly, to do more.

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2. ISIS and Atrocities

On September 21, 2017, U.S. Permanent Representative to the UN Nikki Haley provided the U.S. explanation of vote following adoption of UN Security Council Resolution 2379 on accountability for ISIS atrocities. That statement is excerpted below and available at <https://usun.state.gov/remarks/7988>.

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The idea of seeking justice for victims of genocide, crimes against humanity, and other atrocity crimes had its beginning in the years following World War II. Nothing could replace the lives lost or make families whole again. But by holding perpetrators to account for their crimes, a measure of justice was provided to the victims and the loved ones they left behind.

By acting here today, we, too, cannot restore the lives, the dignity, and the innocence of the victims of crimes committed by the Islamic State. But by taking this important step towards holding ISIS accountable for its many unspeakable crimes, we can achieve justice. And that, in time, will hopefully begin a process of healing.

It may have taken a long time to get here, but today's resolution is a landmark. It is a major first step towards addressing the death, suffering, and injury of the victims of crimes committed by ISIS in Iraq—crimes that include genocide. These victims have been Yazidis, Christians, Shia and Sunni Muslims, and many, many more.

In the long history of human beings committing atrocities against their fellow human beings, the crimes of ISIS stand out—especially the brutality they inflicted on girls and women. Thousands of Yazidi women and girls have been kidnapped by ISIS and then bought and sold like animals. I have met with some of these women. The victims of rape and sexual slavery are understandably reluctant to speak out publicly. But thanks to what we do here today, the world will still hear about their suffering.

The investigative team created by this resolution is part of a comprehensive approach to holding ISIS accountable for its atrocities against the Iraqi people. Working with the Iraqi and other partners, it will expose ISIS' depravity, and provide an indispensable record of the scope and scale of its criminality. With victory over ISIS in Iraq on the horizon, this record will play an important role as Iraqis attempt to reconcile this painful period of their national life. This team

will help to identify victims and perpetrators. It will help bring perpetrators to face the justice they so richly deserve, giving victims their day in court. And in doing so, we hope and pray that the Iraqi people can begin the process of returning to peaceful, normal, everyday lives.

The United States was honored to work alongside our Iraqi and British partners over the course of the past year to make this resolution a reality. We thank them for their dedication of seeing this through.

And while this resolution is about the transnational ISIS threat, we support accountability for all violations of international humanitarian law and human rights violations and abuses.

Above all, we thank the Iraqi government and Prime Minister Abadi for taking this important first step towards demonstrating that justice is never beyond reach, that no victim is voiceless, and that no perpetrator is above the law.

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As discussed in Chapter 6, Secretary Tillerson included, in his August 15, 2017 remarks at the release of the annual report on international religious freedom, the following regarding atrocities by ISIS. See Chapter 6 for the full statement.

To remove any ambiguity from previous statements or reports by the State Department, the crime of genocide requires three elements: specific acts with specific intent to destroy in whole or in part specific people, members of national, ethnic, racial, or religious groups. Specific act, specific intent, specific people.

Application of the law to the facts at hand leads to the conclusion ISIS is clearly responsible for genocide against Yezidis, Christians, and Shia Muslims in areas it controls or has controlled.

ISIS is also responsible for crimes against humanity and ethnic cleansing directed at these same groups, and in some cases against Sunni Muslims, Kurds, and other minorities.

Cross References

International tribunals, **Ch. 3.C.**

Al-Tamimi v. United States, **Ch. 5.A.1, 5.C.1**

Sokolow, **Ch. 5.A.3.**

Women, Peace, and Security, **Ch. 6.B.2.**

Children in Armed Conflict, **Ch. 6.C.2.**

Ukraine, **Ch. 9.B.2.**

Jerusalem, **Ch. 9.B.8.**

Sanctions relating to restoration of peace and security, **Ch. 16.A.9.**

Burma sanctions, **Ch. 16.A.9.b.**

Sokolow, **Chapter 5.A.2.**

Human Rights Council statement on Israel, **Chapter 6.A.3.a.**

Human Rights Council actions on Syria, South Sudan, Burundi, **Chapter 6.A.3.**

Women, peace, and security, **Chapter 6.B.2.b.**

Water, peace, and security, **Chapter 6.B.2.b.**

Criminal accountability of UN officials and experts on missions, **Chapter 7.A.2.**

UN-African Union cooperation, **Chapter 7.A.8.**

Suspension of bilateral channel with Russia for Syria cessation of hostilities, **Chapter 9.A.4.**

Protecting Syrian cultural property, **Chapter 14.B.**

Syria-related sanctions, **Chapter 16.A.2.**

Sanctions, **Chapter 16.A.**

Civilians in armed conflict, **Chapter 18.A.3.a.**

Syria chemical weapons, **Chapter 19.D.1.**

CHAPTER 18

Use of Force

A. GENERAL

1. War Powers Act Report to Congress

On December 11, 2017, the President sent a report to the Speaker of the House and the President of the Senate of the United States regarding deployment of U.S. combat forces, as required by the War Powers Resolution, P.L. 93-148. The communication to Congress is excerpted below and available at <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-2/>.

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MILITARY OPERATIONS IN SUPPORT OF UNITED STATES COUNTER-TERRORISM EFFORTS

In furtherance of counterterrorism efforts, the United States continues to work with partners around the globe, with a particular focus on the U.S. Central and Africa Commands' areas of responsibility. In this context, the United States has deployed United States combat-equipped forces to conduct counterterrorism operations and to advise, assist, and accompany security forces of select foreign partners on counterterrorism operations. Specific information about counterterrorism deployments to select countries is provided below, and a classified annex to this report provides further information.

Military Operations against al-Qa'ida, the Taliban, and Associated Forces and in Support of Related United States Counterterrorism Objectives

Since October 7, 2001, United States Armed Forces, including Special Operations Forces, have conducted counterterrorism combat operations against al-Qa'ida, the Taliban, and associated forces. Since August 2014, these operations have targeted the Islamic State of Iraq

and Syria (ISIS), also known as the Islamic State of Iraq and the Levant (ISIL), which was formerly known as al-Qa'ida in Iraq. In support of these and other overseas operations, the United States has deployed combat equipped forces to several locations in the U.S. Central, European, Africa, Southern, and Pacific Commands' areas of responsibility. Such operations and deployments have been reported previously, consistent with Public Law 107-40, Public Law 107-243, the War Powers Resolution, and other statutes. These ongoing operations, which the United States has carried out with the assistance of numerous international partners, have been successful in significantly degrading ISIS capabilities in Syria and Iraq. If necessary, in response to terrorist threats, I will direct additional measures to protect the citizens and interests of the United States. It is not possible to know at this time the precise scope or duration of the deployments of United States Armed Forces that are or will be necessary to counter terrorist threats to the United States.

Afghanistan. Consistent with the strategy I announced publicly on August 21, 2017, United States forces remain in Afghanistan for the purposes of stopping the reemergence of safe havens that enable terrorists to threaten the United States, supporting the Afghan government and the Afghan military as they confront the Taliban in the field, and creating conditions to support a political process to achieve a lasting peace. United States forces in Afghanistan are training, advising, and assisting Afghan forces; conducting and supporting counterterrorism operations against al-Qa'ida and against ISIS; and taking appropriate measures against those who provide direct support to al-Qa'ida, threaten United States and coalition forces, or threaten the viability of the Afghan government or the ability of the Afghan National Defense and Security Forces to achieve campaign success. The United States remains in an armed conflict, including in Afghanistan and against the Taliban, and active hostilities remain ongoing.

Iraq and Syria. As part of a comprehensive strategy to defeat ISIS, United States Armed Forces are conducting a systematic campaign of airstrikes and other necessary operations against ISIS forces in Iraq and Syria. United States Armed Forces are also conducting airstrikes and other necessary operations against al-Qa'ida in Syria. United States Armed Forces are also deployed to Syria to conduct operations against ISIS with indigenous ground forces. In Iraq, United States Armed Forces are advising and coordinating with Iraqi forces and providing training, equipment, communications support, intelligence support, and other support to select elements of the Iraqi security forces, including Iraqi Kurdish Peshmerga forces. Actions in Iraq are being undertaken in coordination with the Government of Iraq, and in conjunction with coalition partners.

Since the last periodic update report, United States Armed Forces participating in the Defeat-ISIS campaign in Syria have undertaken a limited number of strikes against Syrian government and pro-Syrian government forces. These strikes were lawful measures to counter immediate threats to United States and partner forces engaged in that campaign.

Yemen. A small number of United States military personnel are deployed to Yemen to conduct operations against al-Qa'ida in the Arabian Peninsula (AQAP) and ISIS. The United States military continues to work closely with the Government of Yemen and regional partner forces to dismantle and ultimately eliminate the terrorist threat posed by those groups. Since the last periodic update report, United States forces have conducted a number of airstrikes against AQAP operatives and facilities in Yemen, and supported the United Arab Emirates- and Yemen-led operations to clear AQAP from Shabwah Governorate. In October, United States forces also conducted airstrikes against ISIS targets in Yemen for the first time. United States forces, in a

non-combat role, have also continued to provide logistics and other support to regional forces combatting the Houthi insurgency in Yemen.

Jordan. At the request of the Government of Jordan, approximately 2,300 United States military personnel are deployed to Jordan to support Defeat-ISIS operations, to enhance Jordan's security, and to promote regional stability.

Lebanon. At the request of the Government of Lebanon, approximately 100 United States military personnel are deployed to Lebanon to enhance the government's counterterrorism capabilities and to support the Defeat-ISIS operations of Lebanese security forces.

Turkey. United States forces, including strike and combat support aircraft and associated United States military personnel, remain deployed to Turkey, at the Turkish government's request, to support Defeat-ISIS operations and to enhance Turkey's security.

East Africa Region. In Somalia, United States forces continue to counter the terrorist threat posed by ISIS and al-Shabaab, an associated force of al-Qa'ida. Since the last periodic report, United States forces have conducted a limited number of airstrikes against al-Shabaab as well as ISIS. United States forces also advise, assist, and accompany regional forces, including Somali and African Union Mission in Somalia (AMISOM) forces, during counterterrorism operations. Additional United States forces are deployed to Kenya to support counterterrorism operations in East Africa. United States forces continue to partner with the Government of Djibouti, which has permitted use of Djiboutian territory for basing of United States forces. United States military personnel remain deployed to Djibouti, including for purposes of posturing for counterterrorism and counter-piracy operations in the vicinity of the Horn of Africa and the Arabian Peninsula, and to provide contingency support for embassy security augmentation in East Africa, as required.

Libya. Since the last periodic update report, United States forces have conducted a number of airstrikes against ISIS terrorists and their camps in Libya. These airstrikes were conducted in coordination with Libya's Government of National Accord.

Lake Chad Basin and Sahel Region. United States military personnel in the Lake Chad Basin and Sahel Region continue to conduct airborne intelligence, surveillance, and reconnaissance operations and to provide support to African and European partners conducting counterterrorism operations in the region, including by advising, assisting, and accompanying these partner forces. On October 4, 2017, an element assessed to be part of ISIS attacked United States and Nigerien forces in Niger. The attack resulted in the deaths of four United States service members. Approximately 800 United States military personnel remain deployed to Niger. United States military personnel are also deployed to Cameroon, Chad, and Nigeria to support counterterrorism operations.

Cuba. United States forces continue to conduct humane and secure detention operations for detainees held at Guantánamo Bay, Cuba, under authority provided by the 2001 Authorization for the Use of Military Force (Public Law 107-40), as informed by the law of war. There are 41 such detainees as of the date of this report.

Philippines. United States forces deployed to the Philippines are providing support to the counterterrorism operations of the armed forces of the Philippines.

MILITARY OPERATIONS IN EGYPT

Approximately 400 United States military personnel are assigned to or supporting the United States contingent of the Multinational Force and Observers, which have been present in Egypt since 1981.

United States AND NORTH ATLANTIC TREATY ORGANIZATION OPERATIONS IN KOSOVO

The United States continues to contribute forces to the Kosovo Force (KFOR), led by the North Atlantic Treaty Organization in cooperation with local authorities, bilateral partners, and international institutions, to deter renewed hostilities in Kosovo. Approximately 640 United States military personnel are among KFOR's approximately 4,150 personnel.

* * * *

2. Use of Force Issues Related to Counterterrorism Efforts

a. *Plan to Defeat ISIS*

On January 28, 2017, the President issued Presidential Memorandum-3 on the Plan to Defeat the Islamic State of Iraq and Syria. 82 Fed. Reg. 9125 (Feb. 2, 2017). Excerpts follow from the Presidential Memorandum.

* * * *

The Islamic State of Iraq and Syria, or ISIS, is not the only threat from radical Islamic terrorism that the United States faces, but it is among the most vicious and aggressive. It is also attempting to create its own state, which ISIS claims as a "caliphate." But there can be no accommodation or negotiation with it. For those reasons I am directing my Administration to develop a comprehensive plan to defeat ISIS.

ISIS is responsible for the violent murder of American citizens in the Middle East, including the beheadings of James Foley, Steven Sotloff, and Peter Abdul-Rahman Kassig, as well as the death of Kayla Mueller. In addition, ISIS has inspired attacks in the United States, including the December 2015 attack in San Bernardino, California, and the June 2016 attack in Orlando, Florida. ISIS is complicit in a number of terrorist attacks on our allies in which Americans have been wounded or killed, such as the November 2015 attack in Paris, France, the March 2016 attack in Brussels, Belgium, the July 2016 attack in Nice, France, and the December 2016 attack in Berlin, Germany.

ISIS has engaged in a systematic campaign of persecution and extermination in those territories it enters or controls. If ISIS is left in power, the threat that it poses will only grow. We know it has attempted to develop chemical weapons capability. It continues to radicalize our own citizens, and its attacks against our allies and partners continue to mount. The United States must take decisive action to defeat ISIS.

Sec. 1. Policy. It is the policy of the United States that ISIS be defeated.

Sec. 2. Policy Coordination. Policy coordination, guidance, dispute resolution, and periodic in-progress reviews for the functions and programs described and assigned in this memorandum shall be provided through the interagency process established in National Security Presidential Memorandum-2 of January 28, 2017 (Organization of the National Security Council and the Homeland Security Council), or any successor.

Sec. 3. Plan to Defeat ISIS. (a) *Scope and Timing.*

- (i) Development of a new plan to defeat ISIS (the Plan) shall commence immediately.
- (ii) Within 30 days, a preliminary draft of the Plan to defeat ISIS shall be submitted to the President by the Secretary of Defense.
- (iii) The Plan shall include:
 - (A) a comprehensive strategy and plans for the defeat of ISIS;
 - (B) recommended changes to any United States rules of engagement and other United States policy restrictions that exceed the requirements of international law regarding the use of force against ISIS;
 - (C) public diplomacy, information operations, and cyber strategies to isolate and delegitimize ISIS and its radical Islamist ideology;
 - (D) identification of new coalition partners in the fight against ISIS and policies to empower coalition partners to fight ISIS and its affiliates;
 - (E) mechanisms to cut off or seize ISIS's financial support, including financial transfers, money laundering, oil revenue, human trafficking, sales of looted art and historical artifacts, and other revenue sources; and
 - (F) a detailed strategy to robustly fund the Plan.

(b) *Participants.* The Secretary of Defense shall develop the Plan in collaboration with the Secretary of State, the Secretary of the Treasury, the Secretary of Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, the Assistant to the President for National Security Affairs, and the Assistant to the President for Homeland Security and Counterterrorism.

(c) *Development of the Plan.* Consistent with applicable law, the Participants identified in subsection (b) of this section shall compile all information in the possession of the Federal Government relevant to the defeat of ISIS and its affiliates. All executive departments and agencies shall, to the extent permitted by law, promptly comply with any request of the Participants to provide information in their possession or control pertaining to ISIS. The Participants may seek further information relevant to the Plan from any appropriate source.

* * * *

b. Congressional communications regarding legal basis for counterterrorism operations

On August 2, 2017, Deputy Secretary of State John Sullivan sent a letter to Chairman of the U.S. House of Representatives Committee on Foreign Relations Edward R. Royce regarding the 2001 AUMF. The letter appears below.

* * * *

I am following up on our July 10 conversation regarding your request for the Administration's views on the potential consequences of repealing the Authorization for Use of Military Force (2001 AUMF), Public Law 107-40.

The United States has sufficient authority to prosecute the campaign against al-Qa'ida and associated forces, including against the Islamic State of Iraq and Syria (ISIS). This legal authority includes the 2001 AUMF which authorizes the use of military force against these

groups. Accordingly, the Administration is not seeking revisions to the 2001 AUMF or additional authorizations to use force.

Congress passed the 2001 AUMF shortly after the September 11th attacks. In that joint resolution, Congress authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” Through the 2001 AUMF, Congress gave the President the statutory authority he needed “in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

The 2001 AUMF provides the statutory authority for ongoing U.S. military operations against the following individuals and groups: al-Qa’ida; the Taliban; certain other terrorist or insurgent groups affiliated with al-Qa’ida or the Taliban in Afghanistan; al-Qa’ida in the Arabian Peninsula; al-Shabaab; individuals in Libya who are part of al-Qa’ida; al-Qa’ida in Syria; and ISIS.

The 2001 AUMF also provides statutory authority for the United States to detain those persons who were part of, or substantially supported, Taliban or al-Qa’ida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces. During the past decade, the United States has detained individuals pursuant to the authority of the 2001 AUMF in Afghanistan, in Iraq, temporarily at sea, and at the Guantanamo Bay detention facility. The United States continues to detain 41 individuals at Guantanamo Bay.

In the absence of an appropriate statutory replacement, the repeal of the 2001 AUMF would call into question the domestic law basis for these ongoing U.S. counterterrorism military operations and could impede our counterterrorism efforts, including the campaign to defeat ISIS in Iraq and Syria and the detention of members of al-Qa’ida and the Taliban at the Guantanamo Bay detention facility.

I hope this information is useful. Please do not hesitate to contact me if you or your Committee requires further assistance from the Department of State.

* * * *

Also on August 2, 2017, Charles Faulkner of the State Department’s Bureau of Legislative Affairs sent a letter to Chairman of the Senate Committee on Foreign Relations Bob Corker responding to an inquiry about the legal basis for the use of force in U.S. military actions in Syria in May and June 2017. The body of that letter appears below.

* * * *

The 2001 AUMF also provides authority to use force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS to the extent such use of force is a necessary and appropriate measure in support of counter-ISIS operations. As Secretary Tillerson indicated in his testimony before the Committee on June 13, 2017, our purpose and reason for being in Syria

are unchanged: defeating ISIS. The strikes taken by the United States in May and June 2017 against the Syrian Government and pro-Syrian-Government forces were limited and lawful measures to counter immediate threats to U.S. or partner forces engaged in that campaign. The United States does not seek to fight the Syrian Government or pro-Syrian-Government forces. However, the United States will not hesitate to use necessary and proportionate force to defend U.S., Coalition, or partner forces engaged in the campaign against ISIS.

As a matter of international law, the United States is using force in Syria against al-Qa'ida and associated forces, including ISIS, and is providing support to Syrian partners fighting ISIS, such as the Syrian Democratic Forces, in the collective self-defense of Iraq (and other States) and in U.S. national self-defense.

Upon commencing airstrikes against ISIS in Syria in September 2014, the United States submitted a letter to the U.N. Security Council consistent with Article 51 of the U.N. Charter explaining the international legal basis for its use of force. As the letter explained, Iraq has made clear that it faces serious threats of continuing armed attacks from ISIS, operating from safe havens in Syria; the Syrian Government has shown it cannot, or will not, confront these safe havens. The Government of Iraq has requested the United States lead international efforts to strike ISIS sites and strongholds inside Syria to end armed attacks on Iraq, to protect Iraqi citizens, and to enable Iraq to control its borders. Moreover, ISIS threatens Iraq, U.S. partners in the region, and the United States. Therefore, consistent with the inherent right of individual and collective self-defense, the United States initiated necessary and proportionate actions in Syria against ISIS in 2014, and those actions continue to the present day. Such necessary and proportionate measures include the use of force to defend U.S., Coalition, and U.S.-supported partner forces from threats by Syrian Government and pro-Syrian Government forces.

* * * *

On September 5, 2017, Secretary of Defense James Mattis and Secretary of State Rex Tillerson sent a letter to U.S. Senate Majority Leader Mitch McConnell regarding the legal authority under the AUMF to pursue the Taliban, al-Qa'ida, and associated forces. The text of the letter appears below.

* * * *

As the Senate resumes its work on the Fiscal Year 2018 National Defense Authorization Act, we write to reaffirm the Administration's position that the United States has sufficient legal authority to prosecute the campaign against the Taliban, al-Qa'ida, and associated forces, including against the Islamic State of Iraq and Syria (ISIS). The legal authority for these operations includes the 2001 Authorization for the Use of Military Force (2001 AUMF), which authorizes the use of "all necessary and appropriate force" against these groups, including, as necessary, to implement the President's recently announced South Asia Strategy. The 2002 Authorization for the Use of Military Force (2002 AUMF) provides the President with the authority "to defend the national security of the United States against the continuing threat posed by Iraq," which the previous Administration invoked at points "to address the threat posed by ISIL's operations in Iraq."

The AUMFs also provide statutory authority for the United States to detain persons who were part of or substantially supporting the groups covered by the AUMFs. The United States continues to detain 41 individuals at Guantanamo Bay.

The Administration therefore opposes the adoption of any measure to revise or repeal the 2001 AUMF and 2002 AUMF. In the absence of an appropriate statutory replacement, changes to, or repeal of, the 2001 AUMF and 2002 AUMF could call into question the domestic legal basis for ongoing U.S. military and counterterrorism operations, including operations to defeat the Taliban, al-Qa'ida, and associated forces, including those to defeat ISIS, and for the detention of captured combatants at Guantanamo Bay. However, we look forward to working with the Congress to develop other appropriate expressions of national unity.

Specifically, the Administration opposes S.J. Res. 43, "To authorize the use of United States Armed Forces against al-Qaeda, the Taliban, and the Islamic State of Iraq and Syria, and associated persons or forces, that are engaged in hostilities against the United States, the Armed Forces, or its other personnel." For the reasons highlighted below, S.J. Res. 43 would undermine the President's authority to use force against the Taliban, al-Qa'ida, and associated forces, including against ISIS, which threaten U.S. national security.

Among other key concerns, the legislation would arbitrarily terminate the authorization five years after the date of enactment. This is inconsistent with the conditions-based approach in the President's South Asia Strategy. Such a provision could also unintentionally embolden our enemies with the recognizable goal of outlasting us. In addition, S.J. Res. 43 includes a definition of "associated persons or forces" which is inconsistent with the standard applied by the Executive Branch and which could result in unnecessary uncertainty regarding its scope. Further, the joint resolution would create a cumbersome Congressional review and disapproval process for the use of force against new associated forces or in new countries.

In sum, the Administration affirms that the United States has sufficient legal authority to prosecute the campaign against the Taliban, al-Qa'ida, and associated forces, including against ISIS, and S.J. Res. 43 would, in our view, undermine this campaign. We look forward to working with Congress on reviewing and analyzing any further proposals.

* * * *

On October 30, 2017, Secretary Tillerson testified before the Senate Foreign Relations Committee on the administration's perspective on the AUMF in its counterterrorism efforts. The Secretary's opening remarks are excerpted below and available at

<https://www.state.gov/secretary/20172018tillerson/remarks/2017/10/275196.htm>.

* * * *

Thank you, Mr. Chairman, Chairman Corker, Ranking Member Cardin, distinguished members. I appreciate the opportunity to speak to you today. I know the Senate's desire to understand the United States' legal basis for military action is grounded in your constitutional role related to foreign policy and national security matters. I understand your sense of obligation to the American people well in this regard.

In the 2001 Authorization for Use of Military Force, or AUMF, Congress authorized the President to “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.” Congress granted the President this statutory authority “in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”

The 2001 AUMF provides statutory authority for ongoing U.S. military operations against al-Qaida, the Taliban, and associated forces, including against the Islamic State in Iraq and Syria, or ISIS.

The administration relies on the 2001 AUMF as a domestic legal authority for our own military actions against these entities, as well as the military actions we take in conjunction with our partners in the Coalition to Defeat ISIS.

The 2001 AUMF provides a domestic legal basis for our detention operations at Guantanamo Bay, where the United States currently detains members of al-Qaida, the Taliban, and associated forces.

The 2001 AUMF also authorizes the use of necessary and appropriate force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS in Iraq and Syria. In Syria, the efforts of the U.S.-led Coalition are aimed at the defeat of ISIS; the United States does not seek to fight the Syrian Government or pro-Syrian-Government forces. However, the United States will not hesitate to use necessary and proportionate force to defend U.S., Coalition, or partner forces engaged in the campaign against ISIS.

The President’s authority to use force against ISIS is further reinforced by the Authorization for Use of Military Force Against Iraq, or, in more plain terms, the “2002 AUMF.”

In addition to authorities granted to the President by statute, the President has the power under Article II of the Constitution to use military force in certain circumstances to advance important U.S. national interests, including to defend the United States against terrorist attacks. As an example, President Reagan relied on his authority as Commander-in-Chief in 1986 when he ordered airstrikes against terrorist facilities and military installations in Libya following a terrorist attack by Libya in West Berlin which killed and wounded both civilians and U.S. military personnel.

The United States has the legal authority to prosecute campaigns against the Taliban, al-Qaida, and associated forces, including ISIS, and is not currently seeking any new or additional congressional authorization for the use of force. The 2001 AUMF remains a cornerstone for ongoing U.S. military operations and continues to provide legal authority relied upon to defeat this threat.

However, should Congress decide to write new AUMF legislation, I submit to you several recommendations that the administration would consider necessary to a new AUMF:

First, new AUMF authorities must be in place prior to or simultaneous with the repeal of old ones. Failure to do so could cause operational paralysis and confusion in our military operations. Diplomatically speaking, it could cause our allies in the Global Coalition to question our commitment to defeating ISIS. And potential repeal of the 2001 AUMF without an immediate and appropriate replacement could raise question about the domestic legal basis for the United States’ full range of military activities against the Taliban, al-Qaida, and associated forces, including against ISIS, as well as our detention operations at Guantanamo Bay.

Second, any new authorization should not be time-constrained. Legislation which would arbitrarily terminate the authorization to use force would be inconsistent with a conditions-based approach and could unintentionally embolden our enemies with the goal of outlasting us. Any oversight mechanism in a new AUMF also would have to allow the United States the freedom to quickly move against our enemies without being constrained by a feedback loop.

Third, a new AUMF must not be geographically restricted. As is the case under the current AUMF, the administration would need to retain the statutory authority to use military force against an enemy that does not respect or limit itself based on geographic boundaries. As ISIS's fraudulent caliphate in Iraq and Syria has crumbled, it has tried to gain footholds in new locations.

As was discussed with the Senate during a closed defeat-ISIS briefing in July, the United States has a limited military presence in the Lake Chad Basin to support partners, including France, in their counterterrorism operations in the region. This information has also been conveyed to you in multiple periodic reports submitted to Congress consistent with the War Power Resolution. The collapse of ISIS's so-called caliphate in Iraq and Syria means it will attempt to burrow into new countries and find new safe havens. Our legal authorities for heading off a transnational threat like ISIS cannot be constrained by geographic boundaries. Otherwise, ISIS may re-establish itself and gain strength in vulnerable spaces.

The United States must retain the proper legal authorities to ensure that nothing restricts or delays our ability to respond effectively and rapidly to terrorist threats to the United States. Secretary Mattis and I, along with the rest of the administration, are completely aligned on this issue. We fully recognize the need for transparency with you as we respond to what will be a dynamic regional and global issue. We will ... continue to regularly update Congress and to make sure you and the American people understand our foreign policy goals, military operations, and national security objectives.

* * * *

3. Bilateral and Multilateral Agreements and Arrangements

a. Montenegro Joins NATO

On March 28, 2017, the Senate provided its advice and consent to ratification of the protocol to the North Atlantic Treaty allowing Montenegro to join NATO. See <https://www.congress.gov/treaty-document/114th-congress/12/resolution-text>. The President of the United States signed the U.S. instrument of ratification of the protocol for Montenegro's accession to NATO on April 11, 2017. On June 5, 2017, Under Secretary of State Thomas Shannon accepted Montenegro's instrument of accession to the North Atlantic Treaty. See State Department notice to the press, available at <https://www.state.gov/r/pa/prs/ps/2017/06/271540.htm>. Montenegro's prime minister, Dusko Markovic, deposited Montenegro's instrument of accession and Montenegro became the 29th NATO ally. Under Secretary Shannon's remarks at the ceremony for Montenegro's accession to NATO are available at <https://www.state.gov/p/us/rm/2017/271590.htm> and excerpted below.

* * * *

Over decades, the promise of NATO membership and broader Euro-Atlantic integration has advanced our security, our democratic values, and our respect for the rule of law. It has served as an incentive for nations to pursue difficult reforms. This policy has yielded clear results, and that is why NATO allies unanimously agreed to welcome Montenegro into the alliance.

Montenegro has taken NATO's guidance and mentorship to heart and implemented meaningful reforms including force structure transformation and modernization and upgrading operational capabilities. We greatly appreciate that Montenegro takes seriously the financial commitment it will undertake with NATO membership.

On May 25, NATO leaders met in Brussels and agreed that allies should develop national plans by the end of the year for implementing the 2014 Wales pledge to aim to reach 2 percent of GDP towards defense spending and 20 percent of defense budgets on necessary capabilities by 2024. Montenegro is on track to allocate 1.72 percent of its GDP in 2017, and its long-term defense development plan envisions reaching 2 percent by 2024.

Montenegro has been a reliable partner and force provider to NATO, the EU, and UN missions. It has contributed to NATO's operations in Afghanistan for six years and contributed over \$1 million in the last two years towards the sustainability of Afghan security forces. We also appreciate that Montenegro has been an active contributor to the 67-member defeat ISIS coalition. All NATO allies are members of the coalition, and on May 25, NATO leaders agreed that NATO would formally join the coalition and that NATO would do more in the fight against international terrorism. Montenegro should be commended in particular for asserting its sovereign right to choose its own alliances even in the face of concerted foreign pressure. As President Trump said in his February 28th remarks to a joint session of Congress, "America respects the right of all nations to chart their own path."

Montenegro's accession sends a strong message of strength to the region and makes clear to our allies that the United States remains as committed as ever to the principle of collective defense as enshrined in Article 5 of the Washington Treaty. In a strong demonstration of U.S. support for Montenegro's membership, the U.S. Senate voted overwhelmingly, 97-2, on March 28 to ratify Montenegro's accession protocol.

NATO's strength is based on not only on its military might, but also on our allies' shared commitment to the fundamental values enshrined in the Washington Treaty, democracy, individual liberty, and the rule of law. Montenegro's accession also affirms to other aspiring members that NATO's doors remain open to those countries willing and able to make the reforms necessary to meet NATO's high standards, and to accept the risks and responsibilities as well as the benefits of membership. Montenegro's accession is an important stepping stone toward our vision of a Europe whole, free, and at peace.

* * * *

b. Cabo Verde SOFA

On September 25, 2017, delegations from the governments of the United States and the Republic of Cabo Verde met in Washington, D.C. and concluded a new Status of Forces Agreement ("SOFA"). See September 25, 2017 media note, available at

<https://www.state.gov/r/pa/prs/ps/2017/09/274414.htm>. The media note highlights the SOFA as follows:

This new Status of Forces Agreement illustrates the enduring strength of the U.S.-Cabo Verde security partnership in a strategically important region of West Africa. The agreement memorializes many existing aspects of our strong defense ties which have allowed us to work closely together over the years to address a wide range of challenges, such as maritime security, combatting illicit trafficking, and providing humanitarian assistance in the region.

c. Agreement with Georgia

On May 9, 2017, the United States and Georgia signed a General Security of Information Agreement (“GSOIA”). See State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/05/270754.htm>. Secretary Tillerson signed on behalf of the United States and Prime Minister Giorgi Kvirikashvili signed on behalf of Georgia. The media note describes the significance of the agreement:

The agreement represents a major milestone in security cooperation between the United States and Georgia. The GSOIA establishes a legal foundation for bilateral intelligence sharing and will strengthen counterterrorism cooperation between the United States and Georgia. This agreement will also enhance the Georgian military’s interoperability with the armed services of NATO member states. The GSOIA supports Georgia’s efforts to transform its military and paves the way for future security agreements between the United States and Georgia.

4. International Humanitarian Law

a. *Civilians in Armed Conflict*

See Chapter 6.A.2.b for U.S. comments on the applicability of the International Covenant on Civil and Political Rights (“ICCPR”) in situations of armed conflict. See also Chapter 6.C.2 on children in armed conflict. And see Chapter 6.I for U.S. submissions to the Committee Against Torture on the Draft Revised General Comment on the implementation of Article 3 of the Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment. And see Chapter 6.M.2 on protecting human rights while countering terrorism.

b. *Applicability of international law to conflicts in cyberspace*

On June 23, 2017, U.S. Deputy Coordinator for Cyber Issues Michele G. Markoff delivered the explanation of position for the United States at the conclusion of the 2016-2017 UN Group of Governmental Experts (“GGE”) on developments in the field

of information and telecommunications in the context of international security. The U.S. explanation of position is excerpted below and available at <https://www.state.gov/s/cyberissues/releasesandremarks/272175.htm>.

* * * *

The UN GGE has had an honorable foundation since 2004. I'm sorry that, despite the efforts of the chair to facilitate the draft and the contributions of experts in the search for consensus, I believe the report falls short of our mandate and doesn't meet the standard that the previous GGEs have set for us.

Throughout the 2016-2017 GGE, I have sought clear and direct statements on how certain international law applies to States' use of [information and communication technologies, or] ICTs, including international humanitarian law, international law governing States' exercise of their inherent right of self-defense, and the law of State responsibility, including countermeasures. I sought such statements in the interests of international peace and security, based on my strong conviction that the framework of international law provides States with binding standards of behavior that can help reduce the risk of conflict by creating stable expectations of how States may and may not respond to cyber incidents they face. The final draft of the report insufficiently addresses these issues. I believe it would be a troubling and potentially destabilizing signal for this GGE to release a report that does not take a clear position on the applicability of these bodies of international law to States' use of ICTs, much less fulfill the mandate given to this Group by the UN General Assembly to study *how* international legal rules and principles apply to the use of ICTs.

Despite years of discussion and study, some participants continue to contend that it is premature to make such a determination and, in fact, seem to want to walk back progress made in previous GGE reports. I am coming to the unfortunate conclusion that those who are unwilling to affirm the applicability of these international legal rules and principles believe their States are free to act in or through cyberspace to achieve their political ends with no limits or constraints on their actions. That is a dangerous and unsupportable view, and it is one that I unequivocally reject.

During this GGE, I heard repeated assertions on the part of some participants that a discussion of certain bodies of international law, including the *jus ad bellum*, international humanitarian law, and the law of State responsibility, would be incompatible with the messages the Group should be sending regarding the peaceful settlement of disputes and conflict prevention. That is a false dichotomy that does not withstand scrutiny. A report that discusses the peaceful settlement of disputes and related concepts but omits a discussion of the lawful options States have to respond to malicious cyber activity they face would not only fail to deter States from potentially destabilizing activity, but also fail to send a stabilizing message to the broader community of States that their responses to such malicious cyber activity are constrained by international law.

I approached this GGE with optimism and have been encouraged by the productive and serious nature of much of the negotiations. It is unfortunate that the reluctance of a few participants to seriously engage on the mandate on international legal issues has prevented the Group from reaching consensus on a report that would further the goal of common

understandings among UN Member States on these important issues. This is particularly disappointing given the work this Group has done in this session to reach common understandings on the implementation of stabilizing measures, including voluntary, non-binding norms of responsible State behavior in cyberspace and confidence-building measures. But our work has been in vain, despite extraordinary efforts from the chair, and I look forward to continuing to work with others on these efforts that are so important to international peace and security. I call on all member states to take this seriously in the future and focus on international law.

* * * *

On October 23, 2017, Ms. Rachel Hicks delivered the U.S. statement at a UN First Committee thematic discussion on other disarmament measures and international security. The portion of her remarks addressing security of cyberspace is excerpted below and available at <https://www.state.gov/t/avc/rls/275061.htm>.

* * * *

It is a fundamental goal of the United States to create a climate in which all States can enjoy the benefits of cyberspace; all have incentives to cooperate and avoid conflict; and all have good reason not to disrupt or attack one another—a concept we call international cyber stability. We have sought to achieve this goal by nurturing a broad consensus on what constitutes responsible State behavior in cyberspace.

The United Nations Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security has served as a productive and groundbreaking expert-level venue to advance international stability in cyberspace. The consensus recommendations of the three UN GGE reports (2010, 2013, and 2015) have included affirmation of the applicability of existing international law to States' activities in cyberspace, support for certain voluntary norms of responsible State behavior in peacetime, and the implementation of practical CBMs. In addition, these three landmark and successful GGE reports have demonstrated the value of consensus-driven, expert-level negotiation on this topic within the UN. The failure to find consensus during the most recent round of GGE discussions demonstrates that there are challenging issues that we still need to confront. However, this inability to reach consensus does not make the existing GGE recommendations of the previous reports any less valid or important. We look forward to future discussions where we can focus on the important issues, particularly on those issues where we were unable to find consensus during the most recent GGE.

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B. CONVENTIONAL WEAPONS

1. U.S. Response to Stockholm International Peace Research Institute

On September 1, 2017, the U.S. Department of Defense responded to a questionnaire from the Stockholm International Peace Research Institute (“SIPRI”) on the practice of the United States in the review of the legality of weapons, often referred to as the Article 36 review process (referring to Article 36 of the 1977 Additional Protocol I to the 1949 Geneva Conventions). Excerpts follow from the DoD response (with some footnotes omitted).

* * * *

1. When and how was the review mechanism established ...?

As a matter of U.S. Department of Defense (DoD) policy, the intended procurement or acquisition of DoD weapons and weapon systems is reviewed for consistency with all applicable U.S. domestic law and the international legal obligations of the United States, including arms control obligations and the law of war.¹ DoD policy establishes a requirement for such reviews to be conducted by an authorized attorney, but DoD policy does not establish a particular formal procedure through which all of the reviews must be conducted.²

The regulations of particular DoD components, such as the Department of the Army, the Department of the Navy, and the Department of the Air Force, that implement the DoD policy requirement in each component’s respective area of responsibility establish procedures with varying degrees of specificity.³ These procedures are supplemented by the normal procedures of

¹ See DoD Directive 5000.01, *The Defense Acquisition System*, encl. 1, ¶E1.1.15 (May 12, 2003, certified current as of Nov. 20, 2007) (“The acquisition and procurement of DoD weapons and weapon systems shall be consistent with all applicable domestic law and treaties and international agreements (for arms control agreements, see DoD Directive 2060.1 (Reference (m)[)], customary international law, and the law of armed conflict (also known as the laws and customs of war).”); see also DoD Directive 3000.03E, *DoD Executive Agent for Non-Lethal Weapons (NLW), and NLW Policy*, ¶4 (Apr. 25, 2013) (“The GC, DoD ensures the review of the legality of NLW as provided in DoDDs 5145.01, 5000.01, and 2311.01E (References (g), (h), and (i)).”); encl. 2, ¶11 (“The Secretaries of the Military Departments and the Commander, USSOCOM, through the CJCS: . . . [r]equire, as appropriate, that a legal review of the acquisition of all NLW is conducted in accordance with Reference (h) and an arms control compliance review is completed in accordance with DoDD 2060.1 (Reference (l)).”); encl. 2, ¶13 (“In his or her capacity as the DoD EA for NLW, the CMC: . . . [e]nsures a legal review of the acquisition of all NLW is conducted in accordance with Reference (h) and an arms control compliance review is completed in accordance with Reference (l).”).

² See DoD Directive 5000.01, *The Defense Acquisition System*, encl. 1, ¶E1.1.15 (May 12, 2003, certified current as of Nov. 20, 2007) (“An attorney authorized to conduct such legal reviews in the Department shall conduct the legal review of the intended acquisition of weapons or weapons systems.”).

³ See, e.g., Army Regulation 27-53, *Review of Legality of Weapons Under International Law*, ¶1 (Jan. 1, 1979) (“This regulation – . . . b. Prescribes procedures and assigns responsibilities for submission of weapon or weapon systems to The Judge Advocate General (TJAG) for legal review under international law.”); Secretary of the Navy Instruction 5000.2E, *Department of the Navy Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and Development System*, ¶1 (Sept. 1, 2011) (“Purpose a. To issue mandatory procedures for Department of the Navy (DON) implementation of references (a), (b), (c), and (d) for major and non- major defense acquisition programs

the legal office of the attorney authorized to conduct the review, as well as the attorney's professional discretion. Thus, U.S. practice and procedures relating to the review of the legality of weapons are not conducted through a single, formal "review mechanism" as seems to be contemplated by this question and some of the questions that follow.

DoD policy does not establish a specific requirement to review the lawfulness of new "methods of warfare" that are studied, developed, or acquired. In practice, legal advice regarding new methods of warfare is given where appropriate. For example, an attorney reviewing the legality of the acquisition of a weapon would often review the legality of any new method of warfare that may be suggested for the use of that weapon.

Similarly, DoD policy establishes a responsibility for the heads of DoD components to make qualified legal advisers at all levels of command available to provide advice about law of war compliance during the planning and execution of military exercises and operations.⁴ Also, certain senior operational commanders are required as a matter of DoD policy to ensure that all plans, policies, directives, and rules of engagement issued by them and their subordinate commands and components are reviewed by legal advisers to ensure their consistency with the law of war and DoD policy requirements related to the law of war's implementation.⁵

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3. Who is responsible for carrying out the review? (special committee, an individual reviewer?)

Pursuant to DoD policy, as reflected in DoD Directive 5000.01, an attorney authorized to conduct such legal reviews in the Department is to conduct the legal review of the intended acquisition of weapons or weapon systems.

In general, the Heads of DoD Components that acquire weapons or weapon systems (e.g., the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force) are required to ensure that DoD policy is implemented, including the requirement related to the legal review of the intended acquisition of weapons or weapon systems. The Heads of DoD Components may specify additional or more exacting requirements, consistent with DoD policy.

Within DoD, the legal review of weapons is one aspect of a much larger process of acquiring weapons. Rather than leading the acquisition process or directing other departments, sectors, and experts involved in the acquisition process, lawyers support the larger acquisition

and major and non-major information technology (IT) acquisition programs."); Air Force Instruction 51-402, *Legal Reviews of Weapons and Cyber Capabilities*, page 1 (Jul. 27, 2011) ("[This Instruction] prescribes guidance and procedures for the review of Air Force weapons and cyber capabilities to ensure legality under domestic and international law including the Law of Armed Conflict (LOAC).").

⁴ See DoD Directive 2311.01E, *DoD Law of War Program*, ¶5.7 (May 9, 2006, incorporating change 1, Nov. 15, 2010, certified current as of Feb. 22, 2011) ("The Heads of the DoD Components shall: . . . 5.7.3. Make qualified legal advisers at all levels of command available to provide advice about law of war compliance during planning and execution of exercises and operations; and institute and implement programs that comply with the reporting requirements established in section 6.").

⁵ See DoD Directive 2311.01E, *DoD Law of War Program*, ¶5.11 (May 9, 2006, incorporating change 1, Nov. 15, 2010, certified current as of Feb. 22, 2011) ("The Commanders of the Combatant Commands shall: . . . 5.11.8. Ensure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.").

process by helping ensure that the acquisition is consistent with U.S. and applicable international law.

* * * *

6. How does the review mechanism reach decisions?

DoD Directive 5000.01 requires that the acquisition of DoD weapons and weapon systems be consistent with all applicable domestic law and treaties and international agreements as well as with customary international law and the law of war. Past DoD directives and instructions also reflected this requirement. DoD Directive 2060.1 also requires that all DoD activities be fully compliant with arms control agreements of the United States.

For the Department of Defense, the initial focus of a legal review of the acquisition or procurement of a weapon is often on whether the weapon is illegal *per se*. A weapon may be illegal *per se* if a treaty to which the United States is a party or customary international law has prohibited its use in all circumstances.³³ For example, under Protocol (IV) on Blinding Laser Weapons, Annexed 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), Oct. 13, 1995, the use of “blinding laser” weapons, *i.e.*, lasers specifically designed to cause permanent blindness to unenhanced vision, is prohibited, regardless of how they are used.³⁴

Most weapons, however, are not illegal *per se*. That is, their use may be lawful in some circumstances, although unlawful in other circumstances, such as if the weapons are used to attack combatants placed *hors de combat*. Law of war issues related to targeting, however, generally are not determinative of the lawfulness of a weapon. For example, the issue of whether a weapon would be used consistent with the requirement that attacks may only be directed against military objectives might only be capable of determination when presented with the facts of a particular military operation. That said, weapons that are inherently indiscriminate are prohibited. In addition, certain weapons, such as mines, are subject to specific rules on their use in order to reduce the risk of harm to the civilian population.

In general, three questions should be considered when reviewing the acquisition of a weapon for consistency with U.S. law of war obligations: (1) whether the weapon’s intended use is calculated to cause superfluous injury; (2) whether the weapon is inherently indiscriminate; and (3) whether the weapon falls within a class of weapons that has been specifically prohibited. If, after considering these three questions, the weapon is not prohibited, the review should also consider whether there are legal restrictions on the weapon’s use that are specific to that weapon. Please refer to Chapter Six of the DoD Law of War Manual for a detailed discussion of these three questions and other rules related to weapons.

7. What kind of comments and recommendations is the weapon review authority empowered to make?

³³ DoD Law of War Manual, § 6.1.1 (Legality of the Weapon Itself (Per Se) Distinguished From the Legality of the Use of the Weapons) (June 2015, Updated Dec. 2016) (“A weapon may be illegal *per se* if a treaty to which the United States is a Party or customary international law has prohibited its use in all circumstances.”).

³⁴ DoD Law of War Manual, § 6.1.1 (Legality of the Weapon Itself (Per Se) Distinguished From the Legality of the Use of the Weapons) (June 2015, Updated Dec. 2016) (“For example, the use of ‘blinding laser’ weapons is prohibited, regardless of how they are used.”).

As noted above, an attorney authorized to do so provides his or her legal opinion as to whether the acquisition of the particular weapon is consistent with international law.

If it is determined during a legal review that the weapon is not prohibited, the attorney authorized to conduct the review should also consider whether there are legal restrictions on the weapon's use that are specific to that type of weapon. If any specific restrictions apply, then the weapon's intended concept of employment should be reviewed for consistency with those restrictions. The advice that is offered as part of the review of the weapon could be useful because, when authorizing or using such weapon, the responsible commander and weapon system operator is required to use such a weapon consistent with any applicable prohibitions and restrictions in the law of war.

The attorney who reviewed the legality of the weapon also may find it appropriate to advise whether other measures should be taken that would assist in ensuring compliance with law of war obligations related to the type of weapon being acquired or procured. For example, it may be appropriate to advise on the need for training programs and other practical measures, such as promulgating doctrine or rules of engagement related to the type of weapon.

* * * *

Does customary international law require the review of the legality of weapons, means, and methods of warfare?

The United States views the review of the legality of weapons, means, and methods of warfare as a best practice for the implementation of customary and treaty law relating to weapons, means, and methods of warfare, but does not consider customary law to require these reviews as such.

In our view, there is insufficient State practice and *opinio juris* to conclude that there exists, under customary law, an obligation to review the legality of weapons for consistency with customary law. First, the provision in the 1977 Additional Protocol I to the 1949 Geneva Conventions relating to the review of the legality of new weapons was a new provision at the time of its adoption. One scholar has observed that, even including States Parties to the 1977 Additional Protocol I, "relatively few states are believed to have systems for the legal review of weapons."¹⁶³ Furthermore, a 2006 ICRC study states that only Australia, Belgium, the Netherlands, Norway, Sweden, the United States, France, the United Kingdom, and Germany are known to have instituted processes for the legal review of weapons.¹⁶⁴ In our view, the limited State practice of which we are aware does not constitute the general and consistent practice required for the formation of customary law, even assuming that such practice was done out of a sense of legal obligation.

Although legal reviews are not required as such under customary international law, there are customary international law rules relating to weapons. The DoD Law of War Manual discusses a number of customary international law rules relating to weapons. For example, the prohibition on weapons calculated to cause superfluous injury and the prohibition on inherently indiscriminate weapons are described as based in customary international law. Similarly, the DoD Law of War Manual notes that the United States has determined that the prohibition on the

¹⁶³ WILLIAM H. BOOTHBY, *WEAPONS AND THE LAW OF ARMED CONFLICT* 341 (2009).

¹⁶⁴ International Committee of the Red Cross, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, page 5, fn. 8 (Jan. 2006).

use in war of asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices is part of customary international law.

In our view, conducting a legal review of a weapon, or a means or method of warfare, is a best practice for the implementation of substantive legal rules (whether treaty or customary), but a State (or non-State armed group) does not violate customary international law by failing to conduct such a review.

Is information about your State's process of reviewing the legality of weapons public?

DoD and its components have issued a number of publicly available directives, instructions, and manuals relating to the legal review of the acquisition of weapons and weapon systems. These include:

- DoD Directive 5000.01, *The Defense Acquisition System*, (May 12, 2003, certified current as of Nov. 20, 2007);
- DoD Directive 3000.03E, *DoD Executive Agent for Non-Lethal Weapons (NLW), and NLW Policy*, (Apr. 25, 2013);
- DoD Directive 3000.09, *Autonomy in Weapon Systems*, (Nov. 21, 2012);
- Department of Defense Law of War Manual, § 6.2 (DoD Policy of Reviewing the Legality of Weapons) (June 2015, updated Dec. 2016);
- Army Regulation 27-53, *Review of Legality of Weapons Under International Law*, (Feb. 1, 1979);
- Secretary of the Navy Instruction 5000.2E, *Department of the Navy Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and Development System*, (Sep. 1, 2011); and
- Air Force Instruction 51-402, *Legal Reviews of Weapons and Cyber Capabilities*, (July 27, 2011).

As noted in our introduction to this questionnaire, we intend to make public the information we have provided in this questionnaire.

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2. Convention on Certain Conventional Weapons

On November 10, 2017, the United States submitted a working paper to the Group of Governmental Experts on lethal autonomous weapons systems ("LAWS"), established by 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 (the "Convention on Certain Conventional Weapons"). U.N. Doc. No. CCW/GGE.1/2017/WP.6. Excerpts follow from the U.S. submission (omitting some parts consistent with the response to the SIPRI questionnaire, excerpted *supra*).

* * * *

1. The United States acknowledges both the challenges and opportunities presented by emerging technologies in the area of lethal autonomous weapons systems (LAWS). As an overall matter, we believe that the law of war (also called international humanitarian law) provides a robust and appropriate framework for the regulation of all weapons in relation to armed conflict.

2. This working paper seeks to contribute to the meetings of the Group of Governmental Experts (GGE) on Lethal Autonomous Weapons Systems (LAWS) in Geneva between November 13-17, 2017, by providing the views of the United States on: (i) the legal review of weapons with autonomous functions in acquisition or development; (ii) the potential of weapon systems with autonomous functions to improve the implementation of law of war principles in military operations; and (iii) legal accountability regarding weapons with autonomous functions.

II. Legal review of weapons with autonomous functions in acquisition or development

3. The United States views the review of the legality of weapons as a best practice for implementing customary and treaty law relating to weapons and their use in armed conflict. The United States is not a party to the 1977 Additional Protocol I to the 1949 Geneva Conventions and therefore is not bound by that instrument, but we note that Article 36 of that Protocol creates an obligation for its Parties with respect to the study, development, acquisition, or adoption of a “new” weapon, means, or method of warfare.

* * * *

7. Law of war issues related to targeting generally are not determinative of the lawfulness of a weapon. A legal review of a weapon should consider whether the weapon is “inherently indiscriminate,” *i.e.*, whether the weapon is capable, under any set of circumstances and in particular the intended concept of employment, of being used in accordance with the principles of distinction and proportionality. Nevertheless, most targeting issues (*e.g.*, whether a weapon would be used consistent with the requirement that attacks may only be directed against military objectives) are only capable of determination when presented with the facts of a particular military operation.

8. Weapons that use autonomy in target selection and engagement seem unique in the degree to which they would allow consideration of targeting issues during the weapon’s development. For example, if it is possible to program how a weapon will function in a potential combat situation, it may be appropriate to consider the law of war implications of that programming. In particular, it may be appropriate for weapon designers and engineers to consider measures to reduce the likelihood that use of the weapon will cause civilian casualties.

9. Under DoD policy, autonomous and semi-autonomous weapons systems go through “rigorous hardware and software verification and validation (V&V) and realistic system developmental and operational test and evaluation (T&E).” Although rigorous testing and sound development of weapons are not required by the law of war as such, these good practices can support the implementation of law of war requirements. Rigorous and realistic testing standards and procedures can ensure that commanders and national security policy makers can have a reasonable expectation of the likely effects of employing the weapon in different operational contexts. In addition, such practices can help reduce the risk of unintended combat engagements, such as weapons malfunctions that could inadvertently cause harm to civilians.

III. Compliance with the law of war in using weapon systems with autonomous functions

10. The law of war rules on conducting attacks (*e.g.*, the rules relating to distinction and proportionality) impose obligations on States and other parties to a conflict, and it is for individual human beings, commensurate with their role within the State or party to the conflict, to ensure compliance with those obligations when employing any weapon or weapons system, including autonomous or semi-autonomous weapons systems. For example, DoD policy

recognizes that “[p]ersons who authorize the use of, direct the use of, or operate autonomous and semi-autonomous weapon systems must,” among other requirements, “do so ... in accordance with the law of war.”

11. It is not the case that the law of war requires that a weapon, even a semi-autonomous or autonomous weapon, make legal determinations. For example, the law of war does not require that a weapon determine whether its target is a military objective, but rather that the weapon be capable of being employed consistent with the principle of distinction. Similarly, the law of war does not require that a weapon make proportionality determinations, such as whether an attack is expected to result in incidental harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage expected to be gained.

12. The law of war does not require weapons to make legal determinations, even if the weapon (*e.g.*, through computers, software, and sensors) may be characterized as capable of taking some form of action or decision in a given moment in the absence of direction by a human being, such as whether to fire the weapon or to select and engage a target. Relatively rudimentary autonomous weapons, such as homing missiles, have been employed for many years, and there has never been a requirement that such weapons themselves determine that legal requirements are met.

13. Rather, it is persons who must comply with the law of war by employing weapons in a discriminate and proportionate manner. For example, even if the weapon autonomously selects and engages targets, its use would be precluded when the use of the weapon would be expected to result in incidental harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage expected to be gained.

14. In addition, the obligation to take feasible precautions in order to reduce the risk of harm to civilians and other persons or objects protected from being made the object of attack must be considered when using weapon systems with advanced autonomous functions. For example, depending on the circumstances, it might be feasible to monitor the operation of the weapon system and to stop its operation in the event that it malfunctioned or the circumstances change. As another example, it might be appropriate to consider whether it is possible to program or build mechanisms into the weapon that would reduce the risk of civilian casualties while in no way decreasing the military advantages offered by the weapon. A best practice in this regard may be found in the requirements in DoD policy for the interface between people and machines for autonomous and semi-autonomous weapons to: (1) be readily understandable to trained operators; (2) provide traceable feedback on system status; and (3) provide clear procedures for trained operators to activate and deactivate system functions. These requirements to improve human-machine interfaces assist operators in making accurate judgments regarding the use of force.

15. The ability of weapons to make decisions or assessments of issues that would be considered under law of war can be viewed as an additional feature that improves the ability of human beings to implement legal requirements rather than as an effort to replace a human being’s responsibility and judgment under the law.

IV. Potential for autonomy in weapon systems to improve the implementation of law of war principles in military operations

16. In many cases, the use of autonomy in weapon systems could enhance the way law of war principles are implemented in military operations.

17. For example, very basic applications of autonomy allow some munitions to self-deactivate or to self-destruct, which helps reduce the risk these weapons may pose to the civilian population after the munitions have served their military purpose.

18. More advanced applications of autonomy may facilitate greater precision in guidance of bombs and missiles against military objectives, reducing the likelihood of inadvertently striking civilians and civilian objects as compared to the use of unguided bombs and missiles to achieve the same desired result.

19. Similarly, autonomous functions allow defensive systems to select and engage incoming enemy projectiles, such as mortars, artillery shells, and rockets. These defensive systems can provide military commanders more time to decide on how to respond to the threat. For example, directing “counter-battery fire” against the origin of the enemy projectiles has been a common response to such attacks, and the additional time afforded by autonomous defensive systems could allow military commanders more time to consider and execute a more deliberate and precise response.

20. These applications of autonomy illustrate a fundamental feature of the law of war — the law of war often reflects the convergence of military and humanitarian interests.

21. Autonomy can be used in weapon systems to create more capabilities. Commanders can use additional capabilities to increase the efficiency of military operations — more precisely applying force and causing less unintended destruction. Improving efficiency is done for sound military reasons — to allow fewer resources to accomplish more military purposes. But the same capabilities that reduce wasteful or incorrect applications of military force, such as incidents of “friendly fire,” can also reduce the risk of civilian casualties.

22. For example, militaries might develop weapons with advanced technologies, such as smart grenade launchers, to give their soldiers new advantages in countering the use of cover by enemy fighters to avoid small arms fire. By reducing the need for even greater applications of force such as artillery or air bombardments, these weapons have potentially long-term benefits by reducing the effects of larger explosive weapons in populated areas or the presence of explosive remnants of war.

23. These types of “smart” weapons might create additional options for commanders — allowing attacks to be conducted in circumstances where the use of “dumb” weapons would cause significant or excessive civilian casualties. This, however, should not be construed as necessarily requiring States to use “smart” weapons when available rather than “dumb” weapons.

24. It is expected that further developments in autonomous and semi-autonomous weapon systems will allow military forces to apply force more precisely and with less collateral damage than would be possible with existing systems.

V. Legal accountability and weapons with autonomous functions

25. Machines are not States or persons under the law. Questions of legal accountability are questions of how existing and well-established principles of State and individual responsibility apply to States and persons who use weapon systems with autonomous functions.

26. As a general principle, States are responsible for the acts of persons forming part of their armed forces. It follows that States are responsible for the uses of weapons with autonomous functions by persons forming part of their armed forces as well as other such acts that may be attributable to a State under the law of State responsibility. States, in ensuring accountability for such conduct, may use a variety of mechanisms, including investigations, individual criminal liability, civil liability, and internal disciplinary measures.

27. As with all decisions to employ weapon systems, persons are responsible for their individual decisions to use weapons with autonomous functions. For example, persons who use weapons with autonomous functions to violate the prohibition on targeting the civilian population may be held responsible for such violations.

28. The responsibilities of any particular individual belonging to a State or a party to the conflict may depend on that person's role in the organization or military operations. As a general matter, the persons who are responsible for implementing a party to a conflict's obligation are those persons with the authority to make the necessary decisions and judgments required by that international obligation. For example, a party to a conflict has the obligation to take feasible precautions to reduce the risk to civilians, such as providing warnings before attacks. The determination of whether it is feasible to provide such a warning would be made by the relevant commander in charge of the attack.

29. As noted above, advanced applications of autonomy in weapon systems can allow for issues that would normally only be presented in the context of the use of the weapon system to be presented in the context of the development of the weapon system. Persons who engage in wrongdoing in the development and testing of a weapon could be held accountable, at least under principles and rules of accountability in domestic law.

30. Intentional wrongdoing involving weapons is clearly prohibited. In the absence of intentional wrongdoing, assessments of accountability may be more complex. Mere accidents or equipment malfunctions are not violations of the law of war, even if civilians are killed or injured as a result of those malfunctions. The standard of care or regard that is due in conducting military operations with regard to the protection of civilians is a complex question to which the law of war does not provide a simple answer. This standard must be assessed based on the general practice of States and common standards of the military profession in conducting operations.

31. A general principle of accountability, which is reflected in the law of war, is that decision-makers must be judged based on the information available to them at the time and not on the basis of information that subsequently comes to light. Thus, for example, in assessing whether a commander's decision to use weapons with autonomous functions was reasonable in a particular context, whether the commander acted in good faith based on the information available to him or her at the time would need to be considered. In this regard, training on the weapon system and rigorous testing of the weapon system can help commanders be advised of the likely effects of employing the weapon system. These measures, found in DoD policy, can help promote good decision-making and accountability.

* * * *

As referenced in the U.S. submission excerpted above, the Group of Governmental Experts ("GGE") on LAWS met in Geneva in November 2017. Attorney-Adviser Charles Trumbull of the U.S. Department of State, Office of the Legal Adviser, delivered the opening statement for the United States on November 15, 2017. His statement is excerpted below and available at <https://geneva.usmission.gov/2017/11/15/u-s-opening-statement-at-ccw-meeting-of-group-of-governmental-experts-on-lethal-autonomous-weapons-systems/>.

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The United States welcomes the establishment of this GGE. ... The CCW is uniquely suited to hold these discussions, given its focus on international humanitarian law (IHL) and given that delegations of High Contracting Parties routinely include members with military, technical, and policy experience.

... We believe that this substantive review of the technological, military, and legal/ethical considerations associated with emerging technologies relevant to LAWS is a valuable contribution to the work of the CCW. ...[M]any governments, including that of the United States, are still trying to understand more fully the ways that autonomy will be used by their societies, including by their militaries. These are complex issues, and we need to continue to educate ourselves.

One thing is clear: any development or use of LAWS must be fully consistent with IHL, including the principles of humanity, distinction, and proportionality. For this reason, the United States places great importance on the weapon review process in the development and acquisition of new weapon systems. This is a critical measure in ensuring that weapon systems can dependably be used in a manner that is consistent with IHL. We continue to believe that best practices for reviewing weapon systems that use autonomy are an especially productive area for continued discussions, as a number of other delegations have also suggested.

The United States also continues to believe that advances in autonomy and machine learning can facilitate and enhance the implementation of IHL, including the principles of distinction and proportionality. One of our goals is thus to understand better how this technology can continue to be used to reduce the risk to civilians and friendly forces in armed conflict. On this issue, we refer other delegations to the United States working paper.

The United States is committed to playing an active and constructive role in this GGE, including by sharing our experience in addressing issues related to autonomy in weapon systems.

...

It remains premature, however, to consider where these discussions might or should ultimately lead. For this reason, we do not support the negotiation of a political or legally binding document at this time. The issues presented by LAWS are complex and evolving, as new technologies and their applications continue to be developed. We must be cautious not to make hasty judgments about the value or likely effects of emerging or future technologies. As history shows, our views of new technologies may change over time as we find new uses and ways to benefit from advances in technology. In particular, we want to encourage innovation and progress in furthering the objects and purposes of the Convention. We should therefore proceed with deliberation and patience.

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Also on November 15, 2017, Lieutenant Colonel John Cherry delivered the U.S. intervention on “Appropriate Levels of Human Judgment over the Use of Force” at the meeting of the GGE on LAWS in Geneva. The U.S. Statement on the subject is excerpted below and available at <https://geneva.usmission.gov/2017/11/16/u-s-statement-at-ccw-gge-meeting-intervention-on-appropriate-levels-of-human-judgment-over-the-use-of-force/>.

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[The Chair's] paper asks whether potential LAWS could be accommodated under existing chains of military command and control. We believe the answer to this question is yes.

As with all weapons systems, commanders must authorize the use of lethal force against an appropriate targeted military objective. That authorization is made within the bounds established by the rules of engagement and international humanitarian law (IHL) based on:

- The commander's understanding of the tactical situation, informed by his or her training and experience
- The weapon's system performance, informed by extensive weapons testing as well as operational experience; and
- The employment of tactics, techniques, and procedures for that weapon

In all cases, the commander is accountable and has the responsibility for authorizing weapon release in accordance with IHL. Humans do, and must, play a role in authorizing lethal force.

States will not develop and field weapons that they cannot control. Uncontrollable weapons are not militarily useful. So, although the thought of uncontrollable weapons or machines may be prevalent in popular imagination we do not think that this is a realistic issue for States to consider for their work in the CCW.

Rather than focusing on the controllability of the weapon system, the United States has used the phrase "appropriate levels of human judgment over the use of force" in these discussions. This standard is used in U.S. Department of Defense policy concerning the use of autonomy in weapon systems, which requires that autonomous and semi-autonomous weapon systems "be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force."

In our view, ensuring "appropriate levels of human judgment over the use of force" more accurately frames the question that States should consider:

- First, this formulation focuses on human beings to whom IHL applies, rather than suggesting a new requirement that machines make legal determinations. As we discussed in one of our working papers, IHL does not require that a weapon determine whether the target is a military objective, but rather that the weapon be capable of being employed consistent with the principle of distinction by a human operator.

- Second, the "appropriate levels of human judgment over the use of force" also reflects the fact that there is not a fixed, one-size-fits-all level of human judgment or the same "minimum level of control" that should be applied to every weapon system. Different weapons systems and different operational contexts mean that the appropriate level of human judgment can differ across weapon systems and even across different functions in a weapon system. Some functions might be better done by a computer than a human being, while other functions should be performed by humans.

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C. DETAINEES***Hamidullin***

As discussed in *Digest 2016* at 856-65, the U.S. Court of Appeals heard argument on the briefs submitted in *Hamidullin*, No. 15-4788, in December 2016. In 2017, the court ordered supplemental briefing on the question of whether the district court possessed jurisdiction to decide, in the first instance, whether Hamidullin qualifies as a prisoner of war under the Third Geneva Convention. The U.S. filed two briefs on that issue. The brief filed on July 11, 2017 is excerpted below (with footnotes omitted) and available at <https://www.state.gov/s/l/c8183.htm>. The brief argues that the district court properly determined that Hamidullin did not qualify as a prisoner of war (“POW”) under the Third Geneva Convention (“GPW”).

* * * *

The district court’s ruling was fully consistent with Army Regulation 190-8 (AR 190-8). Section 1-6 of that regulation implements GPW Article 5 by specifying procedures a military tribunal applies for determining the legal status of detainees under the GPW. As a threshold matter, Section 1-6 of AR 190-8 has no application to prisoners like Hamidullin who are captured in non-international armed conflicts. But in any event, the GPW and AR 190-8 do not call for a competent tribunal for every individual captured combatant, but only when there is “doubt” as to an individual’s “legal status” under the GPW to receive POW privileges. *See* AR 190-8 ¶ 1-5a(2) (providing that detainees should receive the protections of the GPW “until some other legal status is determined by competent authority”). Hamidullin’s legal status has been determined by a “competent authority” within the meaning of the Regulation because the President—the highest “competent authority” on the subject—conclusively determined in 2002 that Taliban detainees such as Hamidullin do not qualify for POW status. Nothing in AR 190-8 suggests that an individualized military adjudication for a particular detainee is required to determine his status when the Executive Branch has already determined that the relevant armed conflict was non-international and that, even when the conflict was initially deemed an international armed conflict, the Taliban as a group could not qualify for POW status under the GPW’s stringent criteria. In light of these prior determinations, the protections provided to POWs under the GPW and AR 190-8 do not apply to Hamidullin as a matter of law because he has never disputed that he is a part of Taliban forces. Thus, Hamidullin was not entitled to the Executive Branch process outlined in Section 1-6 of AR 190-8, or any other process, until he raised the combatant immunity defense that the district court properly adjudicated, and rejected, on the merits.

Even if a military process under AR 190-8 should have been applied in Hamidullin’s case, he would not be entitled to a reversal of his conviction because AR 190-8 does not extend any substantive rights. In addition, the district court’s adjudication of Hamidullin’s assertion of combatant immunity, pursuant to all the procedural protections in Article III courts, afforded Hamidullin any right to a “competent tribunal” that he may have had.

ARGUMENT

I. The District Court Had Jurisdiction To Determine That Hamidullin Was Not a Lawful Combatant

A federal district court has jurisdiction in a criminal case under 18 U.S.C. § 3231 when the United States charges a defendant with “offenses against the laws of the United States.” *See United States v. Cotton*, 535 U.S. 625, 630-31 (2002).

That jurisdiction includes authority to resolve a defendant’s assertion of a defense to the charges. . . .

In this case, the district court had jurisdiction to determine whether Hamidullin qualified as a POW under the GPW for the purpose of adjudicating Hamidullin’s assertion of combatant immunity. The district court’s adjudication of that question is consistent with several other district court decisions that have likewise exercised jurisdiction to decide that a defendant could not assert a combatant immunity defense because he fought for an organization that did not satisfy the GPW’s criteria. *See, e.g., United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (rejecting combatant immunity defense raised by defendant who fought with the Taliban against U.S. troops in Afghanistan); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917 (N.D. Ill. 2003) (rejecting combatant immunity defense raised by defendant charged with supporting al Qaeda and other insurgent groups); *United States v. Pineda*, 2006 WL 785287, at *3 (D.D.C. Mar. 28, 2006) (rejecting combatant immunity defense raised by defendants who attacked U.S. surveillance aircraft in Colombia on behalf of the FARC); *United States v. Hausa*, 2017 WL 2788574, at *6 & n.6 (E.D.N.Y. Jun. 27, 2017) (holding that lawful combatant immunity defense did not apply to defendant who plotted attacks on U.S. forces in Afghanistan on behalf of al Qaeda); *cf. United States v. Yunis*, 924 F.2d 1086, 1097-99 (D.C. Cir. 1991) (noting that the district court adjudicated whether defendant’s militia complied with the GPW’s criteria for purposes of defense to criminal charges); *United States v. Noriega*, 808 F. Supp. 791, 796 (S.D. Fla. 1992) (holding that the question of POW status, when properly presented, may be decided by federal courts). There does not appear to have been a prior Executive Branch tribunal convened under the procedures of AR 190-8 in any of those cases, yet none of them suggests that the absence of such process would prevent the court from adjudicating combatant immunity as a defense to criminal charges.

II. The District Court’s Ruling Was Consistent With AR 190-8

Section 1-6 of AR 190-8 is part of the Department of Defense’s implementation of GPW Article 5. In general, AR 190-8 provides procedures for determining detainees’ legal status under the GPW. Hamidullin contends (Br. 19- 20) that, under Article 5 and AR 190-8, all persons claiming POW status must be deemed POWs until a military tribunal determines otherwise pursuant to procedures set forth in the Regulation. Presumptive POW protections apply, however, in international armed conflicts only if “doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy,” meet GPW Article 4’s definition of POWs. 6 U.S.T. at 3324, 75 U.N.T.S. at 142. Hamidullin’s contention ignores the GPW’s plain terms, which do not extend POW protection to those detained in non-international armed conflicts or to members of organizations that do not meet the Article 4 standards. *See Gov’t Br. 20-46.*

The process and interim status in AR 190-8 are provided “[i]n accordance with Article 5, GPW.” AR 190-8, ¶ 1-6(a). Under the GPW, these processes are unavailable when (1) the conflict in which the prisoner was captured is a non-international armed conflict; or (2) the opposing armed force(s) in the conflict do not satisfy Article 4’s criteria. If, on the other hand, a

prisoner is captured in an *international* armed conflict and there has been no determination that the opposing force fails to satisfy the Article 4 criteria, then a tribunal described in AR 190-8 may be convened to determine whether an individual detainee is in fact a member of a group covered by Article 4 and whether his individual circumstances entitle him to POW status as a member of that force. But nothing in the Regulation empowers a tribunal of mid-level officers to revisit the Executive Branch's determinations regarding the non-international character of the armed conflict or whether the opposing force satisfies the Article 4 criteria. Those overall determinations are properly made by the Commander-in-Chief or other higher authorities in the Executive Branch, not by the potentially varying opinions of field grade officers in AR 190-8 tribunals.

A. AR 190-8 Does Not Apply to Hamidullin Because He Was Captured in a Non-International Armed Conflict

Under GPW Article 2, POW protections, combatant immunity, and the right to a determination of POW status by a competent tribunal apply only in international armed conflicts. By 2009, when the events of this case occurred, the conflict in Afghanistan was not an international armed conflict. *See* Gov't Br. 27-31. Because Hamidullin was captured during the course of a non-international armed conflict, there is no "doubt" about his POW status for a tribunal under Article 5 and AR 190-8 to resolve. Indeed, Hamidullin could not possibly benefit from such a tribunal because the Regulation does not authorize a tribunal of three mid-level officers to decide overarching questions, such as the appropriate classification of the conflict, that properly belong to higher authorities within the Executive Branch.

B. AR 190-8 Does Not Apply to Hamidullin Because POW Status Is Only Available to Members of Forces That Satisfy Article 4's Criteria

Even if the conflict in Afghanistan in 2009 had been an international armed conflict, Hamidullin could not qualify as a POW because the Taliban did not meet the Article 4 requirements. The relevant subsection, Article 4(A)(2), provides that members of militias or volunteer corps are eligible for POW status only if *the group in question* displays "a fixed distinctive sign," "carr[ies] arms openly," and "conduct[s] [its] operations in accordance with the laws and customs of war." 6 U.S.T. at 3320, 75 U.N.T.S. at 138. The President, as Commander-in-Chief, has found, *inter alia*, that Taliban fighters systematically failed to follow the laws of war, and hence did not qualify as lawful combatants. *See* White House Press Secretary Announcement of President Bush's Determination Re Legal Status of Taliban and Al Qaeda Detainees (Feb. 7, 2002) ("President's Determination"). The President's Determination satisfies AR 190-8 with respect to all Taliban detainees, because it means that their status has already been "determined by competent authority." *See Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557 (2006) ("The President found that [petitioner] was not a prisoner of war under the Convention. Nothing in [Army Regulation 190-8], and nothing [petitioner] argues, suggests that the President is not a 'competent authority' for these purposes.").

Hamidullin contends (Br. 19-20) that AR 190-8 and Article 5 entitle him to an individual consideration of his POW status based on his own battlefield conduct. But neither AR 190-8 nor the GPW requires individual determinations for each Taliban detainee. In the context of the war in Afghanistan, Hamidullin's disqualification from lawful combatant status turns on the overall characteristics of the Taliban, not his individual conduct, as well as on the characterization of the conflict as a non-international armed conflict. *See* DOD Law of War Manual § 4.27.3 (2016) (explaining that "if there was no doubt that the armed group to which a person belongs fails to

qualify for POW status, then the GPW would not require a tribunal to adjudicate the person's claim to POW status by virtue of membership in that group"). The same is true of past conflicts, in which the United States has made group status determinations of captured enemy combatants. ... And "the accepted view" of Article 4 is that "if the group does not meet the [Article 4] criteria ... the individual member cannot qualify for privileged status as a POW." W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 Case W. Res. J. Int'l L. 39, 62 (1977). Consistent with that "accepted view," the federal courts that have faced combatant immunity claims have focused on the fact that the overall military organization, not the individual defendant or his particular unit, did not satisfy the criteria. See *Lindh*, 212 F. Supp. 2d at 552 n.16, 558 n.39 (noting that "[w]hat matters for determination of lawful combatant status is not whether Lindh personally violated the laws and customs of war, but whether the Taliban did so"); *Pineda*, 2006 WL 785287, at *3 ("Even if the Geneva Convention did apply, the Court is unpersuaded that the defendant would qualify as a prisoner of war because FARC fails to meet the Geneva Convention's definition of a lawful combatant"); *Hausa*, 2017 WL 2788574, at *6 & n.6 (holding that lawful combatant immunity defense did not apply to defendant because al Qaeda did not satisfy Article 4's criteria); *Arnaout*, 236 F. Supp. 2d at 917-18 (same). Thus, the procedures specified in AR 190-8, which focus on determining a detainee's "legal status" with respect to the privileges of POWs, do not apply because the relevant legal status of all Taliban detainees has already been determined categorically by a "competent authority" within the meaning of the Regulation.

Hamidullin's argument conflicts with the purposes of the GPW. Article 4's requirements serve important humanitarian purposes by maintaining a clear distinction between civilians and combatants and by providing incentives for compliance with the laws of armed conflict. But accepting Hamidullin's argument would afford the privilege of combatant immunity to Taliban fighters even though the Taliban has consistently defied the laws of war. See *Al-Warafi v. Obama*, 716 F.3d 627, 632 (D.C. Cir. 2013) ("Without compliance with the requirements of the Geneva Conventions, the Taliban's personnel are not entitled to the protection of the Convention."); DoD Law of War Manual § 4.3.1 ("States have been reluctant to conclude treaties to afford unprivileged enemy belligerents the distinct privileges of POW status or the full protections afforded civilians.").

Nothing in AR 190-8 supports Hamidullin's attempt to claim immunity for the Taliban by invoking the same rules that they systematically violate.

The determination of whether the Taliban in general satisfy the Article 4 criteria is properly made by the Commander-in-Chief rather than by mid-level officers in individual AR 190-8 tribunals. Neither the Regulation nor the GPW can plausibly be construed to require the government to bring Taliban detainees before a military tribunal empowered to grant POW status when the President has already determined that no such detainee qualifies. And such a construction would be an extraordinary usurpation of the President's authority to direct the armed conflict in which the United States remains engaged.

The fact that Taliban detainees do not merit tribunals under AR 190-8 or Article 5 does not mean that there is no Executive Branch process afforded to individual Taliban fighters detained in the Afghanistan conflict. The Executive Branch has applied in Afghanistan administrative tribunals to examine cases of individual detainees to ensure that their detention remains lawful and appropriate. See *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 227 (D.D.C. 2009) (noting that the status of detainees in Afghanistan is reviewed periodically by detainee

review boards that review “all relevant information reasonably available,” including a written statement by the detainee if he chooses to submit one). Because these tribunals have been conducted in the context of non-international armed conflict where none of the detainees could qualify as POWs, these tribunals do not determine potential POW status but rather determine whether a detainee was in fact a person who joined hostile forces or engaged in hostilities. *Id.* Hamidullin has made no claim that this process was inadequate, nor could he, since he does not dispute that he was a Taliban fighter and could lawfully be detained under the law of war.

The Executive’s determinations regarding the character of the conflict, the status of the Taliban, and the proper application of the GPW and AR 190-8 are entitled to great deference by this Court. These determinations constitute a classic exercise of the President’s war powers and his authority over foreign affairs that also implicates his exclusive authority to determine whether a foreign government merits recognition. *See Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) (“Recognition is a topic on which the Nation must speak ... with one voice That voice must be the President’s.”) (internal quotation marks and citations omitted); *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1512 (2017) (courts give “‘great weight’ to ‘the Executive Branch’s interpretation of a treaty.’”) (citation omitted); *Lindh*, 212 F. Supp. 2d at 556 (recognizing that deference was appropriate in considering the application of the GPW to the Taliban).

III. Even if the Government Violated AR 190-8, That Would Not Entitle Hamidullin to Reversal of His Conviction

Even if a military tribunal under AR 190-8 should have been convened in Hamidullin’s case, he would not be entitled to a reversal of his conviction. *See United States v. Caceres*, 440 U.S. 741 (1979) (executive department’s violation of its own regulation did not warrant an exclusionary remedy in a criminal trial). AR 190-8 does not extend any substantive rights; instead, it merely establishes internal policies. *See* AR 190-8 ¶ 1-1(a); *cf. United States v. Jackson*, 327 F.3d 273, 295 (4th Cir. 2003) (internal Justice Department policies “do not vest defendants with any personal rights”). The Army regulation neither limits the district court’s jurisdiction nor creates rights for enemy combatants that can be enforced in civilian courts. *See, e.g.,* DoD Directive 2310.01E, DoD Detainee Program, August 19, 2014, Incorporating Change 1, May 24, 2017, ¶ 1.d. (noting that the Directive “[i]s not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law”).⁵ Neither the regulation nor any related legislation creates such rights.

In addition, the district court’s adjudication of Hamidullin’s assertion of combatant immunity, following extensive briefing and testimony from multiple experts, satisfied any requirement in AR 190-8 for a determination of status by a competent tribunal. The district court can function as a “competent tribunal” under the GPW when such matters arise within its jurisdiction, and Article III courts provide at least as much substantive and procedural protections as the process specified in AR 190-8. *See Hamdan*, 415 F.3d at 43 (holding that a criminal prosecution before a military commission satisfied any entitlement to a “competent tribunal” under AR 190-8). For that reason, even assuming that the failure to adjudicate Hamidullin’s POW status before a military tribunal under AR 190-8 amounted to a procedural error, that error was harmless in light of the district court’s substantive determination—subject to this Court’s review—that Hamidullin did not qualify for that status.

On July 18, 2017, the United States filed a supplemental response brief in *Hamidullin*. That brief is excerpted below and available at <https://www.state.gov/s/l/c8183.htm>.

* * * *

The district court in this case correctly rejected Hamidullin’s claim that, as a Taliban fighter, he was immune from prosecution for attacking U.S. and coalition forces in Afghanistan. Hamidullin now contends that Army Regulation 190-8 (AR 190-8) stripped the district court of jurisdiction to decide that question until a military tribunal determined that he was not entitled to prisoner-of-war (POW) status under the Third Geneva Convention (GPW). As explained below, Hamidullin’s argument is inconsistent with the plain terms of AR 190-8. Nothing in that regulation requires that a tribunal determine the legal status of detainees in non-international armed conflicts or where a competent Executive Branch authority has determined that the opposing force does not satisfy the GPW criteria for its members to qualify as POWs. Hamidullin’s interpretation of AR 190-8 also conflicts with applicable case law and subsequent Department of Defense (DoD) regulations. And Hamidullin’s reading of the regulation would undermine the consistent legal framework that the United States and its coalition partners have long relied on in prosecuting the ongoing armed conflict in Afghanistan.

Hamidullin provides no sound reason or authority supporting his assertion that AR 190-8 implicates the district court’s subject-matter jurisdiction. Accordingly, the district court properly adjudicated Hamidullin’s combatant immunity claims. The district court proceeding, with all of the procedural protections available to criminal defendants in Article III courts, satisfied any right to a “competent tribunal” Hamidullin may have under AR 190-8.

ARGUMENT

I. AR 190-8 Does Not Require a Military Tribunal To Determine the Legal Status of Taliban Members Detained in this Non-International Armed Conflict

Hamidullin’s argument—that AR 190-8 precluded the district court’s jurisdiction unless and until a military tribunal ruled that Hamidullin was not a prisoner of war—is inconsistent with the plain terms of the Regulation itself. AR 190-8, which applies to detainees “in the custody of U.S. Armed Forces,” ¶1-1a, requires a military tribunal only when there is “doubt” as to an individual’s “legal status” under the GPW to receive POW privileges, and not as to each and every captured combatant. *See id.* ¶¶ 1-5(a)(2) (“All persons taken into custody by U.S. forces will be provided with the protections” afforded POWs “*until some other legal status is determined by competent authority.*”) (emphasis added), 1-6(a) (requiring a status determination by a competent tribunal only when “doubt arises as to whether a person [taken into custody] belongs to any of the categories enumerated in Article 4, GPW”). In the case of Hamidullin and other Taliban detainees, there is no such doubt. “Competent authorit[ies]” at the highest levels of the Executive Branch have conclusively determined that Taliban detainees such as Hamidullin do not “belong to any of the categories enumerated in Article 4” because (1) the conflict against the Taliban in 2009 was not an international armed conflict; and (2) the Taliban flagrantly and systematically violate the Article 4 criteria. *See Gov’t Br. 20-46; Gov’t Supp. Br. 6-14.* Those determinations are sufficient to resolve any “doubt” as to Hamidullin’s status, and nothing in AR 190-8 requires convening a tribunal to revisit those determinations in each individual case.

Hamidullin's argument conflicts with case law. In support of the extraordinary proposition that the President is not a "competent authority" under AR 190-8, Hamidullin cites a single district court case, *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), which held that the petitioner could not be tried by a military commission until a tribunal under AR 190-8 determined that he was not a prisoner of war. But that decision was unanimously reversed on appeal. *Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557 (2006). And for good reason. The D.C. Circuit, citing the President's categorical determination, explicitly rejected the petitioner's reliance on AR 190-8 and held that "[n]othing in the regulations, and nothing [the petitioner] argues, suggests that the President is not a 'competent authority' for these purposes." *Hamdan*, 415 F.3d at 43 (D.C. Cir. 2005). In addition, numerous district courts have adjudicated defendants' combatant immunity claims without suggesting that a prior determination by a military tribunal was a prerequisite for the court's jurisdiction. *See, e.g., United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917 (N.D. Ill. 2003); *United States v. Pineda*, 2006 WL 785287, at *3 (D.D.C. Mar. 28, 2006); *United States v. Hausa*, 2017 WL 2788574, at *6 & n.6 (E.D.N.Y. Jun. 27, 2017); *United States v. Shakur*, 690 F. Supp. 1291, 1298 (S.D.N.Y. 1988).

Hamidullin's interpretation of AR 190-8, which was issued in 1997, also conflicts with more recent Defense Department directives that govern the current armed conflict. *See, e.g.,* DoD Directive 2310.01E, *DoD Detainee Program*, August 19, 2014, Incorporating Change 1, May 24, 2017.¹ That Directive makes clear that a presumption of POW status, and the requirement of a tribunal in cases of doubt, applies only "[d]uring international armed conflict." *See id.* ¶ 3(h); *see also* DoD Law of War Manual § 4.27.2 (2016) (same). The Directive also reaffirms the established principle that "unprivileged belligerents" who fight on behalf of "enemy non-state armed group[s]," such as the Taliban, are not entitled to combatant immunity. *See id.*, Part II (defining "unprivileged belligerent"). Thus, even assuming AR 190-8 could be construed to require tribunals even where the Executive Branch has determined that the conflict is non-international and that the members of the relevant armed group are categorically ineligible for POW status, any such requirement has been superseded by more recent DoD directives establishing that tribunals are not required in these circumstances. *See Schwaner v. Dep't of Army*, 370 F. Supp. 2d 408, 414 (E.D. Va. 2004), *aff'd sub nom. Schwaner v. Dep't of Army, Fort Eustis, Va.*, 119 F. App'x 565 (4th Cir. 2005) ("Army regulations must be in accord with directives promulgated by the Department of Defense."); *Casey v. United States*, 8 Cl. Ct. 234, 239 (1985) ("To the extent that Army regulations conflict with those of the Department of Defense, the service regulations must give way.").

The Executive Branch's determinations regarding the status of Taliban detainees are consistent with Congress's actions in this area. In the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA), Congress expressly affirmed the Executive Branch's authority to detain Taliban members who engaged in hostilities against U.S. or coalition forces and to transfer such detainees to civilian custody for trial in Article III courts. *See* 2012 NDAA, Pub. L. No. 112-81, §§ 1021, 1029, 125 Stat. 1562, 1569 (2011). Nothing in the 2012 NDAA suggests that any Taliban members may be lawful combatants immune from prosecution, still less that they must be presumed to be such until a military tribunal determines otherwise.

Hamidullin's sweeping interpretation of AR 190-8 would undermine the legal framework that the United States and its coalition partners apply to the ongoing armed conflict in Afghanistan. The United States and its partners currently apply the legal framework for non-international armed conflicts and treat the Taliban as a non-state insurgent group whose members

may lawfully be prosecuted in criminal courts for insurgent activity. *See* Letter Pursuant to F.R.A.P. 28(j) (filed Dec. 14, 2016) (noting that the Afghan government, with the support of the United States and its allies, has tried thousands of Taliban insurgents in criminal courts). Hamidullin's reading of AR 190-8 would disrupt that consistent approach, and instead require different panels of mid-level officers to determine independently in each individual case whether the conflict is international or non-international and whether individual Taliban fighters might be eligible for POW status (and thus immune from prosecution in any criminal court), even though those questions have already been resolved at the Executive Branch's highest levels. That could result in the military affording different legal status to similarly situated detainees. It would also conflict with the legal approach applied by the United States' coalition partners, including the Afghan government, which do not afford prisoner-of-war status to any Taliban members. Thus, Hamidullin's broad construction of AR 190-8 would substantially limit the President's authority to apply a consistent legal framework in an ongoing armed conflict, with substantial, real-world effects on current and future military operations. *See Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military ... affairs.").

Hamidullin's reading of AR 190-8 requires the Executive Branch to afford privileges, including GPW Article 5 tribunals and presumptive POW status, that apply only in international armed conflicts. That position would effectively require the Executive Branch to presume that the United States in 2009 (and continuing today) was in an armed conflict *against Afghanistan*. But in the eyes of the United States and the international community, the United States is fighting *in partnership with* the universally recognized and legitimate Government of Afghanistan to oppose insurgent groups unlawfully rebelling against it. Adopting Hamidullin's arguments would usurp the exclusively executive power to determine whether a foreign group should be recognized as a lawful belligerent. *See, e.g., Baker v. Carr*, 369 U.S. 186, 212 (1962) ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of which we know nothing.' ... Similarly, recognition of belligerency abroad is an executive responsibility."). Hamidullin provides no persuasive reason why this Court should adopt a construction of the military's regulations that is so directly at odds with the Executive Branch's judgment in conducting the armed conflict in Afghanistan.

II. AR 190-8 Does Not Implicate the District Court's Subject-Matter Jurisdiction

Even if Hamidullin were correct in arguing that AR 190-8 required a military tribunal to determine whether he is entitled to POW status, it would not affect the district court's subject-matter jurisdiction. The Supreme Court has made clear that even *statutory* procedural requirements are generally nonjurisdictional unless the statute makes clear that Congress intended the provision to limit the court's jurisdiction. *See United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) ("[W]e have repeatedly held that procedural rules... cabin a court's power only if Congress has 'clearly state[d]' as much."). That principle applies with even stronger force to the military regulation at issue here. Hamidullin cites no case in which a military regulation has been construed to limit the district courts' broad jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. § 3231.

Hamidullin's contrary arguments are unpersuasive. Hamidullin relies ... on ¶ 3-7(b) of AR 190-8, which states that prisoners-of-war should not be tried in civil courts "unless a member of the U.S. Armed Forces would be so tried." But Hamidullin's premise—that he is entitled to this protection as a prisoner of war—is incorrect. And contrary to Hamidullin's claim that a

member of the U.S. Armed Forces must be tried by court-martial rather than in an Article III court for conduct analogous to Hamidullin's (Supp. Br. 11), federal district courts have concurrent jurisdiction with military courts, under 18 U.S.C. § 3231, over violations of the laws of the United States committed by military personnel. *See United States v. Walker*, 552 F.2d 566, 567 (4th Cir. 1977).

Hamidullin relies ... on statutes requiring an Attorney General certification for hate crimes or juvenile prosecutions. But AR 190-8 is not a statute, and nothing in the Regulation explicitly purports to limit federal courts' jurisdiction. Regardless of whether the statutes requiring certifications in hate-crime and juvenile prosecutions have sufficiently clear statements to be deemed jurisdictional, AR 190-8 imposes no jurisdictional limits here.

The doctrine of "primary jurisdiction" likewise provides no support to Hamidullin's claims. As Hamidullin concedes (Supp. Br. 13 & n.3), that doctrine does not implicate subject-matter jurisdiction; rather, the doctrine simply reflects the district court's discretion to refer matters that fall particularly within an agency's expertise for a determination by that agency. In this case, there was no need for such a referral because the military authorities, including the Commander-in-Chief, have already resolved the questions at issue. Moreover, the district court had the benefit of military expertise through testimony from senior military experts, including Colonel (retired) Hays Parks, who explained why the conflict in Afghanistan was properly characterized as non-international and why Taliban members do not qualify for combatant immunity. *See Gov't Br. 7-9.*

The district court proceedings in this case satisfied any requirements for a "competent tribunal" that may apply. There is no need for a remand to a military tribunal when Hamidullin has already had the opportunity to raise his combatant immunity claims in district court, with the benefit of all the procedural protections afforded to criminal defendants in Article III courts, including an independent Article III judge, the assistance of counsel and an expert provided at government expense, and the right to appeal to this Court. Those protections go far beyond the process available in military tribunals convened under AR 190-8, where detainees have no right to counsel, no right to a decision-maker independent of the U.S. military, and no right to appeal. The remand to a military tribunal that Hamidullin now seeks would serve no purpose except delay.

* * * *

In September, one of the judges on the original panel of the U.S. Court of Appeals for the Fourth Circuit assigned to decide the case retired and a new judge was assigned to the case. The court requested additional supplemental briefing for the new panel. The panel held oral argument on December 5, 2017.* Excerpts follow from the September 11, 2017 supplemental brief, also available at <https://www.state.gov/s/l/c8183.htm>.

* * * *

* Editor's note: The Court of Appeals issued its decision in 2018. *Digest 2018* will discuss the decision.

Hamidullin is not a lawful combatant entitled to immunity from criminal prosecution for attacking U.S. soldiers and Afghan police officers. Two independent reasons support that conclusion. First, prisoner-of-war (POW) protections under the Third Geneva Convention (GPW), including combatant immunity, apply only in the context of an international armed conflict within the meaning of GPW Article 2. At the time of Hamidullin's attack, the armed conflict between the Taliban and Haqqani Network on one side, and the Afghan government and coalition partners (including the United States) on the other, was not an international armed conflict because it was not a conflict between two or more States. Second, even if Hamidullin had been captured in an international armed conflict, he would not qualify for combatant immunity because the Taliban and Haqqani Network do not satisfy the requirements in GPW Article 4(A)(1), (2), or (3) that an armed force must meet for its members to be entitled to immunity. The Taliban and Haqqani Network do not satisfy the criteria because, among other things, they systematically and flagrantly violate the laws and customs of war.

I. By 2009, the Afghanistan Conflict Was Non-International

The POW protections under the GPW apply in armed conflicts "which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." GPW art. 2, ¶ 1. Accordingly, as explained in detail in the government's response brief, POW protections and combatant immunity apply only in *international* armed conflicts, and, at the time of Hamidullin's attack, the conflict between the United States and the Taliban was *non-international*. See Gov't Br. 27-31; see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (noting that the conflict with al Qaeda is a "conflict not of an international character"); *United States v. Shakur*, 690 F. Supp. 1291, 1298 (S.D.N.Y. 1988) (holding that the GPW did not apply to defendants who asserted combatant immunity based on affiliation with a provisional government that was not a "High Contracting Party" under Article 2). Even assuming the Taliban was responsible for Afghanistan's obligations as a "High Contracting Party" when the conflict began in 2001, by 2009 the internationally recognized and legitimate government of Afghanistan led by Hamid Karzai was responsible for Afghanistan's obligations as a "High Contracting Party," and the Taliban was a non-State insurgent group unlawfully rebelling against it. JA 314-15.

Hamidullin does not dispute that by 2009 the Taliban was not recognized as a State and did not *de facto* govern Afghanistan. Instead, he contends that the Taliban *was* the *de facto* government in 2001 when hostilities with the United States began, and, as such, the Taliban must be treated as a State in an international armed conflict with the United States until hostilities cease. However, as explained below, Hamidullin's premise—that an international armed conflict cannot become a non-international armed conflict without an intervening cessation of hostilities—is incorrect.

Hamidullin cites no case and provides no convincing rationale in support of his extraordinary contention that a conflict's nature is fixed forever, such that an international conflict can never become non-international, regardless of changes in the parties' status. See DoD Law of War Manual § 3.1 (2016) ("[A]n international armed conflict may change into a non-international armed conflict."). Hamidullin's argument is inconsistent with the views of the United States and its coalition partners, the Supreme Court of the United Kingdom, the International Committee of the Red Cross (ICRC), and many law-of-war experts. Those authorities have recognized that the conflict in Afghanistan was initially an international conflict, but, after the Karzai government was recognized, the conflict between the new government (assisted by the U.S.-led coalition) and the Taliban insurgency became a non-international armed

conflict. *See, e.g.*, JA 314-15 (testimony of Col. Hays Parks); The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 19, 32 (2016) (White House Report) (stating that the United States is currently engaged only in non-international armed conflicts); *Serdar Mohammed v. Ministry of Defence*, 2017 UKSC 2, ¶ 322 (Jan. 17, 2017) (Lord Reed, dissenting) (recognizing as “common ground” that the conflict in Afghanistan in 2006 was non-international); ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 10 (2011) (explaining that the conflict in Afghanistan “must be classified as non-international . . . (even though that armed conflict was initially international in nature) . . . [because] all the state actors are on the same side”) (emphasis added); Laurie R. Blank, *Complex Legal Frameworks and Complex Operational Challenges: Navigating the Applicable Law Across the Continuum of Military Operations*, 26 Emory Int'l L. Rev. 87, 126 (2012) (explaining that after “the establishment of the Karzai government, it was generally recognized that the conflict became a non-international armed conflict between the Karzai government and the United States on one side and insurgent Taliban forces on the other.”).

Thus, contrary to Hamidullin's argument, a conflict that was initially international may become non-international when a new government is recognized and multi-national forces assist it in combating an insurgency fighting under the aegis of the former regime. That pattern represents the governing legal framework for the post-9/11 armed conflicts in both Afghanistan and Iraq, as numerous authorities have recognized. *See, e.g.*, *Serdar Mohammed*, 2017 UKSC 2, ¶ 244 (“Although the conflict in Iraq began as an international armed conflict... a multi-national force . . . remained there after that war had concluded and a new Iraqi Government had been established, so as to assist the Iraqi Government in combating insurgents. . . . Similarly, when an international security assistance force . . . assisted the Government of Afghanistan in its struggle against the Taliban, that also was a non-international armed conflict.”); David Wallace, Amy McCarthy, Shane R. Reeves, *Trying to Make Sense of the Senseless: Classifying the Syrian War Under the Law of Armed Conflict*, 25 Mich. St. Int'l L. Rev. 555, 584–85 (2017) (explaining that the 2003 invasion of Iraq was initially an “international armed conflict,” but that when the United States passed control to an interim Iraqi government in 2004, “the ongoing hostilities became a non-international armed conflict”). None of these authorities suggest that an intervening break in hostilities is required before an international conflict can become non-international, particularly where, as in both Afghanistan and Iraq, a new government achieves international recognition, governs the country as a matter of fact, and then, with assistance of international forces, fights against insurgent members of the former regime.

Hamidullin contends (Opening Br. 24-26) that a State should not lose its immunity merely because the opposing State decides not to recognize it. But the conclusion that the conflict was non-international in 2009 does not rest only on the fact that the United States did not recognize the Taliban. Rather, in 2009, *no country* recognized the Taliban, it was not the *de facto* government, and there has been no argument that it satisfied the international law criteria for statehood. Instead, the world had long since recognized the Karzai government as the sole, legitimate government of Afghanistan, and that government *de facto* controlled Afghanistan's major population centers, despite the Taliban's indiscriminate, brutal targeting of all persons, civilian or military, tied to the government.

Hamidullin provides no convincing rationale for his purported requirement that “once an international conflict, always an international conflict.” Combatant immunity is a privilege reserved for members of forces acting under the authority of States, and it makes no sense to

construe the GPW to require States to afford such immunity to non-state insurgent groups like the Taliban merely because the group previously controlled parts of a State. Hamidullin's interpretation would require the United States and its coalition partners to treat lawless Taliban insurgents, many of whom are responsible to no one but themselves, JA 220, as if they were regular forces responsible to and controlled by a recognized State. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring) ... And the Taliban as a group would be particularly unworthy beneficiaries of Hamidullin's proposed extension of combatant immunity to insurgent forces. As the record below establishes, the Taliban committed major atrocities while it controlled parts of Afghanistan, it lost the scant international recognition it had previously attained after the September 11 attacks, and it has continued flouting the laws of war to this day. ...

II. Hamidullin Is Not Entitled to Combatant Immunity Because the Taliban Do Not Comply with the Requirements of GPW Article 4

Even assuming that the conflict in Afghanistan was international as of 2009, the district court correctly held that Hamidullin was not entitled to immunity because the Taliban did not satisfy the criteria in GPW Article 4 that a military organization must meet for its members to qualify as lawful combatants. The relevant subsection, Article 4(A)(2), provides that members of militias or volunteer corps that belong to a party to the armed conflict (*i.e.*, that are acting under the authority of a State) are eligible for POW status only if the group in question (1) is commanded by a person responsible for his or her subordinates; (2) displays "a fixed distinctive sign;" (3) "carr[ies] arms openly;" and (4) "conduct[s] [its] operations in accordance with the laws and customs of war." GPW art. 4(A)(2).

Hamidullin does not dispute that the Taliban has consistently acted in flagrant defiance of the laws of armed conflict. Instead, Hamidullin contends (Reply Br. 22-23) that this does not matter because he did not personally violate the laws of armed conflict during the attacks for which he was convicted. As our prior filings explain ..., the relevant inquiry focuses on the overall characteristics of the Taliban, not the personal conduct of individual Taliban members. That conclusion is supported by the GPW's text, which refers to organizations, not individuals. *See* GPW art. 4(A)(1) (referring to "armed forces"); *id.* art. 4(A)(3) (same); *id.* art. 4(A)(2) (referring to "militias" and "other volunteer corps"). In addition, the federal courts that have faced combatant immunity claims have focused on the fact that the overall military organization, not the individual defendant or his particular unit, did not satisfy the criteria. ...

III. Extending Combatant Immunity to the Taliban Would Have Significant and Deleterious Effects on Ongoing Military Operations in Afghanistan

Hamidullin contends ... that the district court's refusal to extend combatant immunity to the Taliban amounts to a "radical conceit" because it implies that "only one side of an ongoing war is authorized to shoot." But there is nothing novel or "radical" about the principle that the combatant immunity defense does not protect members of forces that neither act under the authority of a State nor comply with the laws of war. Indeed, that principle is firmly rooted in the customary international law of war. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 30-31 (1942); *Lindh*, 212 F. Supp. 2d at 553-54 & n.24. The Taliban has not accepted or applied the provisions of the GPW, but has instead openly flouted them by systematically defying the laws of armed conflict. As a result, the GPW's protections do not extend to them. *See Al-Warafi v. Obama*, 716 F.3d 627, 632 (D.C. Cir. 2013) ("Without compliance with the requirements of the Geneva Conventions, the Taliban's personnel are not entitled to the protection of the Convention.").

Hamidullin's claim boils down to a demand that Taliban and Haqqani Network members

be treated as if they were a legitimate State's regular armed forces that conducts operations in compliance with the laws of war. But they are not a legitimate State's regular armed force and fail to comply with the laws of war, as the district court found with overwhelming support in the record. *See, e.g.*, JA 227-49. For example, they target and kill civilians, including through suicide bombings using the mentally handicapped and children, JA 233-34, 242-43, summarily execute POWs and police officers, including through beheadings, JA 227-29, and target Afghan voters and cut off fingers when voters seek to select a legitimate government through peaceful means, JA 236, 245-46. As the U.S. State Department reported, 67% of all civilian casualties in 2009 were attributed to the Taliban, JA 242, and indeed, the Haqqani Network has been less discriminate than the Taliban in targeting civilians and much more brutal, JA 223. Thus, the "radical conceit" in this case is Hamidullin's contention that this Court should extend combatant immunity to a fighter belonging to a brutal non-State insurgent group (the Taliban) and a terrorist organization (the Haqqani Network), overriding the express terms of the GPW and the specific, wartime determination of the Commander-in-Chief.

Extending combatant immunity to non-State groups who flout the laws of war would discourage States from joining and honoring the GPW, undermining the important humanitarian purposes it is designed to serve. Adopting Hamidullin's arguments would also usurp the exclusively Executive power to determine whether a foreign group should be recognized as a lawful belligerent. *See The Prize Cases*, 67 U.S. 635, 670 (1862) (whether to recognize enemy belligerents is "a question to be decided by [the President], and this Court must be governed by [his] decisions"); *Baker v. Carr*, 369 U.S. 186, 212 (1962) ("recognition of belligerency abroad is an executive responsibility" that "defies judicial treatment"); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015) ("The Executive has exclusive and unreviewable authority to recognize foreign sovereigns."). Here, the Executive Branch, acting with the agreement of Congress, has specifically determined that members of the Taliban are not entitled to POW protections, including combatant immunity, and that, accordingly, they may properly face prosecution in Article III courts for attacks on U.S. forces. To be sure, the judicial branch must render its own decision on the availability of immunity to criminal charges here. But a joint judgment of the political branches in this arena is entitled to the utmost deference from this Court. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

Finally, affording combatant immunity to the Taliban would significantly undermine the consistent legal framework that the United States and its coalition partners have long relied on in conducting the ongoing armed conflict in Afghanistan. The United States and its partners currently apply the legal framework for non-international armed conflicts in Afghanistan and treat the Taliban as a non-State insurgent group whose members may lawfully be prosecuted in Afghan or U.S. criminal courts for insurgent activity. *See* White House Report at 19. The government of Afghanistan, supported by the United States, has conducted thousands of criminal prosecutions of Taliban members for insurgent activity, and that process is a vital part of the effort to defeat the insurgency and to bring increased stability and peace to Afghanistan. *See* David Kris, *Law Enforcement as an Effective Counterterrorism Tool—Pragmatism and Perception*, National Security Investigations and Prosecutions § 24:7 (2016) (describing the U.S. military's goal of transferring detention and prosecution responsibilities for insurgents to Afghan civilian authorities) (citing General Stanley McChrystal, then Commander, Int'l Sec. Assistance Force (ISAF), Joint News Briefing with Ambassador Mark Sedwill, NATO Representative in Afghanistan (Mar. 17, 2010); U.S. Dep't of Defense, *Report on Progress Toward Security and*

Stability in Afghanistan, 74 (Oct. 2014) (explaining that the United States and Afghanistan have created “an enduring National Security Court with Afghan judges, prosecutors, defense counsel, and criminal investigators . . . to prosecute Afghans who were detained by U.S. forces under the law of war . . . The court has tried more than 7,200 cases [as of September 30, 2014] and achieved a 75 percent overall conviction rate.”). The unprecedented expansion of the combatant immunity doctrine Hamidullin advocates here would call into question whether, consistent with international law, the Afghan government could continue to use its domestic criminal justice system to prosecute Taliban insurgents, thereby implicating the legitimacy of ongoing U.S. wartime operations.

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Cross References

Terrorism, **Ch. 3.B.1.**

Effect of armed conflict on treaties, **Ch. 4.A.2.**

ICCPR: application during armed conflict, **Ch. 6.A.2.**

Work of the ILC on protection of the environment in relation to armed conflicts, **Ch. 7.C.1.**

Petition before IACHR by Guantanamo detainee, **Ch. 7.E.1.d.**

Hearings on Guantanamo before the IACHR, **Ch. 7.E.2.**

Preserving cultural heritage in armed conflict, **Ch. 14.C.2.**

Terrorism sanctions, **Ch. 16.A.6.**

Syria conflict, **Ch. 17.B.2.**

ISIS and atrocities, **Ch. 17.C.2.**

CHAPTER 19

Arms Control, Disarmament, and Nonproliferation

A. GENERAL

On April 14, 2017, 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 by Russia and other Soviet successor states 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. Part IV covers other countries' adherence to international commitments, such as the Missile Technology Control Regime ("MTCR"). And Part V covers other countries' adherence to certain unilateral commitments. The 2017 report primarily covers the period from January 1, 2016 through December 31, 2016. The report is available at <https://www.state.gov/t/avc/rls/rpt/2017/270330.htm>.

B. NONPROLIFERATION

1. Non-Proliferation Treaty: Preparatory Committee for the 2020 Review Conference

Ambassador Robert A. Wood, Permanent Representative of the United States to the Conference on Disarmament, delivered a statement for the United States at the first session of the preparatory committee for the 2020 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons in Vienna, on May 2, 2017. Ambassador Wood's statement follows and is also available at <https://vienna.usmission.gov/u-s-statement-to-the-2017-npt-preparatory-committee/>.

* * * *

I am honored to speak on behalf of the United States as we begin preparations for the 10th NPT Review Conference, which will mark the 50th anniversary of the Treaty's entry into force in 1970. This is an opportunity to recall the incalculable benefits that derive from the NPT, to celebrate all we have accomplished, and to rededicate ourselves to the tough, practical steps we must take to preserve and expand these benefits for generations to come. The NPT stands out as a remarkably successful example of states coming together to advance their shared interests.

In 1963, President Kennedy warned of the prospect that, by the end of the 1970s, as many as 25 countries might develop nuclear weapons. It is hard to imagine that we could have avoided any further use of nuclear weapons if this had come to pass. Instead, thanks to concerted international nonproliferation efforts, the vast majority of states have forsworn and deeply oppose the spread of nuclear weapons. This is a remarkable achievement that benefits the security of all states and has helped pave the way for remarkable progress on disarmament and on peaceful uses of nuclear energy.

...The Cold War arms race ended decades ago. The U.S. nuclear warhead stockpile has fallen more than 85% since the height of the Cold War. The United States ended production of fissile material for weapons and removed hundreds of tons of fissile material from weapons programs. I doubt that this would have been possible had proliferation continued unchecked.

Unfortunately, in recent years, security conditions have grown worse, with renewed tensions and growing nuclear stockpiles in some regions. Non-compliance with nonproliferation and arms reduction agreements have put at risk the progress that has been made and undermined confidence in future progress. We cannot simply wish these problems away, but we can work to ameliorate or resolve them and lay the groundwork for enduring progress once conditions permit.

The nuclear nonproliferation regime built around the NPT has made possible the nuclear cooperation and commerce that provide clean, reliable energy for hundreds of millions of people. All NPT Parties benefit from the peaceful uses of nuclear science and technology to meet sustainable development needs in areas as diverse as energy, health, agriculture, industry, and natural resource management. These gains were possible only because we have put in place international safeguards, export controls, and other measures that provide confidence in the safe, secure and peaceful uses of nuclear energy.

...The International Atomic Energy Agency plays a key part in helping us realize the practical benefits of the NPT, and the United States is the leading supporter of the IAEA's work across the board, including the Technical Cooperation Program. We exceeded our initial pledge of \$50 million to the Peaceful Uses Initiative by 2015, and are on track to contribute another \$50 million by 2020.

I am pleased to announce a U.S. pledge of €1 million to support the IAEA's project to renovate its Nuclear Applications Laboratories, in addition to the nearly €8.9 million we have provided to date. This ReNuAL project aims to renew the infrastructure needed to sustain the IAEA's programs for peaceful uses of nuclear energy. We also urge other IAEA Member States to join us in meeting this year's ReNuAL Plus fundraising goals.

Despite these accomplishments, ... the record on nonproliferation remains incomplete and vulnerable. We must remain vigilant for any signs of nuclear weapons ambitions. It is time to recognize the Additional Protocol as the *de facto* standard for assuring that states are meeting

their NPT safeguards obligations, and to reaffirm our shared responsibility to respond to cases of non-compliance that put at risk the benefits we derive from the NPT.

Over the last fifteen years we have redoubled our efforts to prevent terrorists from acquiring the means to launch a nuclear attack, to protect nuclear material from theft and nuclear facilities from sabotage. It is the responsibility of all states pursuing nuclear energy to adhere to international instruments and standards for nuclear security. But it is also a collective responsibility to establish high standards and ensure that states are in a position to meet those standards, in part by supporting the IAEA nuclear security program.

As a long-term goal, we must continue to work toward universal adherence to the NPT, even though we have no illusions that this can be achieved quickly. In several regions, the path to this goal depends on addressing longstanding security challenges. We remain ready to work with the states of the Middle East to support practical steps toward the goal of a zone free of weapons of mass destruction and delivery systems, but fundamentally this goal depends on the willingness of the regional states to engage one another directly.

...Today, our world faces no greater security challenge than that posed by North Korea. The DPRK has resumed its reprocessing activities, admitted enriching uranium for nuclear weapons, and carried out five nuclear tests and many ballistic missile launches, in open defiance of multiple UN Security Council resolutions. Well-intentioned diplomatic efforts over the last 20 years to halt the DPRK's proscribed programs have failed. Its stated objective is to be able to attack U.S. and allied cities with nuclear weapons. The threat of a North Korean nuclear attack on Seoul, or Tokyo is real, and it is only a matter of time before the DPRK develops the capability to strike the U.S. mainland. As Secretary Tillerson stated at the UN Security Council, "it is time for us to retake control of the situation." Our goal is not regime change. The DPRK, for its own sake, must abandon its nuclear and missile programs if it wants to achieve the security, economic development, and international recognition that it seeks. The time has come for all of us to put new pressure on North Korea to change course, and we must all do our share. We must demonstrate our resolve by implementing all UN Security Council obligations and impose increased diplomatic and economic pressures on the North Korean regime. We are all at risk, and we must all act resolutely to answer this challenge. If we fail, permitting North Korea's violations of and announced withdrawal from the NPT and its escalating provocations to plunge the region and perhaps the world into crisis, everything else we do and say here in Vienna will matter little by comparison. Therefore, determining how to mitigate the nuclear threat from North Korea should be the central issue in our discussions during this PrepCom.

Since the DPRK announced its withdrawal from the NPT, three Review Conferences have been unable to reach consensus on the need to hold a withdrawing state accountable for any violations while it was a Party. The right to withdraw is woven into the fabric of the NPT, but a withdrawing State remains responsible for any unresolved noncompliance prior to its withdrawal. Allowing States Parties to violate the Treaty and then withdraw without consequence if caught in a violation ignores this basic principle of international law. To vigorously enforce this principle is not to curtail the right but rather to vindicate the interests of the remaining NPT Parties and preserve the integrity of the Treaty itself. We must also ensure that a withdrawing state cannot escape its obligations to other Parties not to misuse the fruits of peaceful nuclear cooperation.

...The NPT has given all of us enormous benefits over nearly five decades. Despite our differences, we all recognize that the Treaty serves our individual and shared national security and development interests. Through genuine dialogue, we can build on areas of longstanding

consensus, identify new areas where consensus should be possible, and set aside proposals that cannot achieve consensus. Recalling our common interests is the best way to rebuild the culture of consensus building and consensus-based decision making that served us so well over the decades. Abandoning consensus might yield an illusion of progress, but not its reality, and even that illusion would quickly dissipate. Given the benefits the NPT has provided to date, and the important shared interests it protects, we owe the future much better than that.

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On May 8, 2017, Ambassador Wood delivered a statement in a meeting at the NPT Preparatory Committee on regional issues. That statement is excerpted below and available at <https://geneva.usmission.gov/2017/05/09/u-s-statement-to-the-npt-preparatory-committee-cluster-2-regional-issues/>.

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The United States reaffirms the critical role of the NPT in enhancing the security of all States Parties and promoting regional security and stability. We welcome the opportunity to discuss several regional proliferation and compliance challenges that jeopardize our collective security.

...Foremost among these is North Korea's destabilizing and unlawful pursuit of nuclear weapons and advanced delivery systems, which pose an increasingly dangerous threat to international peace and security and an explicit threat to the national security of the United States and our allies. The North Korea we confront today operates far beyond the boundaries of international law and nonproliferation norms: In 2016, the DPRK resumed its spent fuel reprocessing activities, admitted to enriching uranium for nuclear weapons, and carried out two nuclear tests and over 30 ballistic missile launches—all in open defiance of multiple UN Security Council resolutions and with the stated objective of being able to attack U.S. and allied cities with nuclear weapons. We cannot allow these developments to pass without increasing the consequences for the Kim Jong-Un regime and its enablers. We must impose and fully implement more punitive and consequential measures to compel the DPRK to change course. The DPRK must be held to account.

We are exploring the full range of diplomatic, security and economic options to address the North Korean threat and our actions must be commensurate with the growing magnitude of North Korea's violations of its obligations. It is the obligation of every country here today to implement both the spirit and the letter of the multiple resolutions unanimously adopted by the UN Security Council. We must all do our share, and we call on all countries, to compel the DPRK to make the strategic decision to abandon its unlawful weapons programs and cease the provocations that so imperil international peace and security in the region. As Secretary Tillerson noted two weeks ago at the UN, China's role is particularly important. We hope China will alter its strategic thinking and partner with us in this endeavor to demonstrate to the DPRK that it stands alone in its pursuit of weapons of mass destruction. This is essential if we are to convince North Korea to change course and engage seriously on denuclearization efforts that lead to the abandonment of all its nuclear weapons and existing nuclear programs, a return to the NPT and IAEA safeguards, and full compliance with its nonproliferation obligations.

The United States will not accept North Korea as a nuclear-armed state. North Korea must comply with its international obligations and commitments or face the consequences. The only path to a secure, economically-prosperous future for North Korea is for it to abandon its WMD programs.

...The United States is currently undertaking a review of our policies regarding Iran, including its destabilizing activities in the Middle East and the Joint Comprehensive Plan of Action. While that review is underway, we remain committed to ensuring strict and rigorous implementation of Iran's nuclear commitments under the JCPOA, and will continue to fulfill our own commitments. Given Iran's troubling history of noncompliance—with the NPT, with IAEA nuclear safeguards, and with multiple, legally-binding U.N. Security Council resolutions—and its past undeclared nuclear activities and nuclear weapons program, thorough IAEA verification remains absolutely essential to providing the international community with confidence that Iran's nuclear program is and remains exclusively peaceful, and that no undeclared nuclear activities or activities potentially related to weaponization are occurring anywhere in Iran.

To enable the IAEA to provide such assurance, Iran must strictly adhere to all commitments and technical measures under the deal and the international community must be prepared to respond to any violations of Iran's commitments. Any new and credible concerns of undeclared nuclear activities can and must be pursued by the IAEA, which must use all of its authorities to monitor Iran's compliance with all portions of the Joint Comprehensive Plan of Action. The United States will also continue to hold Iran accountable for its other destabilizing activities in the region, including missile development and support for terrorism.

...Nearly six years have passed since the IAEA Board of Governors found Syria to be in noncompliance with its safeguards agreement for constructing an undeclared plutonium production reactor at Dair Alzour with the assistance of North Korea. Since then, the Asad regime has refused to cooperate with the IAEA to remedy its noncompliance, instead prosecuting a brutal campaign of violence against the Syrian people. The Syrian regime's callous disregard for international legal obligations related to weapons of mass destruction became additionally, and tragically, clear in April 2017, with its use of prohibited nerve gas upon civilians in the town of Khan Shaykoun—presenting the international community with new challenges in deterring the use of weapons of mass destruction and ensuring compliance with nonproliferation obligations. Syria's unresolved nuclear noncompliance is no trivial matter either, despite claims to the contrary by the regime and its patrons and apologists, and should be a matter of urgent concern to all NPT States Party. We call on Syria to cooperate fully and urgently with the IAEA and to provide it with access to all locations, materials, and persons necessary to verify the peaceful nature of its nuclear program.

...The United States supports the long-term goal of a Middle East free of weapons of mass destruction and delivery systems, alongside a comprehensive and durable regional peace. However, we are cognizant of the political and security realities that continue to impede progress on such a zone, including the lack of trust among the regional states, ongoing conflict and noncompliance in the region, the horrific use of chemical weapons by Syria and non-state actors, and the non-recognition of Israel by many states in the region.

We believe progress is possible, but only through inclusive dialogue aimed at building confidence and addressing the legitimate concerns of all regional states. Misguided attempts to coerce an outcome, or to hold the NPT review process hostage, indicate a misunderstanding of the function and purpose of weapons-free zones. Such efforts will fail, as they have in the past, and betray political objectives unrelated to the pursuit of a safer and more secure Middle East.

A weapons of mass destruction-free zone must emanate exclusively from the regional states and be based on arrangements freely arrived at, as has been the case in every other such zone. Unfortunately, the region is still far from achieving the essential conditions for such a zone: a comprehensive and durable peace and full compliance with all arms control, nonproliferation, and disarmament obligations—and too far even from establishing the prerequisites for meaningful dialogue, such as mutual recognition, direct relationships, confidence, and trust. Anyone who wishes to see a WMD-free zone come into existence should work to reduce regional tensions and build trust, beginning with establishing direct dialogue among all the affected parties.

We encourage the regional states to assume responsibility for advancing this goal and to pursue constructive avenues for doing so. For our part, the United States is prepared to support direct, regional dialogue based on the principles of consensus and mutual respect. We stand ready and willing to work with the UK and Russia to support such a regional process, as the opportunity arises.

... We also remain concerned by the growing number of nuclear weapons and their delivery systems throughout South Asia, and continue to encourage all states with nuclear weapons to exercise restraint regarding nuclear and missile capabilities. We do not believe that these weapons enhance regional or global security. Moreover, we believe that a more stable and economically integrated region would help enormously in laying a sustainable foundation for regional and global peace and security, as well as for future progress on nuclear disarmament, nonproliferation, and confidence building measures. At the same time, we welcome the steps that states have taken to bolster global nonproliferation efforts, including by harmonizing with, adhering to, and joining export control regimes and supporting efforts to prevent the acquisition and use of weapons of mass destruction by non-state actors.

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2. Convention on Supplementary Compensation for Nuclear Damage: *Cooper v. TEPCO*

As discussed in *Digest 2016* at 186-91, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit in *Cooper v. TEPCO*, No. 15-56424, a case brought by U.S. service members who allege that they were exposed to radiation during the humanitarian operation in response to the earthquake, tsunami, and ensuing meltdown at the Fukushima-Daiichi nuclear power plant in Japan, operated by TEPCO. After the United States filed its brief, in which it discussed the Convention on Supplementary Compensation for Nuclear Damage (“CSC”), the parties filed supplemental response briefs (and General Electric or “GE” filed an *amicus* brief) on the question of whether the CSC affects courts’ jurisdiction over claims arising over nuclear accidents that occurred prior to its entry into force. On June 22, 2017, the Ninth Circuit issued its opinion in the case. Excerpts follow (with footnotes omitted) from the Court’s discussion of the CSC, concluding that it does not deprive courts of jurisdiction over claims based on incidents that occurred prior to its entry into force. Other sections of the opinion are excerpted in Chapter 5.

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The CSC is an attempt to create “a worldwide liability regime” for dealing with nuclear accidents. Convention on Supplementary Compensation for Nuclear Damage, Preamble, opened for signature Sept. 29, 1997, S. Treaty Doc. No. 107-21 (2002) [hereinafter CSC]. One of the main goals of such a regime is to control the nuclear energy industry’s liability exposure, thus ensuring the continuing viability of the industry, while at the same time ensuring compensation for victims of nuclear accidents. Prior to the CSC, there were two major conventions addressing liability for nuclear accidents: the Paris Convention on Third Party Liability in the Field of Nuclear Energy of July 1960 and the Vienna Convention on Civil Liability for Nuclear Damage of May 1963. Both of these conventions included a number of provisions aimed at compensating victims of nuclear accidents while keeping the nuclear energy industry viable, such as imposing strict liability on operators of nuclear installations, requiring those operators to maintain insurance in certain amounts, permitting countries to cap the liability of nuclear installation operators, requiring countries to fund compensation for nuclear damage should private insurance be inadequate, and centralizing jurisdiction over claims arising out of nuclear incidents in the country where the nuclear incident occurred. Vienna Convention on Civil Liability for Nuclear Damage arts. II, V, VII, XI, May 21, 1963, 1063 U.N.T.S. 266; Paris Convention on Third Party Liability in the Field of Nuclear Energy arts. 6–7, 10, 13, 15, July 29, 1960, 956 U.N.T.S. 251. The United States was not a party to either of these conventions, but enacted similar measures in the Price-Anderson Nuclear Industries Indemnity Act of 1957. See 42 U.S.C. § 2210.

To join the CSC, a country must be a party to the Vienna or Paris Conventions or have laws (such as the Price-Anderson Act) that meet the requirements set forth in the CSC’s annex. The CSC builds upon these prior conventions and national laws by creating an international supplementary compensation fund for victims of nuclear incidents. Under the CSC, contracting countries are required to ensure the availability of a certain amount of funds to compensate victims of a nuclear incident that occurs within their territories. CSC art. III. Beyond that amount, the contracting countries will contribute to a supplemental compensation fund. *Id.* Like the Paris and Vienna Conventions, the CSC also provides that “jurisdiction over actions concerning nuclear damage from a nuclear incident shall lie only with the courts of the Contracting Party within which the nuclear incident occurs.” *Id.* art. XIII(1).

The CSC was set to enter into force ninety days after “the date on which at least 5 States with a minimum of 400,000 units of installed nuclear capacity” ratified it. CSC art. XX(1). The CSC opened for signature on September 29, 1997, at which time the United States signed it. See Int’l Atomic Energy Agency, Status Report on the Convention on Supplementary Compensation for Nuclear Damage (2016). The United States ratified the CSC in May 2008, *id.*, but it was not until Japan signed and ratified the CSC on January 15, 2015, almost four years after the FNPP incident, that there were enough parties to put the CSC into effect. Ninety days later on April 15, 2015, the CSC entered into force, almost two-and-a-half years after Plaintiffs first filed this suit. *Id.*

TEPCO and GE do not argue that the entirety of the CSC applies to the FNPP incident. Rather, they acknowledge the general principle that “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.” Vienna Convention on the Law of Treaties art. 28, May 23, 1969, 1155 U.N.T.S. 331. Based on this principle, TEPCO and GE accept that the CSC’s supplemental fund is unavailable for nuclear incidents occurring before the CSC’s entry into force, including the FNPP incident. ... TEPCO and GE maintain, however, that Article XIII’s

mandate that “jurisdiction over actions concerning nuclear damage from a nuclear incident shall lie only with the courts of the Contracting Party within which the nuclear incident occurs” applies to cases pending before the CSC entered into force.

This is so, TEPCO and GE argue, because jurisdictional provisions are not subject to limits on retroactive application. In support of this contention, TEPCO and GE cite a long list of cases explaining that jurisdictional provisions do not retroactively alter substantive rights, but only alter where plaintiffs can go to obtain prospective relief. Accordingly, TEPCO and GE argue that jurisdiction-stripping provisions such as the one at issue here presumptively apply to pending cases. ... TEPCO and GE also argue that the same principle applies to jurisdictional provisions in treaties. ... In short, because the courts of Japan are undisputedly open to Plaintiffs, and because Article XIII makes no reservation as to pending cases, TEPCO and GE argue that the CSC strips us of jurisdiction over Plaintiffs’ claims.

We find this argument plausible, but ultimately unpersuasive. Although jurisdictional provisions can and often do apply to cases already pending when those provisions go into effect, it is not true that we always apply new jurisdictional provisions to pending cases. Rather, we look at the jurisdiction-stripping provision in the context of the statute or treaty at issue, applying normal canons of construction, to determine if the provision should apply to pending cases. ...

Applying normal rules of construction to Article XIII, we do not believe that it strips U.S. courts of jurisdiction over claims arising out of nuclear incidents that occurred prior to the CSC’s entry into force. Two things bring us to this conclusion. First, starting with Article XIII’s text, we find it informative that the CSC gives exclusive jurisdiction to “the courts of the Contracting Party within which the nuclear incident occurs.” CSC art. XIII(1) (emphasis added). The use of the present tense suggests that the provision applies to future nuclear incidents and does not include past incidents. One would expect the drafters to have used the past tense had they intended to alter jurisdiction over claims arising out of nuclear incidents that occurred before the CSC’s entry into force. Other paragraphs within Article XIII also use the present tense, similarly indicating that Article XIII refers only to claims arising out of future nuclear incidents. See *id.* art. XIII(2) (“Where a nuclear incident *occurs* within the area of the exclusive economic zone of a Contracting Party[,] ... jurisdiction over actions concerning nuclear damage from that nuclear incident shall, for the purposes of this Convention, lie only with the courts of that Party.” (emphasis added)); *id.* art. XIII(3) (“Where a nuclear incident *does not occur* within the territory of any Contracting Party[,] ... jurisdiction over actions concerning nuclear damage from the nuclear incident shall lie only with the courts of the Installation State.” (emphasis added)).

Second, the CSC’s overall framework also supports our conclusion that Article XIII does not apply to claims arising out of nuclear incidents that precede the CSC’s entry into force because we view the promise of exclusive jurisdiction as a quid pro quo for establishing a compensation fund. To accept TEPCO and GE’s argument that the CSC’s jurisdictional provision applies to the current case, we would have to view Article XIII as a stand-alone provision, independent of the CSC’s remaining provisions, to centralize jurisdiction over nuclear damage claims in a single country. We cannot fairly construe the CSC in this manner. Article XIII is but one component of the compensation scheme created in the CSC. The CSC’s title—The Convention on Supplementary Compensation for Nuclear Damage—suggests what the remainder of the document makes clear: the CSC is, first and foremost, concerned with creating an international backstop for funding claims by victims of nuclear incidents. The “Purpose and Application” section reinforces that “[t]he purpose of this Convention is to supplement the system of compensation provided pursuant to” the Vienna and Paris Conventions and national laws such

as the Price-Anderson Act. CSC art. II(1). To carry out its goal, the CSC creates what the CSC itself refers to as a “system,” *id.* art. II(2), or a “worldwide liability regime,” *id.*, Preamble. Nothing in the CSC suggests that one component of that system, such as the jurisdictional provision at issue here, would apply when the entire system does not. The jurisdictional provision is not independent of the compensation scheme, but is part of the mechanism for effectuating that scheme.

Other provisions of the CSC confirm our reading that Article XIII is not an independent agreement to centralize litigation from a nuclear accident in a single country, but a mechanism for administering the supplemental compensation fund. A country whose courts have jurisdiction under Article XIII obtains certain rights and responsibilities. Specifically, “the Contracting party whose courts have jurisdiction shall inform the other Contracting Parties of a nuclear incident as soon as it appears that” domestic funds may be insufficient to compensate victims. *Id.* art. VI. Once domestic funds are exhausted, “the Contracting Party whose courts have jurisdiction shall request the other Contracting Parties to make available” the supplemental compensation fund, and “the Contracting Party whose courts have jurisdiction” has “exclusive competence to disburse such funds.” *Id.* art. VII(1); see also *id.* art. X(1) (“The system of disbursement by which the [supplemental funds] are to be made available and the system of apportionment thereof shall be that of the Contracting Party whose courts have jurisdiction.”). “The Contracting party whose courts have jurisdiction” may also exercise certain rights of recourse under the CSC. *Id.* art. IX(3). Article XIII is more than just an agreement to centralize jurisdiction in one country; it is integral to the CSC’s overall “system” for implementing the supplemental fund.

Our interpretation of Article XIII also finds support in a letter from Secretary of State Colin Powell submitting the CSC to President George W. Bush. That letter provides an article-by-article explanation of the CSC. It explains that the CSC “requires that all claims resulting from a covered nuclear incident be adjudicated in a single forum.” Letter of Submittal for the Convention on Supplementary Compensation for Nuclear Damage at VII, Aug. 7, 2001, S. Treaty Doc. No. 107-21 [hereinafter Letter of Submittal] (emphasis added). It further provides that “after the United States deposits its instrument of ratification to the CSC, the effect of Article XIII will be to remove jurisdiction from all U.S. Federal and State courts over cases concerning nuclear damage from a nuclear incident covered by the CSC except to the extent provided in the CSC.” *Id.* at XV; see also *id.* at XIV (“Article XIII determines which Party’s courts shall have jurisdiction over claims brought under the CSC...”). In our view, the phrases “covered nuclear incident” and “nuclear incident covered by the CSC” most logically refer to nuclear incidents subject to all of the CSC’s terms, and in particular to nuclear incidents that are eligible for the supplemental compensation fund. Thus, the United States’ view at the time of ratification appears to be that Article XIII applies only to nuclear incidents occurring after the CSC’s entry into force. That is also the view that the United States expresses in its amicus brief. We owe deference to this view.

...

The CSC’s text, structure, and ratification history dictate that Article XIII’s jurisdiction-stripping provision applies only to claims arising out of nuclear incidents occurring after the CSC’s entry into force. We conclude, therefore, that the CSC does not strip us of jurisdiction over Plaintiffs’ claims.

* * * *

3. Nuclear-Weapon-Free Zones

On October 27, 2017, Ambassador Wood delivered the explanation of vote on behalf of the United States, the United Kingdom, and France at a First Committee discussion on a draft resolution on “Nuclear-Weapon-Free Southern Hemisphere and Adjacent Areas.”

The statement is excerpted below and available at <https://usun.state.gov/remarks/8079>.

* * * *

Mr. Chairman, I am speaking on behalf of the United Kingdom, France, and the United States with regards to draft resolution L.28, “Nuclear-weapon-free southern hemisphere and adjacent areas.”

We would like to emphasize the importance we attach to the development, where appropriate, of internationally recognized nuclear-weapon-free-zones. Such zones can be an important contribution to regional and global security, provided that they are established as set out in the 1999 UNDC guidelines. In particular, they must be freely arrived at by all States of the region concerned; verified *inter alia* through comprehensive safeguards applied by the International Atomic Energy Agency; and concluded in consultation with the Nuclear-Weapon States.

We continue to believe that it is contradictory to propose the establishment of a nuclear-weapon-free zone that would be composed largely of the high seas, while simultaneously claiming that it would be fully consistent with applicable principles and rules of international law, including those of the United Nations Convention on the Law of the Sea, relating to the freedom of the high seas and the right of passage through maritime space. It appears to us that the real goal of this draft resolution is the establishment of a nuclear-weapon-free zone covering the high seas. We do not believe that this ambiguity has been sufficiently clarified.

Finally, we note that this year’s resolution welcomes the adoption of the text of the Treaty on the Prohibition of Nuclear Weapons. Neither we nor any nuclear weapons state or nuclear weapon possessing state participated in the negotiation of this Treaty, which we oppose. For these reasons, we voted against the draft resolution.

* * * *

On October 27, 2017, Ambassador Wood delivered the U.S. explanation of position on a draft resolution in the First Committee entitled, “Establishment of a Nuclear-Weapon-Free Zone in the Region of the Middle East.” That statement follows and is available at <https://usun.state.gov/remarks/8072>.

* * * *

Mr. Chairman, my delegation is pleased to once again join consensus on draft resolution L1, “Establishment of a nuclear weapon-free zone in the region of the Middle East.” We support the important goals of this resolution and the consensus-based spirit in which it was pursued this year. We note, however, that, as it pertains to preambular paragraph 8 of the resolution, we do not consider the Treaty on the Prohibition of Nuclear Weapons to constitute an “initiative leading to general and complete disarmament.”

* * * *

4. Nuclear Security

The Global Initiative to Combat Nuclear Terrorism (“GICNT”) held its 10th senior-level plenary gathering in Tokyo, Japan, June 1-2, 2017. See June 2, 2017 press release of the Bureau of International Security and Nonproliferation, available at <https://www.state.gov/t/isn/rls/other/2017/271536.htm>. The joint statement of the co-chairs of the plenary meeting is excerpted below (and was part of the June 2, 2017 press release).

* * * *

The GICNT welcomed Paraguay and Nigeria as new partners. The GICNT has now grown into a partnership of 88 nations and 5 official observers, and commemorated its 10th anniversary last year, demonstrating its durability as an institution committed to strengthening global capacity to prevent, detect, and respond to nuclear terrorism. This Plenary Meeting further highlighted the progress that GICNT and its partner nations have made in upholding and furthering its principles. It also provided a valuable forum for dialogue on important policy challenges identified through the successful implementation of GICNT activities since its last Plenary Meeting in 2015 in Helsinki, Finland.

* * * *

Strengthening National Political Commitments to Combatting Nuclear Terrorism

Partners gave national statements highlighting their contributions to strengthening nuclear security and shared national priorities and recommendations for the GICNT’s 2017-2019 program of work. These and prior recommendations made by partner nations played an important role in informing plans for the GICNT’s new two year program of work. Several partner nations made voluntary commitments to organize or host future GICNT events, while others committed to national actions that further promote national or international capacity-building in areas related to the GICNT Statement of Principles. National statements will be made available on the Global Initiative Information Portal (GIIP) and/or the GICNT.org public website.

Plenary Reviews Outcomes of 2015-2017 Activities

The Plenary recognized the leadership of countries that hosted and organized GICNT activities over the past two years and reviewed key outcomes:

* * * *

- Together with Canada and the United Nations Office on Drugs and Crime, the Slovak Republic hosted the “Vigilant Marmot” workshop on January 24-26, 2017, in Bratislava to address challenges in adopting and updating national nuclear security legal frameworks.

- The European Commission’s Joint Research Centre hosted the “Magic Maggiore” workshop on March 28-30, 2017, in Ispra, Italy, to raise awareness and build commitment for technical reachback in national nuclear detection architectures.

- Together with the United Kingdom, Bulgaria hosted the “Sentinel” workshop on May 17-19, 2017, to promote the importance of national-level nuclear security exercise programs for sustaining nuclear security capabilities.

* * * *

Mid-Year IAG Meeting, New Delhi, India

The IAG Coordinator thanked India for hosting the February 2017 Mid-Year IAG Meeting, which reviewed GICNT progress, solicited input from partner nations on plans and priorities for 2017-2019, and identified gaps and challenges in need of sustained GICNT focus. Presentations given at concurrent meetings of the three Working Groups highlighted important policy issues and promoted discussion on future work. The IAG Meeting also included three cross-disciplinary seminars on legal frameworks, radioactive source security, and sustainability to advance the 10th Anniversary Meeting’s recommendations.

Legal Frameworks, Radioactive Source Security, and Sustainability

The IAG Coordinator thanked Argentina, Canada, and the United Kingdom for their contributions to the three cross-disciplinary panel discussions at the Mid-Year IAG Meeting. He invited those nations to present outcomes and share recommendations for future work.

- Argentina noted the expanding use of radioactive sources in medicine, research, and industry and the need for increased international engagement that focuses on radioactive source security during each stage of the source’s lifecycle. Securing radioactive sources and responding to known or suspected thefts requires cooperation among a diverse group of stakeholders. The GICNT could bring together these groups to strengthen coordination, exchange best practices, and promote the importance of radiological source security as part of a comprehensive nuclear security regime.

- Canada stressed that national legal frameworks form the foundation for effective and sustainable approaches to nuclear security. The GICNT’s “Vigilant Marmot” and “Glowing Tulip” (March 2015 in the Netherlands) workshops played important roles in facilitating cross-disciplinary dialogue among legal practitioners, law enforcement, policymakers, and technical experts on implementation of international legal instruments and related criminalization penalties that help countries deter, prosecute, and adjudicate illicit acts involving nuclear and other radioactive materials. The GICNT could build upon these outcomes and develop more practical workshops and exercises to support partner nations’ efforts to adopt, modify, and strengthen national nuclear security legal frameworks and address implementation challenges.

- The United Kingdom underscored the need to build sustainability into national nuclear security frameworks and highlighted the value of the GICNT’s “Sentinel” workshop in promoting sustainability through national nuclear security exercise programs. Other GICNT activities that have facilitated cross-disciplinary dialogue on integrating scientific and technical expert advice into national frameworks have also highlighted important sustainability challenges including, for example, maintaining technical capabilities and knowledge management. The GICNT could

continue work in these areas, provide models for countries to address these and other national sustainability challenges, and help build political will to address these challenges.

Each presenter made specific recommendations for future GICNT work and noted that they had co-drafted non-papers to inform discussions on potential future activities. These non-papers describe ongoing efforts of the GICNT's official observer organizations, underscore the need for close collaboration to ensure efforts remain complementary, and reinforce the importance of other national and multilateral work in this field.

Working Group Plans and Priorities

Partner nations at the Plenary recognized the valuable contributions of the GICNT Working Groups and commended the Working Group Chairs for promoting collaboration within these important fields, and between their experts. By participating in Working Group activities, technical and policy experts from different levels of government continue to meet and work together with their counterparts from around the world to discuss shared challenges in the fields of nuclear detection, nuclear forensics, and response and mitigation. Finland, Australia, and Morocco, as Chairs of the Nuclear Detection, Nuclear Forensics, and Response and Mitigation Working Groups, respectively, presented their proposed work plans for 2017-2019, emphasizing how they build strategically upon work plans discussed and endorsed at the 2015 Plenary Meeting and how they address challenges identified during GICNT events held over the past two years.

- The NDWG will continue to organize workshops and exercises that address relevant authorities, regulations, plans, and processes that enable countries to detect and secure nuclear and other radioactive material out of regulatory control (MORC); address challenges and mitigating strategies for scaling and sustaining nuclear detection architectures; and improve partners' capacity to implement a coordinated government approach to detecting and investigating illicit trafficking of MORC.

- The NFWG will further develop and pilot the nuclear forensics self-assessment tool to help countries evaluate their nuclear forensics capabilities; organize regional exercises on nuclear forensics fundamentals for policymakers to promote implementation of GICNT guidance and build on the outcomes from previous nuclear forensics activities; and support multilateral exercises that address challenges in exchanging nuclear forensics information to support national-level investigations and prosecutions.

- The RMWG will continue activities identified in its National Frameworks Series to promote comprehensive national approaches to responding to nuclear security events; engage partner nations in testing national capabilities through Radiological Emergency Management Exercises (REMEX); support activities focusing on radiological source security, recovery and consequence management, and requesting and receiving international assistance; and support incorporating public messaging themes across a variety of GICNT work.

All three Working Group Chairs expressed support for promoting collaboration between Working Group experts; to include supporting REMEX-style exercises that can help partner nations strengthen national-level coordination and mechanisms for bilateral, regional, and international cooperation. In addition, the Chairs suggested coordination between the Working Groups to further develop the GICNT's "Exercise Playbook" and promote it as a tool for countries to organize national-level, scenario-based discussions and exercises.

Discussion on GICNT Event Outcomes and Products

The United Kingdom and Finland encouraged partners to host and organize future activities under the auspices of GICNT and described the process for proposing new GICNT activities. Both indicated that each GICNT activity should produce a product with tangible

outcomes that could be used to inform relevant national-level stakeholders of lessons learned. They described “take-home” exercises, or abridged versions of larger multilateral activities that the GICNT Working Groups developed, which are available on the GIIP. Both reported on the outcomes of the regionally-focused “Olympus” and “Falcon” exercises, and highlighted the development of a “take-home exercise” based on these exercises to ensure that the GICNT work benefits the global partnership. Romania and Hungary then shared national experiences in hosting and participating in GICNT workshops and exercises. Both countries highlighted how they shared key outcomes among relevant national stakeholders and leveraged lessons learned to make improvements to national-level capabilities and protocols for bilateral and multilateral cooperation.

Outgoing IAG Coordinator’s Message to the Plenary

The Netherlands IAG Coordinator, Ambassador Kees Nederlof, emphasized the continued value of the GICNT in promoting practical implementation of nuclear security guidance and best practices and providing a forum for strengthening political commitments to combat nuclear terrorism. He recommended that the GICNT adopt thematic focuses on radioactive source security, sustainability, and legal frameworks and more fully integrate these priorities into future GICNT activities. The IAG Coordinator also recommended maintaining the GICNT’s current structure and supporting implementation of the Working Group Work Plans for 2017-2019 to draw from the GICNT’s existing body of expertise. In addition, he noted the challenges of communicating information to senior leaders during a nuclear security situation and suggested future GICNT activities address these challenges to help partner nations prepare effectively to support the decision-making processes.

The Co-Chairs thanked the Netherlands for its leadership in advancing the GICNT’s efforts over the past two years, including hosting the highly successful 10th Anniversary Meeting. The Co-Chairs also expressed deep appreciation to the outgoing Nuclear Detection, Nuclear Forensics, and Response and Mitigation Working Group Chairs from Finland, Australia, and Morocco, for their contributions to the GICNT.

Endorsement of New IAG Coordinators

The Co-Chairs introduced the Republic of Finland as the candidate for the next two-year IAG Coordinator term. The Co-Chairs highlighted Finland’s contributions to the GICNT by hosting the 2015 Plenary Meeting, Chairing the NDWG from 2015-2017, and hosting the “Northern Lights” exercise in 2015 and the NDWG experts meeting in 2016.

The Co-Chairs introduced the Kingdom of Morocco as the candidate for IAG Coordinator for 2019-2021, noting that endorsement of Morocco’s candidacy will help ensure long-term stability in the GICNT leadership team and better position the GICNT for strategic planning and coordination with other organizations. The Co-Chairs highlighted Morocco’s contributions to the GICNT as one of the original founding partners and host of the first GICNT Plenary, Chair of the RMWG since 2011, and host of several other prominent GICNT activities.

The Plenary endorsed Finland as IAG Coordinator for the term 2017-2019 and Morocco for the term 2019-2021 by consensus.

Announcement on 2019 Plenary Meeting

The Argentine Republic announced it would host the GICNT’s next Plenary Meeting in 2019. Argentina also committed to lead outreach to countries that have not yet joined the GICNT—particularly in Latin America and Africa—by sharing their experience on the benefits of joining. The Co-Chairs thanked Argentina for its contributions to the GICNT and its leadership in agreeing to host the 2019 Plenary. Reflecting on the recommendations made during the 10th

Anniversary High Level Meeting with respect to broadening engagement, they also noted that outreach by the Plenary Host to countries that are not yet partners would be valuable in promoting the GICNT mission.

Partner Nations Look Forward to 2017-2019 IAG Term

Finland, in its capacity as the newly-endorsed IAG Coordinator, announced the appointment of Argentina as the new RMWG Chair and the United Kingdom as the new NDWG Chair. The IAG Coordinator, in consultation with the Co-Chairs, will appoint a new Chair for the NFWG as soon as possible. Morocco and the Netherlands will support implementation of the GICNT's 2017-2019 program of work as Special Advisors to the IAG Coordinator.

Building on the proposals made by the former IAG Coordinator and partners' feedback during the Plenary, the incoming IAG Coordinator, Ambassador Jari Luoto of Finland, presented his vision for a two-year strategy for advancing the GICNT's mission. The incoming IAG Coordinator recognized the value of continuing the strategic direction of the GICNT and strengthening implementation of proposals made in Helsinki and The Hague. These include holding practical activities that strategically promote capacity building, maintaining support for the three Working Groups as the foundation for the GICNT work, and promoting regional approaches to nuclear security. He also recommended a sustained focus on cross-disciplinary activities and developing a systematic way to improve sharing information and lessons learned and more virtual engagements to promote new opportunities for partner nations to engage through the GIIP. In addition, he expressed support for the recommendation for GICNT to adopt thematic focuses on radioactive source security, sustainability, and legal frameworks and welcomed that the Working Groups built these elements into their Work Plans for 2017-2019. To advance these efforts, Ambassador Luoto agreed to host the next IAG Meeting in Helsinki in June 2018 and invited all participants to attend.

The Co-Chairs expressed their support for the recommendations made by the outgoing and incoming IAG Coordinators and thanked all partner nations for their contributions to discussions during the Plenary. The Co-Chairs also thanked the hosts of all GICNT activities that have informed plans and priorities for 2017-2019. The Co-Chairs committed to helping implement these priorities and underscored their shared view on the importance of the GICNT as a forum for strengthening national political commitments to combatting nuclear terrorism. To this end, the Co-Chairs thank and wish to recognize the countries that have committed to host activities that will support implementation of the GICNT's program of work over the next two years, including Argentina, Finland, Hungary, Mexico, Romania, Tajikistan, and the United Kingdom. The Co-Chairs also welcome announcements made by China and Morocco that they are positively considering hosting GICNT events in the future, and appreciate the many other partner nations and official observers that committed to attend and contribute to GICNT activities over the next two years.

The Co-Chairs look forward to working further with the IAG Coordinator, the Working Group Chairs, the Special Advisors, and all GICNT partners to support these and other activities that partner nations agree to host and support, focusing on developing tangible outcomes for the next Plenary Meeting in Argentina in 2019.

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5. Hague Code of Conduct

On June 5, 2017, the State Department issued a statement recognizing the 15th anniversary of the Hague Code of Conduct against Ballistic Missile Proliferation (“HCOC”). The statement, available at <https://www.state.gov/r/pa/prs/ps/2017/06/271593.htm>, includes the following:

The United States...applauds the Code’s 15-year record of promoting transparency and confidence building measures as well as generating a broad international predisposition against ballistic missile proliferation.

Since it was launched in The Hague in 2002, subscription to the Code has grown to include 138 countries and has contributed significantly to international nonproliferation efforts.

The U.S. government looks forward to continuing our close cooperation with all Subscribing States to promote ballistic missile nonproliferation and encourages all countries that have not yet done so to subscribe to the Code.

6. UN Security Council Resolution 1540

On June 28, 2017, Amy Tachco, Political Coordinator for the U.S. Mission to the United Nations, addressed a UN Security Council briefing on non-proliferation of weapons of mass destruction. Ms. Tachco’s remarks are excerpted below and available at <https://usun.state.gov/remarks/7884>.

* * * *

In the context of the evolving threats posed by proliferation of weapons of mass destruction, today’s debate reminds us of the importance of fully implementation of Security Council Resolution 1540. The United States is committed to assisting states and international organizations in their efforts to prevent non-state actors from developing and acquiring nuclear, chemical, or biological weapons and their delivery systems. We also align ourselves today with the statement to be made by Spain on behalf of the Group of Friends of Resolution 1540.

Despite progress made over the past 13 years, significant gaps remain in the implementation of the resolution’s obligations, particularly in the areas of chemical and biological security and controlling means of delivery. We must work smarter as we move forward. The report last year of the 1540 Comprehensive Review and UN Security Council Resolution 2325 adopted in December provided guidance on how to achieve future progress. Today I am going to touch on a few of these challenges and discuss ways we might overcome them.

Recently, we have seen the horror of chemical weapons attacks by states and non-state actors in the Middle East, particularly in Syria. Even more shocking is the confirmed use of the deadly nerve agent VX in Malaysia. These trends are unsettling and alarming, which is why the Committee must work to hold states more accountable for preventing the use and spread of chemical weapons and ensuring effective control over such materials.

As part of our commitment to stopping chemical weapons use, we need to work together to help states in promoting best practices in chemical security to detect and prevent the misuse of chemicals. Moreover, the Comprehensive Review and Resolution 2325 called for increased assistance through matchmaking and dialogue. The exchange of expertise and assistance is extremely valuable to states, the Committee and the global nonproliferation regime.

While 1540 is aimed at deterring non-state actors, its obligations are binding on Member States. Therefore, it is troubling that the Syrian regime has continued to use chemical weapons. We call on all Member States who oppose the use of chemical weapons to urge Bashar al-Assad to cooperate with the OPCW and cease using chemicals as weapons. President Trump was clear on this this week. Moreover, Syria's continued use of chemical weapons will only increase the risk that elements of their CW program could fall into the wrong hands.

The Committee must also continue to work towards strengthening the global nuclear security architecture and increase cooperation among international organizations, such as the IAEA and INTERPOL. We must help states build their capacity to secure nuclear and other radioactive materials, convert research reactors from highly enriched uranium to low enriched uranium, and address critical gaps to counter the smuggling of nuclear and other radioactive materials.

The Comprehensive Review and 2325 also highlighted the need for states to establish effective control over materials that could be used for weapons of mass destruction, including through development of national control lists to monitor production and movement of such materials.

To prevent illicit trade in weapons of mass destruction-related materials, the United States is providing training and technical assistance, as well as detection, inspection, and interdiction equipment, to border and customs authorities around the world.

Last year's report and Resolution 2325 also recommended that the Committee give stronger consideration to the evolving nature of the risk of proliferation and the rapid advances in science and technology. Such developments could lower the barriers to development of weapons of mass destruction making mitigation of these risks even more complex and challenging.

The United States is eager to work with others ensure that we strengthen key obligations under Resolution 1540. The 1540 Committee and Resolution 2325 are key tools in stemming the spread of weapons of mass destruction and helping to maintain international peace and security.

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7. Country-Specific Issues

a. *Democratic People's Republic of Korea ("DPRK" or "North Korea")*

See Chapter 16 for discussion of sanctions in 2017 regarding North Korea. On April 28, 2017, Secretary Tillerson delivered remarks at a UN Security Council ministerial session on the DPRK. His remarks are excerpted below and available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/04/270544.htm>.

* * * *

According to UN Security Council Resolution 2321, a stated objective of this council is North Korea's abandonment of its nuclear weapons and ballistic missile programs.

For the past 20 years, well-intentioned diplomatic efforts to halt these programs have failed. It is only by first dismantling them that there can be peace, stability, and economic prosperity for all of Northeast Asia.

With each successive detonation and missile test, North Korea pushes Northeast Asia and the world closer to instability and broader conflict.

The threat of a North Korean nuclear attack on Seoul, or Tokyo, is real.

And it is likely only a matter of time before North Korea develops the capability to strike the U.S. mainland.

Indeed, the D.P.R.K. has repeatedly claimed it plans to conduct such a strike. Given that rhetoric, the United States cannot idly stand by. Nor can other members of this council who are within striking distance of North Korean missiles.

Having for years displayed a pattern of behavior that defies multiple UN Security Council resolutions, including 2321 and 2270, and erodes global progress on nuclear nonproliferation, there is no reason to think that North Korea will change its behavior under the current multilateral sanctions framework.

For too long, the international community has been reactive in addressing North Korea. Those days must come to an end.

Failing to act now on the most pressing security issue in the world may bring catastrophic consequences.

We have said this before and it bears repeating: the policy of strategic patience is over. Additional patience will only mean acceptance of a nuclear North Korea.

The more we bide our time, the sooner we will run out of it.

In light of the growing threat, the time has come for all of us to put new pressure on North Korea to abandon its dangerous path.

I urge this council to act before North Korea does.

We must work together to adopt a new approach and impose increased diplomatic and economic pressures on the North Korean regime.

The new campaign the United States is embarking on is driven by our own national security considerations, and it is welcomed by many nations who are concerned for their own security and question why North Korea clings to nuclear capabilities for which it has no need.

Our goal is not regime change. Nor do we desire to threaten the North Korean people or destabilize the Asia Pacific region. Over the years, we have withdrawn our own nuclear weapons from South Korea and offered aid to North Korea as proof of our intent to de-escalate the situation and normalize relations. Since 1995, the United States has provided over \$1.3 billion dollars in aid to North Korea, and we look forward to resuming our contributions once the D.P.R.K. begins to dismantle its nuclear weapons and missile technology programs.

The D.P.R.K., for its own sake, must dismantle its nuclear and missile programs if it wants to achieve the security, economic development, and international recognition that it seeks. North Korea must understand that respect will never follow recklessness. North Korea must take concrete steps to reduce the threat that its illegal weapons programs pose to the United States and our allies before we can even consider talks.

I propose all nations take these three actions beginning today:

First, we call on UN member-states to fully implement the commitments they have made regarding North Korea. This includes all measures required in Resolutions 2321 and 2270.

Those nations which have not fully enforced these resolutions fully discredit this body.

Second, we call on countries to suspend or downgrade diplomatic relations with North Korea. North Korea exploits its diplomatic privileges to fund its illicit nuclear and missile technology programs, and constraining its diplomatic activity will cut off a flow of needed resources. In light of North Korea's recent actions, normal relations with the D.P.R.K. are simply not acceptable.

Third, we must increase North Korea's financial isolation. We must levy new sanctions on D.P.R.K. entities and individuals supporting its weapons and missile programs, and tighten those that are already in place. The United States also would much prefer countries and people in question to own up to their lapses and correct their behavior themselves, but we will not hesitate to sanction third-country entities and individuals supporting the D.P.R.K.'s illegal activities.

We must bring maximum economic pressure by severing trade relationships that directly fund the D.P.R.K.'s nuclear and missile program. I call on the international community to suspend the flow of North Korean guest workers and to impose bans on North Korean imports, especially coal.

We must all do our share, but China accounting for 90 percent of North Korean trade, China alone has economic leverage over Pyongyang that is unique, and its role is therefore particularly important. The U.S. and China have held very productive exchanges on this issue, and we look forward to further actions that build on what China has already done.

Lastly, as we have said before, all options for responding to future provocation must remain on the table. Diplomatic and financial levers of power will be backed up by a willingness to counteract North Korean aggression with military action if necessary. We much prefer a negotiated solution to this problem. But we are committed to defending ourselves and our allies against North Korean aggression.

This new pressure campaign will be swiftly implemented and painful to North Korean interest.

I realize some nations for which a relationship with North Korea has been in some ways a net positive may be disinclined to implement the measures of pressure on North Korea.

But the catastrophic effects of a North Korean nuclear strike outweigh any economic benefits. We must be willing to face the hard truths and make hard choices right now to prevent disastrous outcomes in the future.

Business as usual is not an option.

There is also a moral dimension to this problem. Countries must know by now that helping the North Korean regime means enabling cruelty and suffering.

North Korea feeds billions of dollars into a nuclear program it does not need while its own people starve.

The regime's pursuit of nuclear weapons does not serve its own national security or the well-being of a people trapped in tyranny.

* * * *

We ask the members of this council and all other partners to implement a new strategy to denuclearize North Korea.

* * * *

On July 4, 2017, Secretary Tillerson issued another press statement condemning North Korea, this time for the launch of an intercontinental ballistic missile (“ICBM”). His July 4 statement is excerpted below and available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/07/272340.htm>.

* * * *

The United States strongly condemns North Korea’s launch of an intercontinental ballistic missile. Testing an ICBM represents a new escalation of the threat to the United States, our allies and partners, the region, and the world.

Global action is required to stop a global threat. Any country that hosts North Korean guest workers, provides any economic or military benefits, or fails to fully implement UN Security Council resolutions is aiding and abetting a dangerous regime. All nations should publicly demonstrate to North Korea that there are consequences to their pursuit of nuclear weapons. We intend to bring North Korea’s provocative action before the UN Security Council and enact stronger measures to hold the DPRK accountable.

The United States seeks only the peaceful denuclearization of the Korean Peninsula and the end of threatening actions by North Korea. As we, along with others, have made clear, we will never accept a nuclear-armed North Korea.

The President and his national security team are continuing to assess the situation in close coordination with our allies and partners.

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On July 28, 2017, Secretary Tillerson provided a statement on the latest DPRK provocation, the launch of a second ICBM in the course of one month. Secretary Tillerson’s statement, condemning North Korea’s violations of multiple UN Security Council resolutions, is excerpted below and available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/07/272936.htm>.

* * * *

All nations should take a strong public stance against North Korea, by maintaining and strengthening UN sanctions to ensure North Korea will face consequences for its relentless pursuit of nuclear weapons and the means to deliver them.

As the principal economic enablers of North Korea’s nuclear weapon and ballistic missile development program, China and Russia bear unique and special responsibility for this growing threat to regional and global stability.

The United States seeks the peaceful denuclearization of the Korean Peninsula and the end to belligerent actions by North Korea. As we and others have made clear, we will never accept a nuclear-armed North Korea nor abandon our commitment to our allies and partners in the region.

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Ambassador Nikki Haley delivered remarks following the adoption of a UN Security Council statement condemning North Korea's latest ballistic missile launch on August 29, 2017. Her statement is excerpted below and available at <https://usun.state.gov/remarks/7951>.

* * * *

Once again, all 15 members of the Security Council have spoken in unison. All of us: The United States, Japan, China, Russia, Europeans, Africans, South Americans. We are all together.

And what are we saying? We are all denouncing North Korea's outrageous act against another UN Member State, Japan. We are all demanding North Korea stop any further missile launches. We are all demanding North Korea abandon its nuclear weapons.

North Korea has violated every single Security Council resolution, and violated international law. We are all calling on every nation to strictly, fully, and immediately implement all Security Council sanctions on North Korea.

The world is united against North Korea. There is no doubt about that. It is time for the North Korean regime to recognize the danger they are putting themselves in. The United States will not allow their lawlessness to continue. And the rest of the world is with us.

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On November 28, 2017, Secretary Tillerson issued a further press statement on the latest missile launch by the DPRK. The statement, available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/11/276019.htm>, follows.

* * * *

The United States strongly condemns North Korea's launch of what is likely an intercontinental ballistic missile into the Sea of Japan, indiscriminately threatening its neighbors, the region and global stability.

The D.P.R.K.'s relentless pursuit of nuclear weapons and the means to deliver them must be reversed. Together the international community must continue to send a unified message to North Korea that the D.P.R.K. must abandon its WMD programs. All nations must continue strong economic and diplomatic measures. In addition to implementing all existing UN sanctions,

the international community must take additional measures to enhance maritime security, including the right to interdict maritime traffic transporting goods to and from the D.P.R.K.

The United States, in partnership with Canada, will convene a meeting of the United Nations Command Sending States to include the Republic of Korea and Japan and other key affected countries to discuss how the global community can counter North Korea's threat to international peace.

Diplomatic options remain viable and open, for now. The United States remains committed to finding a peaceful path to denuclearization and to ending belligerent actions by North Korea.

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b. Iran

On April 18, 2017, Secretary Tillerson issued a press statement relaying the State Department's certification to Congress that Iran was fully implementing its commitments under the Joint Comprehensive Plan of Action ("JCPOA"). The statement, available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/04/270315.htm>, also advises of concerns about Iran's continued support for terrorism and the commencement of an interagency review of the JCPOA. A letter from the State Department to U.S. House Speaker Paul Ryan* is provided as part of the press statement and states:

This letter certifies that the conditions of Section 135(d)(6) of the Atomic Energy Act of 1954 (AEA), as amended, including as amended by the Iran Nuclear Agreement Review Act of 2015 (Public Law 114-17), enacted May 22, 2015, are met as of April 18, 2017.

Notwithstanding, Iran remains a leading state sponsor of terror through many platforms and methods. President Donald J. Trump has directed a National Security Council-led interagency review of the [JCPOA] that will evaluate whether suspension of sanctions related to Iran pursuant to the JCPOA is vital to the national security interests of the United States. When the interagency review is completed, the administration looks forward to working with Congress on this issue.

On July 28, 2017, the State Department issued, as a media note, the joint statement by France, Germany, the United Kingdom, and the United States, condemning Iran's launch of a Simorgh space launch vehicle on July 27 as inconsistent with UN Security Council resolution 2231. The media note, available at <https://www.state.gov/r/pa/prs/ps/2017/07/272934.htm>, further states:

* Editor's note: Identical letters went to other appropriate congressional committees and leadership.

This resolution calls upon Iran to not undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such technology like this launch. Space launch vehicles use technologies that are closely related to those of ballistic missiles development, in particular to those of Intercontinental Ballistic Missiles.

This step follows missile launches into Syria on 18 June and the test of a medium range ballistic missile on 4 July.

Iran's program to develop ballistic missiles continues to be inconsistent with UNSCR 2231 and has a destabilizing impact in the region. We call on Iran not to conduct any further ballistic missile launches and related activities. We are writing to the UN Secretary General with our concerns. The governments of France, Germany and the United Kingdom are discussing these issues bilaterally with Iran and are raising their concerns.

On October 13, 2017, Secretary Tillerson sent a letter to Congress regarding the administration's review of Iran policy and the JCPOA. That congressional correspondence follows.

* * * *

As you know, President Donald J. Trump has long maintained that the Joint Comprehensive Plan of Action (JCPOA) is a bad deal for the United States. As I reported to you in July, Iran has repeatedly tested the boundaries of the deal—twice exceeding the cap on its heavy water stocks, and also pushing the number of advanced centrifuges it may operate. Outside the narrow parameters of the nuclear deal, moreover, Iran has not moderated, but rather accelerated its malign activities in the region and beyond, in ways that threaten our interests and our allies.

Upon entering office, the President directed his national security team to undertake a comprehensive review of our Iran strategy and of the JCPOA's place within that strategy. Our review is now complete, and he has now approved a new U.S. strategy on Iran that will include concerted efforts, with our allies, to:

- Address the threat of the Iranian regime's destabilizing activities in the broader Middle East, including giving various forms of support to militant proxies and terrorists;
- Rebuild our regional alliances and bolster our allies' capacity to encourage a more stable balance of power in the region;
- Draw attention to the malignant role played by the Islamic Revolutionary Guard Corps (IRGC), both inside and outside Iran, including the use of Iran's wealth to sustain the IRGC's bloody and destabilizing proxy wars and support for terrorism;
- Counter the Iranian regime's proliferation of missiles and advanced conventional weapons that threaten Iran's neighbors, global trade, and freedom of navigation;
- Communicate clearly with the Iranian people that their legitimate aspirations are impeded by the actions of unaccountable regime elements whose greed, corruption, and disregard for human rights have led them to abandon their responsibility to provide for the Iranian people; and
- Deny the Iranian regime all paths to a nuclear weapon.

Given all of the regime's malign activities outside the scope of the deal, it is clear that Iran continues to undermine the expectation set out in the JCPOA that the deal would positively contribute to regional and international peace and security.

However, the JCPOA itself is also flawed, most notably because key restrictions sunset over time, eventually leaving Iran free to openly pursue industrial-scale uranium enrichment. This would allow Tehran to decrease the amount of time it would need to make enough fissile material for a nuclear weapon, should it choose to violate its commitments under the Non-Proliferation Treaty and do so.

Based on these considerations, this Administration has concluded following our comprehensive review that the sanctions relief Iran received as part of the deal is not proportionate to the specific, limited-duration measures Iran took with respect to terminating its illicit nuclear program. Accordingly, I am unable to certify that the condition in Section 135(d)(6)(A)(iv)(I) of the Atomic Energy Act of 1954 (AEA), as amended, including as amended by the Iran Nuclear Agreement Review Act (INARA) of 2015 (Public Law 114-17) is met as of October 15, 2017.

This conclusion does not mean that it is impossible to fix the flaws of the JCPOA or that it is time for us to leave the deal. Rather than take up legislation under the procedures set forth in Section 135(e) of the AEA, the President has requested that Congress instead work with the Administration to directly address the JCPOA's flaws by amending and strengthening the relevant portions of the AEA, as added by INARA, while we continue to hold Iran accountable for its current commitments. We should work together toward a solution that prevents the emergence of a nuclear-armed Iran and prevents Iran from further developing intercontinental ballistic missiles that undermine regional and international peace and security.

It is only right that we face the Iranian threat as Americans united across the political spectrum and across the branches of our government. This Administration will not allow a singular focus on Iran's nuclear program to blind us to, or distract us from addressing, the regime's many other malign activities, especially its ongoing role in fomenting and perpetuating regional conflicts. We look forward to working with Congress, as well as our allies and partners, to address the full range of Iran's malign activities.

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c. *Kazakhstan*

As discussed in *Digest 2015* at 822, the Agreement Continuing the International Science and Technology Center ("ISTC") was signed on December 9, 2015, relocating the ISTC from Russia to Kazakhstan and broadening the scope of ISTC activities. On December 14, 2017, the final instrument of ratification of the Agreement was deposited with the ISTC Secretariat, bringing the Agreement into force in accordance with its terms.

d. *Norway*

On January 19, 2017, the Agreement for Cooperation between the Government of the United States of America and the Government of the Kingdom of Norway concerning Peaceful Uses of Nuclear Energy, signed at Washington on June 11, 2016, entered into

force. For background on the Agreement (called a 123 Agreement, in reference to the section of the U.S. Atomic Energy Act), see *Digest 2016* at 892-93.

C. ARMS CONTROL AND DISARMAMENT

1. United Nations

a. *Disarmament Commission*

On April 3, 2017, U.S. Representative John A. Bravaco delivered remarks at the 2017 session of the UN Disarmament Commission. His remarks are excerpted below and available at <https://www.state.gov/t/avc/rls/269464.htm>.

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...[T]his year's UNDC session straddles two other multilateral events relevant to our own work: The nuclear ban treaty negotiations, which just ended its first meeting last week here in New York, and the Nuclear Non-Proliferation Treaty's (NPT) first Preparatory Committee (PrepCom) meeting for the 2020 NPT Review Conference (RevCon), which begins on May 2. At this opportune moment, please allow me to explain the U.S. position toward both of these processes.

Nuclear Ban Treaty Negotiations:

2016 Open-Ended Working Group (OEWG) on nuclear disarmament:

The 2016 Open-Ended Working Group (OEWG) on nuclear disarmament, which did not operate by consensus, produced a final report that predictably included language calling for a nuclear weapons ban treaty. Countries leading the Humanitarian Impact of Nuclear Weapons (HINW) initiative used this language as the basis for a resolution (UNGAR 71/258) at the 2016 First Committee to launch negotiations for a nuclear weapons ban treaty, which began on March 27. Importantly, the OEWG report, the UNGA resolution, and now the negotiations themselves have all been opposed by a significant number of states, including both nuclear and non-nuclear weapon states. The element of consensus that underpins successful disarmament initiatives is entirely lacking. We opposed the report and note that many other countries joined us in opposition to this ill-conceived endeavor.

...A ban treaty will come at enormous cost to the NPT political process without securing the elimination of a single nuclear warhead or improving the security of any state; it risks deepening the divide between states, polarizing the political environment on nuclear disarmament, and further complicating future prospects for achieving consensus, whether in the NPT review process, the UN, or the Conference on Disarmament.

Moreover, a ban treaty ignores the essential connection between disarmament and international security conditions, a connection that is acknowledged in the NPT's preamble and in consensus decisions of its review conferences. By doing so, it seeks to delegitimize the extended deterrence relationships on which many of our allies rely. For these reasons, the United States opposed the OEWG, opposed the ban treaty resolution, and will not participate in ban treaty negotiations.

The NPT and the upcoming PrepCom

...The NPT remains the cornerstone of the global nuclear non-proliferation regime. Without the nonproliferation guarantees that it was designed to help ensure, it will be impossible to achieve the disarmament goals that remain our long-term objective. We look forward to the first PrepCom meeting for the 2020 RevCon. ...

As the 2020 review process gets under way, there is a clear need to restore balance to the NPT dialogue. The United States is in the midst of a review, the purpose of which is to consider those approaches to best achieve that outcome in support of enhancing national security. We urge all NPT Parties to reject the false divisions over the best way to proceed on disarmament and the Middle East, so that they do not hamper consensus during this NPT review cycle. Together, we must engage in a respectful dialogue, requiring that we not only defend and explain our own points of view, but also genuinely listen to the points of view of others. Indeed, there is much discussion and listening needed from all Parties in seeking to advance our common interests, including on cases of noncompliance, expanding nuclear arsenals in some countries, the difficult international security environment, achieving conditions that facilitate progress on disarmament, and applying nuclear energy to meet sustainable development goals.

Consensus

It is unfortunate that in recent years, some have suggested that multilateral arms control, disarmament, and nonproliferation can be pursued without the consensus of all participants. The abandonment by some States and many NGOs of the consensus approach in this field because it is “too difficult” or “taking too long” is a major source of the division that we are facing today, has been counterproductive to making real progress on disarmament, and should be rejected. We should take up once again the culture of consensus-building and consensus decision-making that has yielded far more successes over the last 50 years than disappointments and will do so again—if we are patient and persistent.

2017 UNDC Agenda

...[T]his year, we are set to conclude work on the Commission’s current triennial issue cycle, which has focused since 2015 on two long-standing agenda items: In Working Group I (WG I), “Recommendations for achieving the objective of nuclear disarmament and non-proliferation of nuclear weapons,” and in Working Group II (WG II), “Practical confidence-building measures [CBMs] in the field of conventional weapons.” We thank our colleagues from Kazakhstan and Morocco, respectively, for their effective Chairmanships of these working groups over the last two years, and will continue to work actively with the representatives of Bulgaria and Venezuela, also respectively, as they assume these posts in this critical, final year of our present agenda.

Last year, both Working Group Chairs drafted non-papers for our ongoing consideration. Our deliberations on the topics before us have been frank and useful. From the U.S. perspective, and because of a number of ongoing or forthcoming national policy reviews, some of the language in the existing non-papers will need to be altered or removed so that we can arrive at a consensus outcome in three weeks’ time. While this will not be an easy task, if we work together, and are modest in our ambitions, this Commission can yield a positive result.

Outer Space TCBMs

...[T]he United States was pleased that UNGA Resolution 71/82, which conveyed the UNDC’s annual report to the UNGA, also contained a provision encouraging the Commission to hold informal consultations at the 2017 session on the practical implementation of transparency

and confidence-building measures in outer space activities. We are prepared to engage substantively in these discussions, and encourage others to do the same.

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b. *Treaty Banning Nuclear Weapons*

As discussed in *Digest 2016*, the United States voted against a UN resolution inviting negotiations on a treaty to ban nuclear weapons. Negotiations proceeded and the treaty was adopted by the UN General Assembly on July 7, 2017. The permanent representatives to the UN of the United States, the United Kingdom, and France provided a joint press statement upon adoption of the treaty, which appears below. The joint statement is available at <https://usun.state.gov/remarks/7892>.

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France, the United Kingdom and the United States have not taken part in the negotiation of the treaty on the prohibition of nuclear weapons. We do not intend to sign, ratify or ever become party to it. Therefore, there will be no change in the legal obligations on our countries with respect to nuclear weapons. For example, we would not accept any claim that this treaty reflects or in any way contributes to the development of customary international law. Importantly, other states possessing nuclear weapons and almost all other states relying on nuclear deterrence have also not taken part in the negotiations.

This initiative clearly disregards the realities of the international security environment. Accession to the ban treaty is incompatible with the policy of nuclear deterrence, which has been essential to keeping the peace in Europe and North Asia for over 70 years. A purported ban on nuclear weapons that does not address the security concerns that continue to make nuclear deterrence necessary cannot result in the elimination of a single nuclear weapon and will not enhance any country's security, nor international peace and security. It will do the exact opposite by creating even more divisions at a time when the world needs to remain united in the face of growing threats, including those from the DPRK's ongoing proliferation efforts. This treaty offers no solution to the grave threat posed by North Korea's nuclear program, nor does it address other security challenges that make nuclear deterrence necessary. A ban treaty also risks undermining the existing international security architecture which contributes to the maintenance of international peace and security.

We reiterate in this regard our continued commitment to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and reaffirm our determination to safeguard and further promote its authority, universality and effectiveness. Working towards the shared goal of nuclear disarmament and general and complete disarmament must be done in a way that promotes international peace and security, and strategic stability, based on the principle of increased and undiminished security for all.

We all share a common responsibility to protect and strengthen our collective security system in order to further promote international peace, stability and security.

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On July 7, 2017, the State Department issued a press statement on the conclusion of the negotiations at the UN of a treaty to ban nuclear weapons. That statement follows and is available at <https://www.state.gov/r/pa/prs/ps/2017/07/272429.htm>.

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Negotiations on a treaty purporting to ban nuclear weapons concluded in New York on July 7. The United States did not participate in these negotiations and will not support the treaty. Over many years and under various Administrations, we have made clear our willingness to work together with all states to improve international security and reduce the risk of nuclear war. However, this proposed treaty—which ignores the current security challenges that make nuclear deterrence necessary—will not result in the elimination of a single nuclear weapon, nor will it enhance the security of any state. No state that possesses nuclear weapons participated in these negotiations, and no U.S. ally that relies on extended nuclear deterrence supported the final text.

The United States is fully committed to responsible nonproliferation and disarmament efforts and to the Nuclear Non-Proliferation Treaty. We remain on track to meet the central limits of the New START Treaty when they take effect in February 2018, which will cap U.S. and Russian nuclear forces at their lowest levels since the 1950s.

Nuclear disarmament cannot take place in a vacuum. It would require a transformation of the international security environment, consensus-based approaches that include states that possess nuclear weapons as well as those that do not, rigorous verification, and swift and sure enforcement against any potential violation. We call on all states to join us in intensifying our efforts to address the real security challenges the international community would need to overcome in order to make this possible, beginning with the threat to international peace and security presented by North Korea's nuclear and ballistic missile programs, its continuing provocations, and its disregard for numerous UN Security Council resolutions. The proposed treaty produced by the nuclear weapons ban negotiations fails in all of these respects, and will do nothing to advance real-world efforts to make the world a safer place. At best it is a distraction from those efforts. At worst, it will deepen political divisions, undermine alliance relationships that help make the world more secure, and make it harder for the international community to work together in devising and implementing effective measures that will let us meet these challenges together.

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Further statements by the United States and its allies regarding the nuclear weapons ban treaty include: a September 2017 statement released by NATO when the treaty opened for signature, available at https://www.nato.int/cps/en/natohq/news_146954.htm; and an address to the Carnegie Endowment for International Peace on August 22, 2017 by National Security Council

Senior Director Chris Ford, available at <http://carnegieendowment.org/2017/08/22/briefing-on-nuclear-ban-treaty-by-nsc-senior-director-christopher-ford-event-5675>. At several subsequent discussions of nonproliferation at the UN in 2017, the United States, the United Kingdom, and France issued joint statements explaining their negative votes on resolutions welcoming the nuclear weapons ban treaty. Such statements are available at <https://usun.state.gov/remarks/8077> and <https://usun.state.gov/remarks/8075>.

c. First Committee

On October 12, 2017, Ambassador Wood addressed the UN First Committee's thematic discussion on nuclear weapons. His statement follows and is available at <https://www.state.gov/t/avc/rls/274867.htm>.

* * * *

The United States remains committed to the goal of nuclear disarmament, and to seeking to create conditions toward that end. And history makes clear that important progress can be made when security conditions allow. The easing of Cold War rivalries allowed the United States and Russia to make significant steps toward the shared dream of eventual nuclear disarmament after decades in which such movement was impossible. As we look to the future, all States must work together soberly and resolutely to lay the foundations for more such progress as we pursue effective measures relating to nuclear disarmament, as called for in NPT Article VI. While progress is not always rapid, this is out of necessity, not lethargy. Disarmament success is predicated on patience, attention to detail, effective verification, and patient attention to the challenges of effecting the changes in the security environment that are necessary for progress. This last element is critical, considering the crucial role that nuclear deterrence plays in preserving and protecting international peace and security, and the potentially catastrophic consequences were deterrence's restraining effect to be removed while it still remains necessary.

The "Treaty on the Prohibition of Nuclear Weapons" violates all these tenets. Its obligations are vaguely worded, imprecise, and sometimes internally contradictory, while offering only an empty shell for verification. Worse, it is fundamentally at odds with today's security challenges. It is not simply an unproductive instrument; it is likely to be a counterproductive one, with the potential to cause lasting harm to the nonproliferation regime and to the cause of disarmament alike.

The ban treaty is based on the premise that addressing crucial international security issues is not necessary for disarmament. Ban treaty proponents would have us believe that we can do away with nuclear deterrence despite—to cite just one example—the danger posed by North Korea's relentless pursuit of nuclear weapons and associated delivery systems, which stand in flagrant violation of international law.

Furthermore, the Treaty does not contain a credible verification mechanism, demurring on the issue almost entirely. It does run counter to decades of progress in nonproliferation verification by endorsing the IAEA Comprehensive Safeguards Agreement as its standard for safeguarding nuclear material, without also requiring the essential Additional Protocol.

Experience has proven that Comprehensive Safeguards alone are insufficient to detect a covert nuclear program. The drafters' decision to reject the Additional Protocol represents a profound failure of judgment, and is likely to undermine efforts to universalize the Additional Protocol.

Finally, the ban treaty has the potential to do real damage to the NPT in other ways. It exacerbates political tensions on disarmament, dividing states into overly-simplified camps of "nuclear weapons supporters" and "nuclear weapons banners," rather than recognizing shared interests—especially on the challenges involved in creating the conditions that would make possible further disarmament progress. Reinforcing this false dichotomy and worsening the world's polarization on disarmament will make further progress within the institutions that have been vehicles for success, such as the NPT review process, significantly more difficult.

Inspired by the NPT Preamble's acknowledgement of the need to ease international tension and strengthen trust between States in order to facilitate disarmament, the United States stands ready to work with others on effective measures to create improved conditions for nuclear disarmament. To take one example, we continue to work through the International Partnership for Nuclear Disarmament Verification to identify and address the complex challenges associated with nuclear disarmament verification. This work is focused on overcoming technical challenges to make substantive progress when the security conditions improve. We also continue our longstanding work to support and strengthen the global nonproliferation regime against the many challenges it faces today, for who could deny that there can be no way to envision today's nuclear weapons possessors ever putting down such tools without rock-solid assurances that no one else will take them up?

There are no shortcuts to nuclear disarmament. Unrealistic attempts to skip to the finish line have the potential to undermine the institutions and standards we have worked so hard to build. Our collective experience demonstrates that inclusiveness and the search for consensus can lead to progress, while polarization is a recipe for failure. We urge all states to work with us in searching for common solutions to collective problems, pursuing a more secure world.

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On October 16, 2017, Ambassador Wood addressed the UN First Committee thematic discussion on other weapons of mass destruction. His remarks are excerpted below and available at <https://www.state.gov/t/avc/rls/274866.htm>.

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During this year, many Member States have acknowledged the 20th anniversary of the Chemical Weapons Convention (CWC) through events reaffirming the solemn objective enshrined therein: "for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons."

While the courageous work of the women and men of the Organization for the Prohibition of Chemical Weapons has been extraordinary, the harsh reality finds that the CWC and the international norm against the use of chemical weapons remain under assault through the continued use of chemical weapons by State and non-State actors. Let's be clear, the use of chemical weapons by anyone, anywhere is a threat to all of us, everywhere. Following previous

reports by the OPCW-UN Joint Investigative Mechanism (JIM), it is undeniable that the Syrian regime has repeatedly used chemical weapons in violation of the CWC and UN Security Council Resolution 2118. The barbarism did not end there as, on April 4, 2017, the Syrian regime again used sarin gas in an attack on Khan Shaykhun, killing an estimated hundred children, women, and men, and injuring many more. The OPCW Fact-Finding Mission (FFM) concluded indisputably that sarin or a sarin-like substance was used in that attack. All those responsible for such heinous acts must be held accountable.

While the international community awaits the results of the findings of the JIM, the United States strongly supports the JIM's renewal and lauds the highly professional manner in which the JIM and the FFM conduct their work.

This year also saw the use of chemical weapons on February 13 at the Kuala Lumpur International Airport in the assassination of North Korean national Kim Jong-nam. The heinous act of using VX, one of the most dangerous nerve agents in the world, defies all human decency and the norms of the civilized world against the use of chemical weapons. All of those involved in perpetrating this deadly attack must be held accountable.

The events of this past year make it clear that the international community must do more to ensure the integrity and viability of the CWC and to preserve the international laws, norms, and standards against the use of chemical weapons. We must continue to collectively condemn in the strongest possible terms the use of chemical weapons by any State or non-State actor, and to hold all those who would use such weapons accountable. Anything less would be irresponsible.

Biological weapons historically have also been used, and terrorist groups, individuals and states continue to pursue them. The Biological Weapons Convention is our most important tool to prevent the use of disease as a weapon of war. But to do so, it must be implemented effectively. Unfortunately, BWC States Parties squandered the opportunity at the Eighth Review Conference (RevCon) to adopt a stronger intersessional program. Many delegations, including the United States, came to the RevCon with proposals for such a program, and a willingness to find an acceptable way forward. Regrettably, we did not succeed in that objective.

Nonetheless, the United States was reassured by the shared commitment to the Convention, to minimizing risks from weaponized pathogens, and to solidifying the global norm against the use of disease as a weapon. The increase in Treaty membership is also heartening, and we welcome Samoa as the 179th State Party.

Although Parties could not agree on a new work program at the RevCon, they tasked the December Meeting of States Parties (MSP) to reach agreement on a work program. We welcome Chairman-designate Indian Ambassador Gill's efforts to prepare for a successful MSP, which in our view would provide for more focused, expert work on oversight of science and technology, national implementation, capacity building, and preparedness for, and response to, outbreaks of disease. Our cross-regional consultations indicate that many would support such a result as a step forward. We call on all States Parties to support such a work program at the upcoming MSP.

Finally, adequate funding for BWC work is essential. We welcome the recent payment of substantial overdue assessments, but many debts are still outstanding, and these debts in combination with structural financial problems will make it very difficult to pay ISU salaries at the beginning of the year. Both issues need urgent attention.

On October 23, 2017, Ms. Rachel Hicks delivered the U.S. statement at a UN First Committee thematic discussion on other disarmament measures and international security. Her remarks are excerpted below and available at <https://www.state.gov/t/avc/rls/275061.htm>.

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At this year's First Committee session, the United States is again sponsoring our resolution on "Compliance with non-proliferation, arms limitation and disarmament agreements and commitments." I will take a moment to introduce L.7 under agenda item 99(aa), "General and Complete Disarmament."

Mr. Chairman, there is a broad consensus that compliance with international treaties, agreements, and other obligations and commitments undertaken by UN Member States to prevent the further proliferation of weapons of mass destruction and delivery systems, and to regulate and/or reduce armaments, is a central element of the international security architecture. Without the confidence that countries are honoring their commitments, the deals we make with one another in this field will not be worth the paper on which they are printed. Moreover, the authority and benefits of effective agreements and commitments will be undermined, and the world will become a far more dangerous place, if we fail to hold states accountable for their noncompliance, in accordance with international law.

Which brings me to North Korea's unlawful and dangerous behavior. North Korea's dangerous actions violate multiple UN Security Council resolutions, and collectively they present a security threat not just to Northeast Asia, but to the entire world. Over the last 25 years, North Korea has violated every agreement it made regarding its nuclear weapons program. Instead, North Korea has used its nuclear weapons and ballistic missile development programs to threaten Member States, and leveraged international negotiations and agreements to extort benefits such as oil, food, and money from the international community, continuing its destructive drive toward a nuclear arsenal.

Given North Korea's failure to comply with its disarmament and nonproliferation obligations and its failure to live up to its international commitments, this body must make clear that compliance is essential to international peace and security, through supporting this resolution. L.7 acknowledges the widespread recognition that noncompliance undermines international peace and stability and affirms our determination to use diplomacy to return violators to compliance.

Mr. Chairman, this year's version of the resolution contains only minor technical updates to the text we sponsored in 2014. L.7 is open for co-sponsorship, and we would welcome even more co-sponsors than the 73 that this resolution currently enjoys.

We hope that all nations represented here will join in supporting L.7, as the principle of compliance with treaties, agreements, obligations, and commitments in this field, freely undertaken, is something which should be universally accepted.

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2. International Partnership for Nuclear Disarmament Verification

As discussed in *Digest 2014* at 824-25, and *Digest 2015* at 863-66, the United States advocated for and led the way in establishing the International Partnership for Nuclear Disarmament Verification (“IPNDV”). The IPNDV convened a joint working group in Geneva on June 28, 2017, at which Ambassador Wood delivered opening remarks. His remarks are excerpted below and available at <https://geneva.usmission.gov/2017/06/28/opening-remarks-to-the-international-partnership-for-nuclear-disarmament-verification-ipndv-joint-working-group-meeting-geneva/>.

* * * *

I want to welcome all the partners in attendance here this morning to Geneva. I am thrilled to host another joint working group meeting here at the U.S. Mission. It is appropriate that the final joint working group meetings be held in the same location as the first. These two joint meetings serve as bookends on the hard work all of you have done over the past 18 months, and I am confident that the work you’ll accomplish this week will put the Partnership solidly on the path to completing its initial phase on time this November.

The key factor to enable the negotiation of further reductions in nuclear weapons is the global security situation. While the near-term security situation does not seem likely to enable such reductions, now is the time, without the pressure of a negotiation, to contemplate what verification objectives and measures will be necessary to have confidence in the further reduction of global nuclear stockpiles. Now is the time to bring together experts from both nuclear weapons possessor and non-possessor States to build capacity and identify the challenges associated with verifying compliance with future nuclear weapon reduction agreements. Now is the time to think through the complex solutions required to address those challenges, and begin the hard work of developing procedures and technologies that can implement those solutions.

Fortunately, the importance of verification in future nuclear disarmament efforts is largely unquestioned, and the collective capacity of nations to address verification issues is increasing and will continue to increase through cooperative efforts like the IPNDV. Over the past two years the Partnership has identified many complex technical challenges involved in the multilateral verification of nuclear disarmament, and you all have rolled up your sleeves and focused collaboratively on doing the hard work to overcome them.

In pursuing your work, you have developed a capacity map highlighting the significant scope and breadth of existing verification-related training courses and programs. You have identified key procedures and technologies that will allow future on-site inspections to remain an essential tool for States to have confidence that nuclear disarmament commitments are being carried out. Through the working groups, you have begun to unravel the complexities of nuclear disarmament verification and have identified the critical objectives and issues that States will need to address in order to credibly verify compliance with future disarmament commitments.

Equally important to completing the work of Phase I, this week you will begin to work out in what direction the Partnership will move during the next Phase. These discussions will be critical to maintaining the momentum that the Partnership has built over the last two years.

My staff and I stand ready to assist you throughout the week, and we look forward to hearing about your progress. I wish you all success in your efforts this week in Geneva, and into the future.

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The IPNDV held its fifth plenary meeting in Buenos Aires, Argentina in November 2017 to review the Phase I results of the Partnership's three working groups and discuss a work program for its next two-year Phase II. See November 27, 2017 media note, available at <https://www.state.gov/r/pa/prs/ps/2017/11/275904.htm>. The opening remarks Anita Friedt delivered on November 29, 2017, on behalf of the U.S. delegation, are excerpted below and available at <https://www.state.gov/t/avc/rls/276054.htm>.

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As many of you know, the U.S. Department of State, in collaboration with the Nuclear Threat Initiative, created the Partnership in order to foster collaborative engagement between states both with and without nuclear weapons on the technical challenges associated with verifying nuclear disarmament. This work includes identifying these challenges, and developing potential technologies and procedures to address them.

As the Partnership has discovered throughout its work, these challenges are significant. However, finding mutually understood solutions that ensures future nuclear disarmament can be credibly verified is essential to achieving any potential future reductions.

This plenary marks the conclusion of the Partnership's first phase, which has focused on the monitoring and inspection of a notional nuclear weapon dismantlement process. While Phase I focused on some of the most complicated and technologically challenging aspects of disarmament verification, the work of the IPNDV has enhanced global understanding of the challenges associated with this work, and already presented new avenues toward potential solutions.

Over the next three days, we will receive updates on the Partnership's work over the course of its initial phase, providing the most comprehensive readout to date of the group's accomplishments. This will include briefings from the co-chairs of each individual Working Group, as well as an integrated discussion led by Dr. Lewis Dunn from NTI. Dr. Dunn will bring together the work of the three groups into one, cohesive framework, in order to highlight all of the key policy judgements reached by the Partnership related to verifying nuclear weapons dismantlement.

This meeting will also mark the transition to the next phase of the Partnership, and will determine the scope of our work over the next two years. Phase II will build on and deepen the work of Phase I, expanding the scope from an exclusive focus on dismantlement to addressing verification issues across the wider nuclear disarmament process. Specifically, the Partnership will be able to leverage its experience and expertise to look into issues such as how to verify declarations, data handling requirements across the inspection process, and the use of technologies to enable measurements of Special Nuclear Material and high explosives – all while preventing the disclosure of proliferation sensitive information. These are but a few areas where

the Partnership can add value to the global understanding about verifying nuclear disarmament in the years ahead.

Our meeting this week brings together over 100 experts from 22 countries, featuring both technical experts and policy makers from across the global political spectrum. While we regret the fact that our Russian colleagues have decided not to participate this week, we are very pleased with the contributions to date from both the other four members of the P5, as well as a host of non-nuclear weapon states which have been so actively involved in this process from the beginning. Collectively, we will continue to make real progress on some of the key technical issues related to nuclear disarmament.

Indeed, multilateral progress on nuclear disarmament necessitates robust and meaningful cooperation between those states that possess nuclear weapons and those that do not. To those who contend there is no work being done on this front, the Partnership stands in clear and stark opposition, and it is an important element of the U.S. commitment to Article VI of the NPT. We hope to continue and deepen this cooperation both this week, and throughout Phase II. The Partnership's work towards credible verification is key to creating the conditions for future nuclear disarmament. The work we are doing here this week, and that the Partnership will perform over the next two years, is an important and necessary step toward future progress.

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3. New START Treaty

The Thirteenth Session of the Bilateral Consultative Commission under the New START Treaty was held in Geneva from March 29 to April 11, 2017. See April 12, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/04/270134.htm>. The 14th BCC session was held in Geneva in October 2017.

4. INF Treaty

December 8, 2017 was the 30th anniversary of the signing of the Intermediate-Range Nuclear Forces ("INF") Treaty between the United States and the Soviet Union. A State Department press statement issued on that date outlines the Trump administration strategy regarding the INF Treaty. The statement is excerpted below and available at <https://www.state.gov/r/pa/prs/ps/2017/12/276363.htm>.

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Unfortunately, this pivotal agreement is under threat today. The Russian Federation has taken steps to develop, test, and deploy a ground-launched cruise missile system that can fly to ranges prohibited by the INF Treaty. In 2014, the United States declared the Russian Federation in violation of its obligations under the INF Treaty. Despite repeated U.S. efforts to engage the Russian Federation on this issue, Russian officials have so far refused to discuss the violation in any meaningful way or refute the information provided by the United States.

The United States remains firmly committed to the INF Treaty and continues to seek the Russian Federation's return to compliance. The Administration firmly believes, however, that the United States cannot stand still while the Russian Federation continues to develop military systems in violation of the Treaty. While the United States will continue to pursue a diplomatic solution, we are now pursuing economic and military measures intended to induce the Russian Federation to return to compliance. This includes a review of military concepts and options, including options for conventional, ground-launched, intermediate-range missile systems, which would enable the United States to defend ourselves and our allies, should the Russian Federation not return to compliance. This step will not violate our INF Treaty obligations. We are also prepared to cease such research and development activities if the Russian Federation returns to full and verifiable compliance with its INF Treaty obligations.

The United States does and will continue to abide by its INF Treaty obligations. We call on the Russian Federation to take concrete steps to return to compliance, preserve the INF Treaty, and restore confidence in the role of arms control to manage strategic stability.

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On December 14, 2017, the State Department issued a media note conveying that the delegations from Belarus, Kazakhstan, the Russian Federation, the United States, and Ukraine had concluded the 31st session of the Special Verification Commission in Geneva. The media note, available at <https://www.state.gov/r/pa/prs/ps/2017/12/276613.htm>, also notes that the delegations at the session had commemorated the 30th anniversary of the INF Treaty.

D. CHEMICAL AND BIOLOGICAL WEAPONS

1. Chemical Weapons in Syria

On April 4, 2017, Secretary Tillerson issued a press statement on a recent chemical weapons attack in Syria. His statement follows and is available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/04/269460.htm>.

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The United States strongly condemns the chemical weapons attack in Idlib province, the third allegation of the use of such weapons in the past month alone. There are reports of dozens dead, including many children. While we continue to monitor the terrible situation, it is clear that this is how Bashar al-Assad operates: with brutal, unabashed barbarism. Those who defend and support him, including Russia and Iran, should have no illusions about Assad or his intentions. Anyone who uses chemical weapons to attack his own people shows a fundamental disregard for human decency and must be held accountable.

It is also clear that this horrific conflict, now in its seventh year, demands a genuine ceasefire and the supporters of the armed combatants in the region need to ensure compliance. We call upon Russia and Iran, yet again, to exercise their influence over the Syrian regime and to

guarantee that this sort of horrific attack never happens again. As the self-proclaimed guarantors to the ceasefire negotiated in Astana, Russia and Iran also bear great moral responsibility for these deaths.

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On June 29, 2017, the State Department issued a media note in support of the OPCW's report by a fact-finding mission ("FFM") confirming that sarin, or a chemical weapon similar to sarin, was used in Khan Shaykhun, Syria on April 4, 2017. The media note, available at <https://www.state.gov/r/pa/prs/ps/2017/06/272289.htm>, goes on to say:

...The FFM's conclusion is based on a wide range of information, including the results of analysis of biomedical samples taken from the victims and the surrounding environment, and extensive witness interviews.

The FFM report will now be conveyed to the OPCW-UN Joint Investigative Mechanism (JIM), the additional independent international expert mechanism established by the UN Security Council, to determine who is responsible for the attack.

The United States strongly supports the FFM and JIM efforts, which have been pursued in an impartial and highly professional manner.

The facts reflect a despicable and highly dangerous record of chemical weapons use by the Assad regime. Through its continued use of chemical weapons and its failure to destroy its chemical weapons program in its entirety, Syria continues to fail to comply with its legal obligations under the Chemical Weapons Convention (CWC) and UN Security Council Resolution 2118.

On October 24, 2017, Ambassador Michele J. Sison, U.S. Deputy Permanent Representative to the United Nations, delivered the U.S explanation of vote on a draft Security Council resolution to extend the mandate of the Joint Investigative Mechanism ("JIM"). That statement is excerpted below and available at <https://usun.state.gov/remarks/8040>. As mentioned by Ambassador Sison, Russia vetoed the resolution. Ambassador Haley's statement on the Russian veto is available at <https://usun.state.gov/remarks/8038> (not excerpted herein). Ambassador Haley delivered a further statement after Russia vetoed a subsequent draft resolution put forward by Japan as a stop-gap measure to allow the JIM to continue. See November 17, 2017 explanation of vote, available at <https://usun.state.gov/remarks/8120>. See also November 16, 2017 explanation of vote, available at <https://usun.state.gov/remarks/8111>.

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Thank you, Mr. President. As I just said before the vote, it is not every day that this Council considers an issue that is so horrific ... as the use of chemical weapons against civilians. And today is an important day on the calendar; it is UN Day on which we the peoples of the United Nations recommit to unite, as the UN Charter preamble states, to maintain international peace and security. We all know there has long been an international norm against the use of chemical weapons because they are so cruel and so indiscriminate as never to be justified.

In one of our rare moments of unity, this Council appropriately condemned chemical weapons attacks in Syria. We even collaborated on creating an independent, impartial body to investigate confirmed cases of chemical weapons use. This body is comprised of internationally recognized, independent experts. It employs professional, scientific means of investigating attacks and identifying those responsible.

And yet ... this body is under attack by the Syrian regime's allies. And the question we must ask ourselves is whether the JIM is being attacked because it has failed in its job to determine the truth in Syria or because its conclusions have been politically inconvenient for some Council members.

We have just voted on a short, simple resolution to extend the mandate of the Joint Investigative Mechanism, also known as the "JIM." We mandated this technical body to investigate chemical weapons attacks on the innocent men, women and children of Syria. Composed of experts from the United Nations and the Organization for the Prohibition of Chemical Weapons, OPCW, the JIM has a simple task: to find out who ordered and carried out the use of these weapons in Syria.

The United States and 10 other members of the Council voted in favor of this resolution today, as it is clear that there is more work to be done—and more chemical weapons attacks to investigate. The JIM has been successful in its work and we want that vital work to continue without interruption in its operations.

We want to know the truth about these attacks, regardless of where it takes us.

The United States deeply regrets that one member of this Council vetoed against this text, putting political considerations over the misery of Syrian civilians who have suffered and died from the use of chemical weapons. The reasons offered fool no one this morning.

We reject this cynicism, and we reaffirm our confidence in these technical experts, men and women who come from many regions, many backgrounds, and many perspectives. They knew their work would be attacked by Syria's allies—yet have carried out their mandate effectively and responsibly.

Claims of JIM partiality just don't survive scrutiny when you consider that all parties have acknowledged that sarin was used in Khan Sheikhoun and, as reported by the OPCW again this week, the Syrian regime itself provided the JIM with samples of evidence that support this conclusion. The JIM has even gone so far as to visit Syria several times to further its investigation—which we had hoped would satisfy the inappropriate demands of some members of this Council.

But it appears it will never be enough for some Council members.

We are not deceived nor deterred, however, and we call on all members of this Council to join us in rejecting these attacks on the JIM. These attacks are not intended to get us closer to the truth; they are intended to hide the truth. They are not designed to get us closer to accountability for chemical weapons use in Syria. They are designed to shield the perpetrators for some of the worst war crimes of our century.

Fortunately, this Council will have more chances to show that it values the truth, and to show its solidarity with the Syrian people. The JIM's mandate expires on November 16, about three weeks from now. This investigative body should be a great symbol of what this Council can do when we work together. It is a symbol of our commitment to justice and accountability, and it is the hope to thousands of suffering and grieving Syrian civilians.

So we call on all Council members not to turn their backs on this hope and to preserve this Council's unity in the face of Syrian chemical weapons attacks.

We call on the Security Council to take up this vital matter once again and vote to extend at that time the mandate of the Joint Investigative Mechanism.

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On October 27, 2017, the State Department issued a statement on the October 26 report of the OPCW-UN JIM regarding chemical weapons use in Khan Shaykhun and Um Housh, Syria. The October 27 statement follows and is available at <https://www.state.gov/r/pa/prs/ps/2017/10/275166.htm>.

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On October 26, 2017, the Organization for the Prohibition of Chemical Weapons-UN Joint Investigative Mechanism (JIM) issued its latest report which concluded that the Assad regime used the chemical weapon sarin in the horrific April 4, 2017 attack that killed scores of people in Khan Shaykhun, Syria. The report also determined that the Islamic State extremist group was responsible for using the chemical weapon sulfur mustard on September 15 and 16, 2016 in Um-Housh, Syria.

This new report confirms unequivocally what the United States and many in the international community have stated publicly for many months—that the Assad regime carried out the heinous April 4 attack killing approximately 100 innocent Syrian civilians, including many children, and injuring hundreds more.

The Security Council must send a clear message that the use of chemical weapons by anyone will not be tolerated, and must fully support the work of the impartial investigators. As Ambassador Haley has emphasized, countries that fail to do so are no better than the dictators or terrorists who use these terrible weapons. By attempting to undermine and eliminate the JIM, Russia has demonstrated once again that it values protecting its ally the Assad regime over stopping the monstrous use of chemical weapons. Syria's blatant disregard for international norms and standards should be met with condemnation and accountability by all members of the international community.

Syria's continued use of chemical weapons and failure to destroy its chemical weapons program in its entirety are clear violations of Syria's obligations under the Chemical Weapons Convention and UN Security Council Resolution 2118. We condemn in the strongest possible terms the use of chemical weapons anywhere, by anyone, under any circumstances and reiterate our commitment that those responsible will be held to account.

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On November 2, 2017, Ambassador Wood provided an explanation of vote on behalf of multiple countries on a draft resolution in the First Committee on implementing the Chemical Weapons Convention. The statement is excerpted below and available at <https://usun.state.gov/remarks/8070>.

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Mr. Chairman, I have asked for the floor on behalf of Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, New Zealand, Norway, Portugal, the Republic of Korea, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom of Great Britain and Northern Ireland, and my own delegation, the United States of America, to explain our vote on Resolution A/C.1/72/L.26, “Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction,” sponsored by Poland.

Mr. Chairman, our respective countries intend to vote in favor of this resolution as we believe it accurately reflects the objectives and goals of the Chemical Weapons Convention, CWC, and supports the extraordinary work done by the Organization for the Prohibition of Chemical Weapons, OPCW, and the United Nations Joint Investigative Mechanism, JIM, team to attribute responsibility for the use of chemical weapons in Syria. Equally important, this resolution highlights the grave reality of chemical weapons use in Syria and underscores the need to hold those responsible to account. We express our deepest appreciation to the brave women and men of the JIM, the OPCW Fact-Finding Mission, FFM, and the OPCW Declaration Assessment Team, DAT, for their dedication and professionalism in investigating chemical weapons attacks in Syria and seeking to resolve the gaps, inconsistencies, and discrepancies in Syria’s declaration.

Mr. Chairman, we believe there is no greater challenge to the CWC than a State Party using chemical weapons in flagrant violation of its legal commitments. The international community must condemn such use and hold those who use chemical weapons accountable. The use of chemical weapons by anyone anywhere is a threat to all of us, everywhere. On October 26, 2017, the JIM released its 7th report which determined that the Syrian Arab Republic used chemical weapons, sarin, on April 4, 2017 in Khan Shaykhoun, Syria. This use of CW by the Syrian regime is reprehensible and violates its obligations under the CWC and UN Security Council Resolution 2118. These findings make clear that Syria has not renounced chemical warfare. These findings further underscore the risks posed by Syria’s failure to declare the true magnitude and scope of its chemical weapons program and arsenals. The international community must squarely confront this reality and hold Syria accountable for its continued use of chemical weapons.

We also condemn in the strongest possible terms the use of chemical weapons (sulfur mustard) by the Islamic State in Iraq and the Levant, ISIL, on September 15 and 16, 2016 in Um-Housh, Syria, in flagrant disregard of well-established international standards and norms. The use of chemical weapons by a State or non-state actor is inexcusable; and we demand that the Syrian government and ISIL immediately desist from any further use of chemical weapons.

We fully support the extension of the JIM to continue investigating additional cases of confirmed use or likely use determined by the OPCW FFM, and further support efforts by the OPCW Declaration Assessment Team to address the gaps and discrepancies in Syria's CWC declaration.

Mr. Chairman, the events of this past year, including the continued use of chemical weapons in Syria, and the use of the nerve agent VX in a fatal incident at the Kuala Lumpur International Airport, make it clear that the international community must do more to preserve the integrity and viability of the CWC and the international laws, norms, and standards against the use of chemical weapons.

Any effort to ignore these aforementioned serious issues undermines the work of the international community to date, detracts from the extraordinary efforts undertaken by the OPCW and the UN, and constitutes a grave challenge to the CWC and the entire international legal framework. We must continue to collectively condemn in the strongest possible terms the use of chemical weapons by any State or non-State actor, and to hold all those who would use such weapons accountable. Anything less would be utterly irresponsible.

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On November 8, 2017, the State Department issued as a press statement the joint statement on Syria chemical weapons by UK Foreign Secretary Boris Johnson, French Foreign Minister Jean-Yves Le Drian, Foreign Minister Sigmar Gabriel and Secretary Tillerson. The joint statement follows and is available at <https://www.state.gov/secretary/20172018tillerson/remarks/2017/11/275394.htm>.

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On October 26, the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism (JIM), a body established by unanimous decision of the United Nations Security Council (UNSC), concluded that the Assad regime is responsible for the use of sarin in Khan Shaykhun on 4 April 2017. We have full trust in the JIM's findings, its professionalism and independence. The Syrian regime violated international law, including the Chemical Weapons Convention. We condemn this heinous act and demand that the Syrian regime immediately cease any and all use of chemical weapons and finally declare to the OPCW all chemical weapons that it possesses.

The JIM also found that ISIS/Daesh was responsible for a sulfur mustard attack on the town of Um Housh in September 2016 on two consecutive days. We also condemn this despicable act, and we are united in our determination to defeat this abhorrent terrorist movement once and for all. We condemn the use of chemical weapons by anyone, anywhere.

We agree that it is vital for the international community to continue to investigate cases where chemical weapons have been used in Syria. We therefore urge the United Nations Security Council to maintain the JIM's investigative capacity. We also call on the OPCW Executive Council to take action in response to the JIM report to send an unequivocal signal that those responsible for the use of chemical weapons will be held accountable.

Sadly, this is not the first report identifying those responsible for the use of chemical weapons in Syria. In 2016, the JIM came to the conclusion that the Syrian regime was responsible for the use of chlorine as a chemical weapon in at least three attacks in 2014 and 2015, and ISIS/Daesh used sulfur mustard once in 2015.

And there is more work for the JIM to do. The OPCW has now reported that a sarin attack “more than likely” took place in Al Lataminah in Syria, just a week before and 15 kilometers from the sarin attack on Khan Shaykhun. The attack it describes bears the hallmarks of the Syrian Regime.

A robust international response is now essential to hold those responsible to account, seek justice for the victims of these abhorrent attacks and to prevent such attacks from happening again. After such a report, the Security Council and all its members have a common responsibility to protect the international non-proliferation regime and live up to their previous commitments.

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Andrea Hall, Senior Director for Weapons of Mass Destruction and Counterproliferation at the U.S. National Security Council, delivered the statement for the United States delegation at the first day of the 22nd Conference of the Parties to the OPCW on November 27, 2017. Her statement follows. OPCW Doc. No. *CS-2017-0745.E* C-22/NAT.7

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It is an honour to join you at the Conference of the States Parties in this twentieth anniversary year of the entry into force of the Chemical Weapons Convention. As we reflect collectively on the many accomplishments that we as States Parties and the Organisation for the Prohibition of Chemical Weapons (OPCW) have made over the years, I am pleased to take this opportunity to salute the tremendous contributions of Director-General Üzümcü, who has provided stalwart and visionary leadership to the OPCW during a period of unprecedented challenges. In this context, I am also pleased to congratulate Ambassador Fernando Arias on his nomination to assume the weighty responsibilities of the Director-General next year. The United States of America looks forward to joining other States Parties in confirming his appointment and supporting his future endeavours as the next Director-General.

Even as we acknowledge the important achievements that we have gained through two decades of implementation of the Convention, we must not be complacent or naïve regarding the challenges we face today. The international community is at a critical juncture in the fight to maintain the international norm against chemical weapons use. I see three issues that have forced us to this precipice—the Assad regime’s continued use of chemical weapons on its own people; the increased interest in and use of chemical weapons by non-State actors; and the growing concern that States are deliberately developing central nervous system (CNS)-acting chemicals for warfare or for other harmful purposes, cloaking these efforts under the guise of non-prohibited purposes such as law enforcement or medical research. I will address each of these issues. And, I have four recommendations that we in the international community should take to address them.

First, let me start with the threat posed by the continued use of chemical weapons by a State Party to the Chemical Weapons Convention—Syria.

Chemical weapons use by the Syrian Arab Republic remains the most serious violation of the Chemical Weapons Convention in the Convention's twenty-year history, and the greatest modern challenge to the global norm against chemical weapons use. The Syrian regime was found responsible by the OPCW-United Nations Joint Investigative Mechanism (JIM), an independent and impartial international body of experts, for three separate attacks using the toxic chemical chlorine as a chemical weapon in 2014 and 2015, and for the 4 April 2017, sarin attack in Khan Shaykhun, an opposition-held territory, where most of the victims were women and children. And the JIM would likely investigate numerous additional cases if the mandate were extended. The OPCW Fact-Finding Mission (FFM) has in front of it an additional 60 allegations of chemical weapons use in Syria to investigate. Syria's continued use of chemical weapons in blatant contravention of international law presumably continues because the Assad regime believes these weapons have military utility and psychological effect, and that they help the regime make gains in the ongoing civil war in Syria. While the civil war continues, we have seen the real effects on television—Syrian civilians with little to no defence against these abhorrent weapons dying in the streets. Use of chemical weapons is barbaric and must not be tolerated by the international community.

Second, I will turn to the increased interest in and use of chemical weapons by non-State actors.

The threat of non-State actor interest in development, acquisition, and use of chemical weapons is not a new challenge, but the threat is real, and the risks to our collective security are great. The technical pathway to a chemical weapon capability is clearly within the grasp of non-State actors. Non-State actors like ISIS are pursuing and using rudimentary chemical agents, like chlorine and mustard, in improvised explosive devices in Iraq and Syria. ISIS has used industrial chemicals and sulfur mustard in improvised explosive devices, mortars, and rockets in both Iraq and Syria. So far, the JIM has concluded that ISIS was responsible for two chemical weapons attacks using mustard, one in Marea in August 2015, and one in Um-Housh in September 2016. The counter ISIS campaign report detailed continued chemical weapons use in 2016 and 2017 beyond those attributed to ISIS by the JIM. Further, these actors are difficult to deter. While our ISIS-specific sanctions are important to limiting the outside support for these groups, non-State actors will continue to pose threats to international security because they shrug off accountability and the basic tenets of human decency. Chemical weapons terrorism can affect us all, and we must work together to stop it.

Finally, I would like to highlight the threat posed by central nervous system-acting chemicals, or so-called "incapacitants."

CNS-acting chemicals raise a new spectre of chemical weapons re-emergence. Since 2002, there has been a growing interest, evident through academic articles and press pieces, in the utility of these chemicals for law enforcement purposes. When it comes to these chemicals, the aerosolised use is not consistent with the law enforcement exception to the Chemical Weapons Convention as a purpose not prohibited by the Convention. President Trump recently announced that the opioid crisis in the United States of America is a public health emergency. As part of our response, the White House issued safety recommendations for first responders when handling and encountering fentanyl, the most well-known of the CNS-acting chemicals. If our first responders are at risk when they encounter illicit fentanyl, how can our unsuspecting populations be safe when fentanyl is aerosolised and used as a law enforcement tool? The simple answer is that they

cannot. Despite these dangers, countries continue to pursue these chemicals. If we do not seriously confront this issue here in The Hague, we would be turning a blind eye to the threat that CNS-acting chemicals pose to the Chemical Weapons Convention—a threat that will increase, not decrease, over time.

Call to Action

The international community must take action now or risk a reversal of a trend we have worked so hard to establish. We must take every opportunity to deter states from using chemical weapons. If we fail to take action now, non-State actor use will also rise. And, the number of countries pursuing nefarious CNS-acting chemical programmes will rise as well. We have made a commitment to put an end to chemical weapons use, and to fulfil that commitment, I recommend four concrete steps.

Step One: Hold Accountable Those Who Use Chemical Weapons

The international community must continue to take steps to hold the Syrian regime accountable for its chemical weapons use and take additional steps to deter future use. Holding the regime appropriately accountable would require effective United Nations Security Council and OPCW Executive Council action. But accountability cannot occur without appropriate resources. The United States of America has provided millions of dollars to the United Nations and OPCW trust funds set up specifically for the investigation of chemical weapons use in Syria. And we are not alone—the EU, Japan, and a number of other countries have made contributions to these funds, which have facilitated the OPCW and United Nations' ability to continue to investigate chemical weapons use in Syria. The Executive Council demonstrated accountability with the adoption of its 11 November 2016 decision, and it must do so again. While we sought an accountability resolution earlier this year at the United Nations, our efforts were undercut by Syria's ally the Russian Federation, which made a blatant decision to choose politics over human decency and our collective international obligations. The use of the veto has not deterred us, and many countries have enacted national sanctions on entities involved in the use of chlorine as a chemical weapon in Syria in 2014 and 2015, and we will again seek United Nations action on the latest JIM conclusions. We urge every State Party to condemn the use of chemical weapons by Syria and non-State actors. Unified condemnation and action are key to deterring future use and upholding the international norm against chemical weapons use. Everyone here in this room has a responsibility to respond to these atrocious acts.

Step Two: Full and Effective Implementation of Article VII of the Chemical Weapons Convention

The threat of non-State actor development, acquisition, and use of chemical weapons is a complex problem, and the response from the OPCW and States Parties—individually and collectively—must equal the challenge. We must fully and effectively implement our Chemical Weapons Convention Article VII obligations, specifically, comprehensive penal and export control legislation at the national level. This is the best way to ensure that there are no jurisdictions where non-State actors who commit or seek to commit chemical weapons-related crimes may seek safe harbour. Further, like-minded States Parties could share information regarding their relevant national domestic policies and laws. This would serve not only as a confidence-building measure, but would also strengthen the prohibitions in the Convention and provide other stakeholders examples that could shorten their own routes to stronger national policies. Implementation of Article VII helps us deter not only those who would use chemical weapons but also those who would support them or provide them materials, knowledge, or a safe

haven. It might deny terrorists or other non-State actors the tools they need to succeed and drive them away from these heinous weapons.

Step Three: Improve Chemical Defences

The international community should work to improve the defence of those populations most vulnerable to chemical weapons use. I specifically recommend providing support to the NGO medical community and to countries that may be a risk of attack, but are currently inadequately prepared to defend themselves. The establishment of the Rapid Response and Assistance Mission is an excellent step towards providing necessary assistance to States Parties affected by chemical weapons use, but we can do more. We should provide these entities training, defensive equipment, and appropriate medical countermeasures. Indeed, within the U.S. Government, the State Department has committed to providing up to USD 15 million in chemical weapons threat reduction equipment and training to medical personnel and first responders. I know we are not alone in wanting to improve our collective security and defence against chemical weapons use. Furthermore, denying those that would use these weapons their desired effect is, in itself, a deterrent to use.

Step Four: Endorse a CNS-acting Chemical Non-Use Policy Statement

Lastly, I call on States to endorse a non-use policy regarding aerosolisation of CNS-acting chemicals that reiterates the tenets of the Chemical Weapons Convention, to include that we are “determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons.” This endorsement would include international support recognising that the aerosolised use of CNS-acting chemicals is not consistent with law enforcement exception to the Chemical Weapons Convention. Together we can preserve the norm against chemical weapons use, but we have to do it now.

On 6 April 2017, President Trump said, “It is in the vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons.” I would argue that preventing the spread and use of chemical weapons is also strongly in the international community’s security interest. It is important that the international community take steps now, such as those I have outlined, to improve the chances of deterring future use of chemical weapons.

Mr Chairperson, I request that this statement be considered an official document of the Twenty-Second Session of the Conference of the States Parties and posted on the external server.

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2. Biological Weapons Convention

The United States welcomed Samoa’s accession to the Biological and Toxin Weapons Convention (“BWC”) in a September 29, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/09/274517.htm>. Samoa deposited its instrument of accession on September 21, 2017, becoming the 179th State Party to the BWC.

On November 1, 2017, Ambassador Wood provided the U.S. explanation of position in the First Committee on a draft resolution on the Biological Weapons Convention. Ambassador Wood’s statement on the BWC is excerpted below and available at <https://usun.state.gov/remarks/8083>.

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I would like to explain the United States' position regarding Resolution A/C.1/72/L.49 on the "Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction."

Mr. Chairman, for over four and a-half decades, the BWC has served as a barrier against the possession and proliferation of biological weapons. Together with the 1925 Geneva Protocol, the BWC has solidified the international norm against the use of disease as weapons.

This is not the resolution we hoped to see. The international processes that support the Biological Weapons Convention are struggling. Last year's Review Conference was unable, for the first time since 2001, to agree on a new program of work. The BWC is even struggling to simply pay its bills. However, Parties have another chance at the upcoming BWC Meeting of States Parties, which is specifically tasked to "seek to make progress on issues of substance and process for the period before the next Review Conference, with a view to reaching consensus on an intersessional process." It seemed to my delegation that, if there was ever a time for the General Assembly to send a clear message of support, this was it. And so we sought more ambitious text that would capture what we believe is broad support among BWC States Parties for a new, more substantive and action-oriented work program. In the interest of consensus, we accepted far less. Nevertheless, we greatly appreciate the efforts of Eighth Review Conference President Amb Molnár in drafting this resolution and skillfully working to reconcile conflicting views.

We also support the efforts of BWC MSP Chairman Indian Ambassador Gill to set the stage for a constructive meeting in December. Since the RevCon, the United States has been working constructively across traditional political boundaries to forge agreement on elements that could comprise a constructive, substantive program of work. We are encouraged by the emerging support for a program that includes expert-level working groups on a balanced set of key issues, including science and technology, national implementation, international cooperation and assistance, and preparedness for and response to outbreaks of disease. Support is also growing for the idea that these groups would prepare factual reports with recommendations to be considered at the annual meetings. We hope that all Parties will approach the MSP in a positive spirit, prepared to agree on such a reasonable and doable program.

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E. ARMS TRADE TREATY

For background on the Arms Trade Treaty, see *Digest 2015* at 883-84, *Digest 2013* at 710-15, and *Digest 2012* at 674-79. Ambassador Wood provided the U.S. explanation of vote in the UN First Committee on a draft resolution on the Arms Trade Treaty on October 31, 2017. That statement follows and is available at <https://usun.state.gov/remarks/8078>.

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Mr. Chairman, my delegation has abstained on draft resolution L.27, "The Arms Trade Treaty."

The United States is conducting standard reviews of various international agreements, including the Arms Trade Treaty, and as such we are not in a position to vote "yes." Our abstention in no way prejudices the outcome of our policy review.

The United States shares the aims of the States Parties to the Arms Trade Treaty. We continue to support efforts to improve international standards for regulating the international trade in conventional arms, and to prevent and eradicate the illicit trade in conventional arms and prevent their diversion. We continue to offer our cooperation and assistance to Member States in order to achieve this objective, including by assisting in the establishment of robust transfer controls and the enhancement of conventional weapons stockpile security and management, in order to contribute to international peace and security. We look forward to continuing our engagement with Member States, both Arms Trade Treaty States Parties and non-States Parties alike, to prevent conventional arms from falling into the wrong hands.

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Cross References

Litigation involving alleged breach of NPT, **Ch. 4.B.2.**

Cooper v. TEPCO, **Ch. 5.C.4.**

Palestinian attempted accession to Law of Sea Convention, **Ch. 12.A.1.**

Disarmament aspects of outer space, **Ch. 12.B.2.**

Iran sanctions, **Ch. 16.A.1.**

Syria sanctions, **Ch. 16.A.2.**

North Korea nonproliferation sanctions, **Ch. 16.A.5.c.**