

## Table of Contents

<b>CHAPTER 12</b> .....	<a href="#">526</a>
<b>Territorial Regimes and Related Issues</b> .....	<a href="#">526</a>
<b>A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES</b> .....	<a href="#">526</a>
1. UN Convention on the Law of the Sea.....	<a href="#">526</a>
<i>Meeting of States Parties to the Law of the Sea Convention</i> .....	<a href="#">526</a>
2. South China Sea and East China Sea .....	<a href="#">527</a>
3. Freedoms of Navigation, Overflight, and Maritime Claims .....	<a href="#">528</a>
a. <i>China</i> .....	<a href="#">528</a>
b. <i>Ecuador</i> .....	<a href="#">531</a>
c. <i>Mexico</i> .....	<a href="#">533</a>
d. <i>Canada</i> .....	<a href="#">533</a>
4. Other Boundary or Territorial Issues.....	<a href="#">534</a>
a. <i>Cuba maritime boundary</i> .....	<a href="#">534</a>
b. <i>Mexico maritime boundary</i> .....	<a href="#">535</a>
5. Maritime Security and Law Enforcement.....	<a href="#">535</a>
a. <i>Cuba Search and Rescue Agreement</i> .....	<a href="#">535</a>
b. <i>Portugal Search and Rescue Agreement</i> .....	<a href="#">535</a>
<b>B. OUTER SPACE</b> .....	<a href="#">536</a>
1. The Outer Space Treaty: Potential Legal Models for Activities in Space.....	<a href="#">536</a>
2. UN First Committee .....	<a href="#">538</a>
a. <i>Discussion on disarmament aspects of outer space</i> .....	<a href="#">538</a>
b. <i>Resolution on preventing an arms race in outer space</i> .....	<a href="#">539</a>
c. <i>Resolution on no first placement of weapons in outer space</i> .....	<a href="#">541</a>

3. Galloway Space Law Symposium.....	<a href="#">542</a>
<b>Cross References</b> .....	<a href="#">546</a>

## 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 27<sup>th</sup> meeting of SPLOS on June 15, 2017. His statement follows.

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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>.

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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.

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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](http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin83e.pdf). Excerpts follow from the U.S. note to Ecuador in May 2017.

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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.

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**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>.

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...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>.

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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 12<sup>th</sup> 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.**