

DIGEST OF
UNITED STATES PRACTICE
IN INTERNATIONAL LAW

2015

OFFICE OF THE LEGAL ADVISER
U.S. DEPARTMENT OF STATE



A Note About this Online Publication of the *Digest*

I am pleased to present this online version of the *Digest of United States Practice in International Law* for the calendar year 2015.

This is the eighteenth edition of the *Digest* published by the International Law Institute, and the third edition published online by ILI. Each year the U.S. Department of State has published the *Digest of United States Practice in International Law*. From 1989 to 2010 ILI and the State Department co-published a hard bound edition of the *Digest* through the active participation of the Department's Office of the Legal Advisor. During the latter part of that period, Oxford University Press joined as co-publisher with ILI and State. Beginning in 2011, the State Department has posted the entire edition of the *Digest* on its website. That year ILI and Oxford University Press also published the *Digest* as a hard bound edition, and for the year 2012 ILI published a hard bound edition jointly with the American Society of International Law.

In light of the general worldwide trend towards online publishing and the increased reliance on online materials for legal research, ILI has suspended publication of a hard bound edition of the *Digest* and in lieu thereof is presenting this online version of the 2015 *Digest* on ILI's website.

This online version exactly duplicates the *Digest* for 2015 published by the State Department on State's website. Selections of materials in this *Digest* were made solely by the Office of the Legal Advisor of the State Department, based on judgments as to the significance of the issues, their possible relevance to future situations, and their likely interest to government lawyers, their foreign counterparts, scholars and other academics, and private practitioners.

It is my hope that practitioners and scholars will find this new edition of the *Digest*, tracking the most important developments in the state practice of the United States during 2015, to be useful.

Don Wallace, Jr.
Chairman
International Law Institute

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

2015

CarrieLyn D. Guymon
Editor

Office of the Legal Adviser
United States Department of State

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Introduction

It is my pleasure to introduce the 2015 edition of the *Digest of United States Practice in International Law*. This volume covers the period just prior to my becoming Legal Adviser, and reflects the work of the Office of the Legal Adviser under the outstanding and dedicated leadership of my predecessor, Mary E. McLeod. 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.

As is true every year, in 2015 the United States negotiated and concluded a number of noteworthy treaties, other international agreements, and political arrangements. On July 14, 2015, the P5+1 (China, France, Germany, Russia, the United Kingdom, and the United States), the European Union, and Iran reached a Joint Comprehensive Plan of Action (“JCPOA”) to ensure that Iran’s nuclear program will be exclusively peaceful. U.S. leadership was also instrumental in the conclusion by over 190 countries of the Paris Agreement of the UN Framework Convention on Climate Change on December 12, 2015. The Addis Ababa Action Agenda on Financing for Development and the 2030 Agenda for Sustainable Development were concluded with U.S. involvement and support. The passage of Trade Promotion Authority (“TPA”) and Trade Adjustment Assistance (“TAA”) legislation in June 2015 paved the way for the Trans-Pacific Partnership (“TPP”), which was concluded in October 2015, and the Trans-Atlantic Trade and Investment Partnership (“T-TIP”), on which negotiations are ongoing. The United States also signed an extradition treaty with the Dominican Republic; a mutual legal assistance treaty with Kazakhstan; an agreement continuing the International Science and Technology Center in Kazakhstan; new air transport agreements with Togo, Barbados, Serbia, Ukraine, Seychelles, and Mexico; and a tax treaty with Vietnam. The Executive Branch transmitted a number of treaties to the Senate for ratification, including mutual legal assistance treaties with Algeria and Jordan, and a protocol to the U.S. tax treaty with Japan. The U.S. Congress adopted implementing legislation for several nuclear security treaties, including the Nuclear Terrorism Convention, leading to U.S. ratification of those treaties. The United States advocated for other non-binding foreign relations tools as appropriate in certain circumstances. For example, the U.S. government continued its campaign of diplomatic engagement to advance the long-term sustainability and security of the outer space environment, eschewing the negotiation of new instruments.

The United States also undertook a number of significant steps in the area of diplomatic relations in 2015. On July 20, 2015, the United States and Cuba re-established diplomatic relations and permanent diplomatic missions in their respective countries. Also in 2015, the United States rescinded Cuba’s designation as a state sponsor of terrorism, made further adjustments to sanctions on Cuba, and entered into claims settlement talks and an aviation arrangement with Cuba. U.S.-Nicaraguan relations also registered a milestone: the settlement of remaining property claims by U.S. nationals against Nicaragua in 2015 lifted the requirement of an annual waiver to allow U.S. government assistance and support. The United States suspended embassy operations in Sana’a, Yemen in February 2015 and responded to litigation regarding visas and evacuations. The U.S. Mission to Somalia commenced operations out of the U.S.

Embassy in Nairobi, Kenya in September 2015. The United States also participated in and supported a UN-sponsored effort in 2015 to broker a political resolution in Libya to create a “Government of National Accord.”

The United States continued to lead a coalition of nations participating in the non-international armed conflict against ISIL in Iraq and Syria in 2015. The United States also continued to deploy a variety of resources to support efforts to resolve conflicts in the Middle East, Syria, Burundi, the Central African Republic, Mali, Sudan, South Sudan, Burma, Ukraine, and Yemen.

The United States actively engaged with a number of UN human rights treaty bodies in 2015. In March the United States submitted its one-year follow up response regarding the International Covenant on Civil and Political Rights (“ICCPR”) to the Human Rights Committee. The United States submitted its Universal Periodic Review (“UPR”) report to the Office of the UN High Commissioner for Human Rights in February, and made its UPR presentation in May. The United States also provided its one-year follow-up response to the Committee on the Elimination of Racial Discrimination and filed its one-year follow-up response to the Committee Against Torture.

The United States participated in a number of lawsuits and arbitration proceedings raising significant issues of foreign policy and international law in 2015. The U.S. Supreme Court issued several important decisions relating to international law or foreign policy in 2015. In *Zivotofsky v. Kerry*, the Supreme Court held that a law purporting to direct the Executive Branch to list “Israel” as the place of birth in passports and other official documents for certain individuals born in Jerusalem was an unconstitutional infringement on the Executive Branch’s exclusive recognition power. In *OBG v. Sachs*, the Supreme Court concurred with the Executive Branch’s interpretation of the scope of the Foreign Sovereign Immunity Act’s commercial activity exception. In *Kerry v. Din*, the Supreme Court found that a consular officer satisfied any due process rights a U.S. citizen may have in her spouse’s visa application when the consular officer informed the citizen that her husband was inadmissible under the “terrorist activities” bar to admissibility, without providing a more specific legal ground or factual allegations. The United States filed briefs in several other cases before the Supreme Court, including *Bank Markazi v. Peterson*, regarding the constitutionality of the Iran Threat Reduction and Syria Human Rights Act of 2012. The United States participated in other litigation matters, including cases challenging U.S. policy and practice regarding passports, citizenship, and visas; cases brought by law of war detainees and former detainees; extradition cases; and cases concerning foreign sovereign and official immunity.

The *Digest* also discusses U.S. participation in international organizations, institutions, and initiatives in 2015. The United States led efforts that resulted in the adoption of a number of important UN Security Council resolutions in 2015, including resolution 2249 on counterterrorism and resolution 2254 on Syria. President Obama addressed the 70th UN General Assembly and a UN Leaders’ Summit on Countering ISIL and Violent Extremism and also convened a summit on peacekeeping for heads of UN Member States. At the Inter-American Commission on Human Rights, the United States made submissions and participated in hearings and other proceedings. The United States provided comments and information to the International Law Commission (“ILC”) on several topics, including: most-favored-nation clauses; the protection of the atmosphere; customary international law and crimes against humanity; protecting the environment in relation to armed conflict; immunity of State officials from foreign criminal jurisdiction; provisional application of treaties; and protection of the

atmosphere. With regard to the International Criminal Court, the United States continued to voice its concerns about the Kampala amendments on the crime of aggression, but expressed support for the work of the Court, including the apprehension of Ahmad Al Faqi Al Mahdi, an alleged member of the Islamic extremist group Ansar al-Dine, and Dominic Ongwen, a senior commander for the Lord's Resistance Army. The U.S. delegation participated in the ten-year review of the World Summit on the Information Society, which concluded at a high-level meeting of the UN General Assembly.

The Executive Branch also advanced a number of important domestic policies and programs with international legal implications in 2015. President Obama issued a new policy regarding the recovery of hostages from overseas. New U.S. measures to counter cybercrime include transnational organized crime rewards offers for specified cybercriminals and Executive Order 13694, "Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities." The Department of State explained and defended the U.S. refugee admission program in light of rising tides of refugee populations around the globe. The general counsel of the Department of Defense provided the latest in a series of speeches by U.S. government officials explaining the legal framework for the use of military force to counter terrorism. The Department of State announced the denial of the application of a permit for the Keystone XL pipeline. The United States defended and explained its freedom of navigation operations in Cuba, Nicaragua and the Spratly Islands. And detainees remaining at Guantanamo Bay declined further in 2015 as part of ongoing U.S. government efforts to close the facility.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2015 volume, attorneys whose voluntary contributions to the *Digest* were particularly significant include Henry Azar, Jay Bischoff, Violanda Botet, David Buchholz, David DeBartolo, Maegan Conklin, Robert Friedman, Kimberly Gahan, Ona Hahs, Kimberly Jackson, Karen Johnson, Meredith Johnston, Emily Kimball, Jeffrey Kovar, Oliver Lewis, Michael Mattler, Holly Moore, Megan O'Neill, Katherine Padgett, Sabeena Rajpal, Shana Rogers, Jesse Tampio, Amanda Wall, Samuel Woodworth, and Jeremy Weinberg. Sean Elliott at the Foreign Claims Settlement Commission also provided valuable input. I express very special thanks to Joan Sherer, the Department's Senior Law Librarian, and to Jerry Drake 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*.

*Brian J. Egan
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Note from the Editor

The official version of the *Digest of United States Practice in International Law* for calendar year 2015 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 2015 volume follows the general organization and approach of past volumes. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Some of the litigation related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through May 2016) 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 2016 where they relate to the discussion of developments in 2015.

Updates on most other 2015 developments, such as the release of annual reports and sanctions-related designations of individuals or entities under U.S. executive orders are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross references to related entries within the volume and to prior volumes of the *Digest*.

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

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

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

<http://www.ca2.uscourts.gov/decisions.html>;

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

<http://www.ca3.uscourts.gov/search-opinions>;

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

<http://pacer.ca4.uscourts.gov/opinions/opinion.htm>;

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

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

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

<http://www.ca6.uscourts.gov/opinions/opinion.php>;

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

<http://media.ca7.uscourts.gov/opinion.html>;

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

<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*

On September 21, 2015, the United States filed a petition for rehearing *en banc* in the U.S. Court of Appeals for the Second Circuit in *Luis Ramon Morales-Santana v. Loretta Lynch*, No. 11-1252 (2d. Cir. 2015). On December 1, 2015, the petition for rehearing was denied. *Morales* involves the constitutionality of the statutory provisions governing when a child born abroad out of wedlock is granted U.S. citizenship at birth. Children born abroad to U.S. citizens do not acquire citizenship as a matter of right; rather, various immigration and nationality statutes control the transmission and acquisition of citizenship overseas. The 1952 version of the Immigration and Nationality Act (“INA”) provided that when a child was born abroad to a U.S. citizen father out of wedlock, the child was declared to be a U.S. citizen only if, before the child’s birth, the U.S. citizen parent had been physically present in the United States for a total of ten years, at least five of which were after the parent had turned 14 years of age. 8 U.S.C. 1401(a)(7). In contrast, Section 1409(c) provided that, notwithstanding 8 U.S.C. 1409(a), a child born out of wedlock to a U.S. citizen mother shall be a U.S. citizen if the mother had previously been physically present in the United States for a continuous period of one year. 8 U.S.C. 1409(c).

Plaintiff Morales was born out of wedlock in the Dominican Republic to a Dominican mother and a U.S. citizen father. He originally entered the United States as a legal permanent resident, but later faced deportation due to his criminal convictions. He argued that the differing requirements for out of wedlock citizen parents constitutes gender discrimination that violates the Fifth Amendment’s equal protection clause. The Court of Appeals for the Second Circuit applied intermediate scrutiny and invalidated the “more onerous” ten-year physical presence requirement for out of wedlock fathers, requiring them to instead show one-year continuous physical presence. Excerpts follow

(with footnotes omitted) from the U.S. brief arguing for *en banc* review. The brief is available in full at www.state.gov/s/l/c8183.htm.

* * * *

Rehearing *en banc* is warranted because the panel erred, the issues are exceptionally important, and the opinion is inconsistent with Supreme Court precedent and creates a conflict among the circuits. The panel's decision makes it impossible for the Departments of State and Homeland Security to administer the citizenship scheme according to uniform, consistent rules.

I. The Panel's Equal Protection Ruling Applied the Wrong Standard of Review, Misinterpreted the Statute and Its Legislative History, and Created a Conflict with *Flores-Villar*

Pursuant to its exclusive and plenary authority under Article I of the Constitution, Congress has enacted comprehensive rules governing immigration and naturalization, including the acquisition of citizenship by children born abroad to U.S. citizen parents. The panel committed a series of errors when it held aspects of the statutory scheme unconstitutional.

A. The panel erred when it failed to apply rational basis review to petitioner's constitutional challenge. Citizenship for children who are born abroad of U.S. citizen parents is available "only upon terms and conditions specified by Congress." *Miller v. Albright*, 523 U.S. 420, 456 (1998) (O'Connor, J., concurring in the judgment) (quotation marks omitted). Deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo v. Bell*, 430 U.S. 787, 792, 793 n. 4 (1977). Indeed, the Supreme Court has held that Congress's judgments regarding requirements for citizenship of a person born abroad are entitled to great deference and should be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" supporting those judgments. *Id.* at 794.

The panel erred in declining to follow *Fiallo* and instead applying heightened scrutiny. The Supreme Court's decision in *Fiallo* rested its deferential standard of review on Congress's "broad power over immigration and naturalization." 430 U.S. at 792 (emphasis added). The power to confer citizenship is just as subject to the plenary authority of Congress as the power to admit or exclude aliens; indeed, it is an aspect of the same power. See *Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment). Moreover, the plaintiffs in *Fiallo* included U.S. citizens, 430 U.S. at 790 n.3, who unsuccessfully argued that rational basis review should not apply because the statutory provision at issue implicated "constitutional interests of U.S. citizens and permanent residents." *Id.* at 794. If rational basis review applied to the constitutional claims of citizens in *Fiallo*, it should apply to petitioner's constitutional claim as well.

B. The panel also erred in rejecting the government's argument that the statutory scheme is justified by the goal of ensuring a sufficient connection between the child and the United States. Throughout the Act, Congress generally made it easier for U.S. citizens to transmit citizenship to children born abroad in circumstances where the child's only legal parent or parents were U.S. citizens or nationals. It carefully distinguished that circumstance from situations in which the child had two legal parents, one of whom was a U.S. citizen and the other of whom was an alien. That distinction reflects Congress's reasonable view that under such

circumstances, the child would be subject to influences of the alien parent and would therefore be less closely connected to the United States.

Section 1409(c) implements this approach by allowing an unmarried U.S. citizen mother to transmit citizenship to her child at birth subject to a one-year continuous physical presence requirement, instead of the ten-year physical presence requirement in Section 1401(a)(7). As Congress was aware, at the exact moment of birth “there is only one . . . legal parent,” *i.e.*, the mother. *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. 62 (1940) (1940 Hearings)*. In the absence of any competing parental influence, it was reasonable for Congress to treat that differently than it would treat a child born to a married couple consisting of one U.S. citizen and one alien. In doing so, Section 1409(c) helps to ensure a connection between U.S. citizen children and the United States.

C. The panel also erred in concluding that Congress did not enact Section 1409(c) for the concededly-legitimate purpose of avoiding statelessness. Slip op. 21, 25, 32. Most importantly, the panel discounted the clearest statement of Congress’s actual purpose with respect to that provision. The Senate Report expressly declared that “[t]his provision [Section 1409(c)] establishing the child’s nationality as that of the [citizen] mother regardless of legitimation or establishment of paternity is new. *It insures that the child shall have a nationality at birth.*” S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952) (1952 Senate Report) (emphasis added). The panel’s holding that Section 1409(c) was not actually motivated by preventing statelessness at birth is thus directly at odds with the express statement of the enacting Congress.

In a lengthy footnote, the panel attempted to distinguish the unambiguous legislative history by asserting that it addressed only that Section 1409 “had eliminated a provision in the 1940 [Nationality] Act that had conditioned a citizen mother’s ability to transmit nationality to her child on the father’s failure to legitimate the child prior to the child’s eighteenth birthday.” Slip op. 28-29 n.10 (citing and quoting Nationality Act of 1940, § 205, 54 Stat. 1137, 1139-1140). The panel concluded that the statement in the legislative history thus “does not purport to justify the gender-based distinctions in the physical presence provisions at issue in this appeal.” *Ibid.*

That analysis is flawed. It makes sense only on the assumption that Section 205 contained the same “gender-based” distinction now at issue in this case. But if the panel is correct that the 1940 Act did not allow unmarried mothers to transmit U.S. nationality to their children in circumstances where the alien father legitimated the child before he or she gained majority, slip. op. 28-29 n.10, then the 1940 Act did not in fact contain the same “gender-based” distinction at issue here. On the panel’s view of the 1940 Act, in circumstances where (1) a child was born abroad, out of wedlock, to a U.S. citizen and an alien, and (2) the child was subsequently legitimated by the father, the child could obtain U.S. citizenship only if the U.S. citizen mother or father could satisfy the ten-year physical presence requirement set forth in Section 201(g) of the 1940 Act. In other words, on the panel’s understanding of the 1940 Act, Section 205 treated unmarried U.S. citizen mothers and fathers equally.

If that is true, however, then Congress must have introduced the “gender- based” disparity at issue in this case only in 1952, through Section 1409(c)’s “eliminat[ion] of a provision in the 1940 [Nationality] Act that had conditioned a citizen mother’s ability to transmit nationality to her child on the father’s failure to legitimate the child prior to the child’s eighteenth birthday.” Slip op. 28-29 n.10. But as the panel acknowledged, the Senate Report

confirms that Section 1409(c)'s elimination of that provision was intended to "insure[] that the child shall have a nationality at birth." 1952 Senate Report 39. The panel's own analysis of the 1940 Act thus supports the conclusion that Congress's actual purpose when enacting the gender disparity at issue here was to avoid statelessness.

D. The panel also erred in suggesting that Section 1409(c)'s gender distinction reflected "gender-based generalizations concerning who would care for and be associated with a child born out of wedlock." Slip op. 31 (citing sources). The panel's support for that proposition involved government statements about the greater likelihood of maternal responsibility for a child who had not subsequently been legitimated by the father. In those circumstances, however, Congress recognized the mother is the "only . . . legal parent." 1940 Hearings 62.

It was not unreasonable or discriminatory for Congress to assume that the only legal parent would be responsible for the child's upbringing. Nor was it unreasonable or discriminatory for Congress to want to ensure that a child whose only legal parent at birth was a U.S. national mother should acquire nationality through the mother instead of running a risk of statelessness. The fact that the scheme ultimately provided a different standard for mothers to transmit their nationality than fathers in certain circumstances did not reflect impermissible gender bias or stereotypes, but rather the practical reality that unmarried mothers and unmarried fathers are differently situated with respect to their children at the moment of birth. See generally *Nguyen v. INS*, 533 U.S. 53, 64-68 (2001).

* * * *

F. The flaws in the panel's analysis of Section 1409(c) would warrant *en banc* review in any event, but such review is especially justified because the panel decision creates a direct circuit conflict with the Ninth Circuit's decision in *Flores-Villar*, 536 F.3d at 997. The panel's errors are exceptionally important because they invalidated a statute on constitutional grounds, conflict with Ninth Circuit, and establish an unmanageable, divergent rule of citizenship contrary to the constitutional mandate for a uniform nationwide rule. See Fed. R. App. P. 35.

II. The Panel Erred in Conferring Citizenship to Petitioner and in Its Revision of the Statutory Scheme

To remedy the perceived constitutional violation, the panel conducted a severability analysis and ultimately ruled that petitioner is entitled to U.S. citizenship. The panel began by asserting that it had chosen to "sever[] the ten- year requirement in [Sections] 1409(a) and 1401(a)(7) and [to] require[] every unwed citizen parent to satisfy the less onerous one-year continuous presence requirement if the other parent lacks citizenship." Slip op. 36. The panel then implemented that conclusion by literally rewriting Section 1401(a)(7) . . .

The panel rejected the government's argument that – even if Section 1409(c) is constitutionally flawed – the proper remedy is to apply Section 1401(a)(7)'s ten- year physical presence requirement, on an equal basis, to any children born abroad, out of wedlock, to a U.S. citizen and an alien. See Br. for the United States, *Flores-Villar v. United States* (No. 09-5801), 2010 WL 3392008 at *45-*52 (explaining severability analysis in detail). The panel's severability analysis is flawed in a number of fundamental ways, two of which are emphasized here.

A. The panel's severability analysis is ambiguous in at least two significant respects, both of which are likely to create confusion in its implementation. First, that analysis fails to appreciate that Section 1401(a)(7) is a broad provision that covers not only children born to

unmarried parents (when one parent is a U.S. citizen and the other is an alien) but also children born to married parents (when one is a citizen and the other is an alien). It is not clear whether the panel intends its rewritten version of Section 1401(a)(7) to apply (1) only to unmarried parents, with parents married to aliens remaining subject to the ten-year physical presence requirement appearing in the version of Section 1401(a)(7) actually enacted by Congress; or (2) to unmarried parents as well as parents married to aliens, as the literal text of its revision suggests, even though the statute as drafted by Congress is not unconstitutional as applied to parents married to aliens. Both of these approaches violate the “Separability” provision, Section 406 of the 1952 Act, which states that if “any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.” 8 U.S.C. § 1101 note (1958).

The panel’s analysis also fails to appreciate the important difference between a “physical presence” requirement (which Congress included in Section 1401(a)(7)) and a “continuous” physical presence requirement (which Congress included in Section 1409(c)). It is conceivable that some U.S. citizen parents are capable of satisfying the ten-year “physical presence” requirement set forth in Congress’s Section 1401(a)(7), but not the one-year “continuous” physical presence requirement that Congress included in Section 1409(c) (and that the panel has now incorporated into its revised version of Section 1401(a)(7)). See 7 Foreign Affairs Manual (FAM) § 1133.4-3(a) (1998). The panel’s revision of Section 1401(a)(7) therefore arguably deprives at least some individuals of the U.S. citizenship to which they were entitled under the version of Section 1401(a)(7) enacted by Congress. It seems unlikely that the panel intended such a result, despite the plain language of its revision of Section 1401(a)(7).

B. The panel’s decision to rewrite Section 1401(a)(7) also violates 8 U.S.C. § 1421(d) (1958). That provision states that “[a] person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in [Title III of the 1952 Act], and not otherwise.” *Id.* In *Nguyen*, the Supreme Court made clear that transmission of citizenship under Section 1409(a) constitutes a “naturalization” for purposes of Section 1421(d), at least where the statutory conditions set forth in that provision are satisfied after the child is born. *Nguyen*, 533 U.S. at 72; see 8 U.S.C. § 1101(a)(23) (1958) (defining “naturalization” for the Act); but see Dept. of State, 7 FAM § 1131.6-3 (2013). Here, the panel decision allows children of unmarried citizen-fathers to acquire citizenship under conditions contrary to those prescribed by statute. That conclusion violates Section 1421(d).

C. For these reasons – as well as those stated in the government’s briefs submitted to the panel in this case, and to the Supreme Court in *Flores-Villar* – the only proper way to cure the equal protection violation identified by the panel would be to apply the ten-year physical presence requirement in Section 1401(a)(7), on a prospective basis, to unmarried citizen mothers. Such a ruling would comply with Section 1421(d) of the 1952 Act, respect Congress’s authority over who may acquire U.S. citizenship, and allow Congress to decide whether or how to extend citizenship to children of unmarried U.S. citizen fathers and mothers who do not meet the physical presence requirement in Section 1401(a)(7).

* * * *

On August 17, 2015, a district court in Texas adopted the Second Circuit’s reasoning in *Morales* and likewise held that the physical presence requirements under 8 U.S.C. § 1409, as applied at the time of the birth of the petitioner in that case, violate the Constitution’s guarantee of equal protection under the Fifth Amendment. *Villegas-Sarabia v. Johnson et al.*, No. 5:15-CV-122-DAE (W.D. Tex.).

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

As described in *Digest 2014* at 22-26, *Tuaua et al. v. United States*, No. 13-5272 (D.C. Cir.) is an action challenging the notation on the U.S. passports of American Samoan individuals indicating they are U.S. nationals, but not U.S. citizens, in accordance with INA § 101(a)(29), 8 U.S.C. § 1101(a)(29), which designates American Samoa as an “outlying possession” of the United States. The district court dismissed all claims, and the U.S. filed a brief on appeal in favor of affirming the dismissal. On June 5, 2015, the U.S. Court of Appeals for the D.C. Circuit affirmed the district court, finding that the Citizenship Clause of the U.S. Constitution does not mandate birthright citizenship for American Samoans and that requiring birthright citizenship when the American Samoan government objected would be “impracticable and anomalous.” *Tuaua et al. v. United States*, 788 F.3d 300 (D.C. Cir. 2015). Excerpts follow from the opinion (with footnotes omitted). Appellants petitioned for rehearing *en banc*. The U.S. brief in opposition to the petition is available at www.state.gov/s/l/c8183.htm. On October 2, 2015, the Court denied the petition for rehearing.

* * * *

The Citizenship Clause of the Fourteenth Amendment provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1, cl. 1. Both Appellants and the United States government agree the text and structure of the Fourteenth Amendment unambiguously leads to a single inexorable conclusion as to whether American Samoa is within the United States for purposes of the clause. They materially disagree only as to whether the inescapable conclusion to be drawn is whether American Samoa “is” or “is not” a part of the United States. ...

* * * *

Appellants and Amici Curiae further contend the Citizenship Clause must—under Supreme Court precedent—be read in light of the common law tradition of *jus soli* or “the right of the soil.” See *United States v. Wong Kim Ark*, 169 U.S. 649, 654, 18 S.Ct. 456, 42 L.Ed. 890 (1898) (“The constitution nowhere defines the meaning of ... [the word “citizen”], either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States.’ In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.”) (internal citation omitted).

* * * *

We are unconvinced, however, that *Wong Kim Ark* reflects the constitutional codification of the common law rule as applied to outlying territories. As the Ninth Circuit noted in *Rabang v. INS*, the expansive language of *Wong Kim Ark* must be read with the understanding that the case “involved a person born in San Francisco, California. The fact that he had been born ‘within the territory’ of the United States was undisputed, and made it unnecessary to define ‘territory’ rigorously or decide whether ‘territory’ in its broader sense meant ‘in the United States’ under the Citizenship Clause.” 35 F.3d 1449, 1454 (9th Cir.1994); accord *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir.2010); *Valmonte v. INS*, 136 F.3d 914, 920 (2d Cir.1998). “It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.” *Wong Kim Ark*, 169 U.S. at 679, 18 S.Ct. 456.

And even assuming the framers intended the Citizenship Clause to constitutionally codify *jus soli* principles, birthright citizenship does not simply follow the flag. Since its conception *jus soli* has incorporated a requirement of allegiance to the sovereign. To the extent *jus soli* is adopted into the Fourteenth Amendment, the concept of allegiance is manifested by the Citizenship Clause’s mandate that birthright citizens not merely be born within the territorial boundaries of the United States but also “subject to the jurisdiction thereof,” U.S. CONST. amend. XIV, § 1, cl. 1; see *Wong Kim Ark*, 169 U.S. at 655, 18 S.Ct. 456 (“The principle embraced all persons born within the king’s allegiance, and subject to his protection.... Children, born in England, of [] aliens, were [] natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king’s dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.”).

Appellants would find any allegiance requirement of no moment because, as non-citizen nationals, American Samoans already “owe[] permanent allegiance to the United States.” 8 U.S.C. § 1101(a)(22); see also *Sailor’s Snug Harbor*, 28 U.S. at 155 (“[A]llegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign.”). Yet, within the context of the Citizenship Clause, “[t]he evident meaning of the[] ... words [“subject to the jurisdiction thereof”] is, not merely subject in some respect or degree to the jurisdiction of the United States, but *completely* subject to their political jurisdiction, and owing them direct and immediate allegiance.” *Elk v. Wilkins*, 112 U.S. 94, 102, 5 S.Ct. 41, 28 L.Ed. 643 (1884) (emphasis added). It was on this basis that the Supreme Court declined to extend constitutional birthright citizenship to Native American tribes. See *id.* at 99, 5 S.Ct. 41 (“The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities....”). ...Even assuming a background context grounded in principles of *jus soli*, we are skeptical the framers plainly intended to extend birthright citizenship to distinct, significantly

self-governing political territories within the United States’s sphere of sovereignty—even where, as is the case with American Samoa, ultimate governance remains statutorily vested with the United States Government. *See Downes*, 182 U.S. at 305, 21 S.Ct. 770 (White, J., concurring) (doubting citizenship naturally and inevitably extends to an acquired territory regardless of context).

III

Analysis of the Citizenship Clause’s application to American Samoa would be incomplete absent invocation of the sometimes contentious Insular Cases, where the Supreme Court “addressed whether the Constitution, by its own force, applies in any territory that is not a State.” *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008). ...

“The doctrine of ‘territorial incorporation’ announced in the Insular Cases distinguishes between incorporated territories, which are intended for statehood from the time of acquisition and in which the entire Constitution applies *ex proprio vigore*, and unincorporated territories [such as American Samoa], which are not intended for statehood and in which only [certain] fundamental constitutional rights apply by their own force.” *Commonwealth of N. Mariana Islands v. Atalig*, 723 F.2d 682, 688 (9th Cir.1984).

Appellants and Amici contend the Insular Cases have no application because the Citizenship Clause textually defines its own scope. ... We conclude the scope of the Citizenship Clause, as applied to territories, may not be readily discerned from the plain text or other indicia of the framers’ intent, absent resort to the Insular Cases’ analytical framework. *See Boumediene*, 553 U.S. at 726, 128 S.Ct. 2229 (While the “Constitution has independent force in the territories that [is] not contingent upon acts of legislative grace[,] ... because of the difficulties and disruptions inherent in transforming ... [unincorporated territories] into an Anglo–American system, the Court adopted the doctrine of territorial incorporation, under which the Constitution applies ... only in part in unincorporated territories”).

* * * *

As the Supreme Court in *Boumediene* emphasized, the “common thread uniting the Insular Cases ... [is that] questions of extraterritoriality turn on objective factors and practical concerns, not formalism.” 553 U.S. at 764, 128 S.Ct. 2229. While “fundamental limitations in favor of personal rights” remain guaranteed to persons born in the unincorporated territories, *id.* at 758, 128 S.Ct. 2229 (quoting *Late Corp. of the Church of Jesus Christ of Latter–Day Saints v. United States*, 136 U.S. 1, 44, 10 S.Ct. 792, 34 L.Ed. 478 (1890)), the Insular framework recognizes the difficulties that frequently inure when “determin[ing] [whether a] particular provision of the Constitution is applicable,” absent inquiry into the impractical or anomalous. *See id.*; *see also Downes*, 182 U.S. at 292, 21 S.Ct. 770 (White, J., concurring) (“[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States.”).

A

... Appellants cite to a bevy of cases to argue citizenship is a fundamental right. *See, e.g., Afroyim v. Rusk*, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757 (1967); *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964); *Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630

(1958) (plurality op.). But those cases do not arise in the territorial context. Such decisions do not reflect the Court's considered judgment as to the existence of a fundamental right to citizenship for persons born in the United States' unincorporated territories. *Cf. Wong Kim Ark*, 169 U.S. at 679, 18 S.Ct. 456.⁷

"Fundamental" has a distinct and narrow meaning in the context of territorial rights. It is not sufficient that a right be considered fundamentally important in a colloquial sense or even that a right be "necessary to [the] []American regime of ordered liberty." *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 (9th Cir.1990) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 n. 14, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)). Under the Insular framework the designation of fundamental extends only to the narrow category of rights and "principles which are the basis of all free government." *Dorr v. United States*, 195 U.S. 138, 147, 24 S.Ct. 808, 49 L.Ed. 128 (1904) (emphasis added); *Downes*, 182 U.S. at 283, 21 S.Ct. 770 ("Whatever may be finally decided by the American people as to the status of these islands and their inhabitants ... they are entitled under the principles of the Constitution to be protected in life, liberty, and property ... even [if they are] not possessed of the political rights of citizens of the United States.").

In this manner the Insular Cases distinguish as universally fundamental those rights so basic as to be integral to free and fair society. In contrast, we consider non-fundamental those artificial, procedural, or remedial rights that—justly revered though they may be—are nonetheless idiosyncratic to the American social compact or to the Anglo–American tradition of jurisprudence. *E.g.*, *Balzac*, 258 U.S. 298, 42 S.Ct. 343 (constitutional right to a jury trial does not extend to unincorporated territories as a fundamental right); *see also Downes*, 182 U.S. at 282, 21 S.Ct. 770 ("We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence.").

We are unconvinced a right to be designated a citizen at birth under the *jus soli* tradition, rather than a non-citizen national, is a "*sine qua non* for 'free government' " or otherwise fundamental under the Insular Cases' constricted understanding of the term. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter–Day Saints v. Hodel*, 830 F.2d 374, 386 n. 72 (D.C.Cir.1987). Regardless of its independently controlling force, we therefore adopt the conclusion of Justice Brown's dictum in his judgment for the Court in *Downes*. *See* 182 U.S. at 282–83, 21 S.Ct. 770. "Citizenship by birth within the sovereign's domain [may be] a cornerstone of [the Anglo–American] common law tradition," Brief for Petitioner–Appellant at 48, *Tuaua v. United States*, No. 135272 (D.C.Cir. April 25, 2014), but numerous free and democratic societies principally follow *jus sanguinis*—"right of the blood"—where birthright citizenship is based upon nationality of a child's parents. *See Miller v. Albright*, 523 U.S. 420, 477, 118 S.Ct. 1428, 140 L.Ed.2d 575 (1998) (citing various authority "noting the 'widespread extent of the rule of jus sanguinis.' "); Graziella Bertocchi & Chiara Strozzi, *The Evolution of Citizenship: Economic and Institutional Determinants*, 53 J.L. & ECON. 95, 99–100 (2010) (*jus sanguinis* has traditionally predominated in civil law countries, whereas *jus soli* has historically been the norm in common law countries).

In states following a *jus sanguinis* tradition birth in the sovereign's domain—whether in an outlying territory, colony, or the country proper—is simply irrelevant to the question of citizenship. Nor is the asserted right so natural and intrinsic to the human condition as could not warrant transgression in civil society. *See generally Dor*r, 195 U.S. at 147, 24 S.Ct. 808. "[C]itizenship has no meaning in the absence of difference." Peter J. Spiro, *The Impossibility of*

Citizenship, 101 MICH. L.REV. 1492, 1509 (2003). The means by which free and fair societies may elect to ascribe the classification of citizen must accommodate variation where consistent with respect for other, inherent and inalienable, rights of persons. To find a natural right to *jus soli* birthright citizenship would give umbrage to the liberty of free people to govern the terms of association within the social compact underlying formation of a sovereign state. ...

B

The absence of a fundamental territorial right to *jus soli* birthright citizenship does not end our inquiry. “The decision in the present case does not depend on key words such as ‘fundamental’ or ‘unincorporated territory [,]’ ... but can be reached only by applying the principles of the [Insular] [C]ases, as controlled by their respective contexts, to the situation as it exists in American Samoa today.” *King*, 520 F.2d at 1147. *Cf. Boumediene*, 553 U.S. at 758, 128 S.Ct. 2229 (“It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.”). “[T]he question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it.” *Reid*, 354 U.S. at 75, 77 S.Ct. 1222. In sum, we must ask whether the circumstances are such that recognition of the right to birthright citizenship would prove “impracticable and anomalous,” as applied to contemporary American Samoa. *Id.* at 74, 77 S.Ct. 1222.

Despite American Samoa’s lengthy relationship with the United States, the American Samoan people have not formed a collective consensus in favor of United States citizenship. In part this reluctance stems from unique kinship practices and social structures inherent to the traditional Samoan way of life, including those related to the Samoan system of communal land ownership. ...

Representatives of the American Samoan people have long expressed concern that the extension of United States citizenship to the territory could potentially undermine these aspects of the Samoan way of life.

The resolution of this dispute would likely require delving into the particulars of American Samoa’s present legal and cultural structures to an extent ill-suited to the limited factual record before us. ... We need not rest on such issues or otherwise speculate The imposition of citizenship on the American Samoan territory is impractical and anomalous at a more fundamental level.

We hold it anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives. *See* Brief for Intervenor, or in the Alternative, *Amici Curiae* the American Samoa Government and Congressman Eni F.H. Faleomavaega at 23–35, *Tuaua v. United States*, No. 13–5272 (D.C.Cir. Aug. 25, 2014) (opposing constitutional birthright citizenship). ...

“Citizenship is the effect of [a] compact[;] ... [it] is a political tie.” *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 141, 1 L.Ed. 540 (1795) (distinguishing citizenship from the feudal doctrine of perpetual allegiance). “[E]very [] question of citizenship [] ... [thus] depends on the terms and spirit of [the] social compact.” *Id.* at 142. The benefits of American citizenship are not understood in isolation; reciprocal to the rights of citizenship are, and should be, the obligations carried by all citizens of the United States. *See Trop v. Dulles*, 356 U.S. 86, 92, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (“The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation.”); THE FEDERALIST NO. 14 (James Madison) (“[T]he kindred blood which flows in the veins of American citizens, the mingled blood which they have shed in defense of their sacred rights, consecrate their Union.”).

... At base Appellants ask that we forcibly impose a compact of citizenship—with its concomitant rights, obligations, and implications for cultural identity—on a distinct and unincorporated territory of people, in the absence of evidence that a majority of the territory’s inhabitants endorse such a tie and where the territory’s democratically elected representatives actively oppose such a compact.

We can envision little that is more anomalous, under modern standards, than the forcible imposition of citizenship against the majoritarian will. ... To hold the contrary would be to mandate an irregular intrusion into the autonomy of Samoan democratic decision-making; an exercise of paternalism—if not overt cultural imperialism—offensive to the shared democratic traditions of the United States and modern American Samoa. *See King v. Andrus*, 452 F.Supp. 11, 15 (D.D.C.1977) (“The institutions of the present government of American Samoa reflect ... the democratic tradition....”).

* * * *

3. Citizenship Transmission on Military Bases: *Thomas*

On August 25, 2015, the U.S. Court of Appeals for the Fifth Circuit ruled in favor of the U.S. government in *Jermaine Amani Thomas v. Loretta Lynch*, 796 F.3d 535 (5th Cir. 2015). Plaintiff Thomas asked the Fifth Circuit to review a Board of Immigration Appeals order that he be removed from the United States pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii) and (iii). Thomas, who was born on a United States military base located in what is now Germany, argues that he is not removable because he is a United States citizen by virtue of the Fourteenth Amendment. Excerpts follow (with footnotes omitted) from the Fifth Circuit decision.

* * * *

This case requires us to determine whether a United States military base located within what is now Germany was “in the United States” for purposes of the Fourteenth Amendment. The answer to this question is decisive because the Fourteenth Amendment grants birthright citizenship to “[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof.” U.S. Const. amend. XIV, §1 ... If Thomas derived birthright citizenship from the Fourteenth Amendment, we must grant his petition for review because only aliens can be deported. *See* 8 U.S.C. § 1227(a). If he is in fact not a citizen, the petition for review must be denied because it is undisputed that he is otherwise deportable as an aggravated felon. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). After a careful review of the decisions of the Supreme Court, other circuit courts of appeals, and our own court, we hold that Thomas is not a citizen, because the United States military base where he was born, which is located in modern-day Germany, was not “in the United States” for purposes of the Fourteenth Amendment.

...At the time of Thomas’s birth, Congress extended birthright citizenship to children born abroad to one citizen parent and one alien parent, as long as the citizen parent met certain physical-presence requirements. *See* 8 U.S.C. § 1401(g) (1982), *amended by* Pub. L. No. 99-653,

§ 12, 100 Stat. 3655, 3657 (Nov. 14, 1986). Thomas was born on a United States military base located within the territorial boundaries of modern-day Germany. His father was a naturalized United States citizen serving in the United States military and his mother was an alien. However, it is undisputed that Thomas was not a statutory birthright citizen because his father did not meet the physical presence requirement of the statute in force at the time of Thomas's birth. *Id.* Consequently, Thomas must rely on the Fourteenth Amendment, which provides, in relevant part, that "[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," U.S. Const. amend. XIV, § 1, to sustain his claim that he is a birthright citizen. Thomas contends that the military base located in modern-day Germany where he was born was "in the United States" for purposes of the Fourteenth Amendment. We disagree.

We have not previously decided whether a military base located abroad qualifies as "in the United States" for Fourteenth Amendment purposes. However, we have addressed whether a person derived United States citizenship from his parents, who he claimed "became United States citizens at birth because they were born in the Philippines when the country was a United States territory." *Nolos v. Holder*, 611 F.3d 279, 282 (5th Cir. 2010) (per curiam). In that case, we were required to determine whether the Philippines was "in the United States" for Fourteenth Amendment purposes. *Id.* at 282. For guidance, we looked to the Second, Third and Ninth Circuits, which had previously "held that birth in the Philippines at a time when the country was a territory of the United States does not constitute birth 'in the United States' under the Citizenship Clause, and thus did not give rise to United States citizenship." *Id.* (citing *Lacap v. INS*, 138 F.3d 518, 518-19 (3d Cir. 1998); *Valmonte v. INS*, 136 F.3d 914, 915-21 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449, 1450-54 (9th Cir. 1994)). . . .

"In reaching their holdings, the courts found guidance from the Supreme Court's *Insular Cases* jurisprudence on the territorial scope of the term 'the United States' as used in the Citizenship Clause of the Fourteenth Amendment." *Id.* (citing *Valmonte*, 136 F.3d at 918-19; *Rabang*, 35 F.3d at 1452). In the *Insular Cases*, the Supreme Court "created the doctrine of incorporated and unincorporated Territories." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976). Incorporated Territories "encompassed those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force," while unincorporated Territories were not destined for statehood and only "fundamental constitutional rights were guaranteed to the inhabitants." *Id.* (internal quotation marks omitted). As relevant here, the Court's decision in *Downes v. Bidwell*, 182 U.S. 244 (1901), one of the *Insular Cases*, "was derived in part by analyzing the territorial scope of the Thirteenth and Fourteenth Amendments." *Valmonte*, 136 F.3d at 918. In *Downes*, the Court held that Puerto Rico was "not a part of the United States within the revenue clauses of the Constitution." *Downes*, 182 U.S. at 287. The Court noted that the Thirteenth Amendment prohibits slavery and involuntary servitude "within the United States, or any place subject to their jurisdiction." *Id.* at 251 (quoting U.S. Const. amend. XIII, § 1 (emphasis added)). The "disjunctive 'or' in the Thirteenth Amendment demonstrates that 'there may be places within the jurisdiction of the United States that are no[t] part of the Union' to which the Thirteenth Amendment would apply." *Valmonte*, 136 F.3d at 919 (quoting *Downes*, 182 U.S. at 251). Conversely, the Fourteenth Amendment "is not extended to persons born in any place 'subject to [the United States'] jurisdiction.'" *Downes*, 182 U.S. at 251. Instead, citizenship under the Fourteenth Amendment is "limited to those born or naturalized in the states of the Union." *Nolos*, 611 F.3d at 283 (citing *Rabang*, 35 F.3d at 1452-53). In fact, the Citizenship Clause of the

Fourteenth Amendment, like the Revenue Clause, “ ‘has an express territorial limitation which prevents its extension to every place over which the government exercises its sovereign- ty.’ ” *Id.* (quoting *Rabang*, 35 F.3d at 1453). Therefore, we held that “ ‘[i]t is . . . incorrect to extend citizenship to persons living in United States territories simply because the territories are subject to the jurisdiction or within the dominion of the United States, because those persons are not born “in the United States” within the meaning of the Fourteenth Amendment.’ ” *Id.* at 283-84 . . .

Accordingly, regardless of whether the treaties applicable to the military base in which Thomas was born rendered it “subject to the jurisdiction or within the dominion of the United States,” such a base was not “in the United States” for purposes of the Fourteenth Amendment.

...

Furthermore, scholars who have addressed the issue agree that “contrary to popular belief, birth in . . . United States military facilities, does not result in United States citizenship in the absence of another basis for citizenship.” . . .

Thomas cites the Supreme Court’s decision in *United States v. Wong Kim Ark*, to support his posi- tion. There, the Supreme Court was asked to decide “whether a child born in the United States, of parents of Chinese descent . . . becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution.” *Wong Kim Ark*, 169 U.S. at 653. How- ever, *Wong Kim Ark* is inapposite. As we explained in *Nolos*, “the question of the territorial scope of the Citizenship Clause of the Fourteenth Amendment was not before the Court in *Wong Kim Ark*.” *Nolos*, 611 F.3d at 284. This is because the fact that “the child was born in San Francisco was undisputed and it was therefore unnecessary to define ‘territory’ rigorously or decide whether ‘territory’ in its broader sense (i.e. outlying land subject to the jurisdiction of this country) meant ‘in the United States’ under the Citizenship Clause.” *Id.* (internal quotation marks and brackets omitted). Accordingly, *Wong Kim Ark* does not support Thomas’s contention that the military base on which he was born was “in the United States” for purposes of the Fourteenth Amendment.

Thomas likewise does not find support in the recent decision of the Court of Appeals for the District of Columbia Circuit in *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015). In *Tuaua*, the D.C. Circuit was asked whether the Citizenship Clause of the Fourteenth Amendment affords birthright citizenship to individuals born in American Samoa. *Id.* at 301. In order to answer this question, the D.C. Circuit considered at length “whether the circumstances are such that recognition of the right to birthright citizenship would prove ‘impracticable and anomalous,’ as applied to contemporary American Samoa.” *Id.* at 309 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)). Ultimately, the D.C. Circuit held that it was “anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives.” *Id.* at 310. We are not convinced that *Reid* requires us to consider whether it would be “impracticable and anomalous” to recognize a right to birthright citizenship to those born on military bases located abroad. *Reid* was concerned with what “constitutional limitations apply to the Government when it acts outside the continental United States.” 354 U.S. at 8. Here, we are not concerned with any of the Constitution’s limitations on the federal or state governments; rather, we are concerned with the “territorial scope of the term ‘in the United States’ as used in the Citizenship Clause of the Fourteenth Amendment.” *Nolos*, 611 F.3d at 282. “We note that the territorial scope of the phrase ‘the United States’ is a distinct inquiry from whether a constitutional provision should extend to a territory.” *Rabang*, 35 F.3d at 1453 n.8 (citing *Downes*, 182 U.S. at 249). Given that we have already determined that “the Citizenship Clause has an express territorial limitation which prevents its extension to every

place over which the government exercises its sovereignty,” *Nolos*, 611 F.3d at 283 (internal quotation marks omitted), we decline to engage in a functional inquiry as to the scope of the Citizenship Clause. Therefore, *Tuaua* does not change our conclusion that Thomas was not born “in the United States” for Fourteenth Amendment purposes.

* * * *

B. IMMIGRATION AND VISAS

1. Consular Nonreviewability

a. *Visa Litigation Relating to Closure of U.S. Embassy in Yemen*

On June 1, 2015, the State Department prevailed on a motion to dismiss in a visa litigation case in which plaintiffs sought to compel adjudication of Yemeni immigrant visa applications which had neither been scheduled for interviews at the embassy in Sana’a nor executed due to the unrest and security situation in Yemen. *Ali Al Naham et al. v. U.S. Department of State*, No. 14-CV-9974 (S.D.N.Y. 2015). The court found that the doctrine of consular nonreviewability bars jurisdiction over plaintiffs’ action, which sought to compel adjudication of the visa applications. Excerpts follow from the court’s opinion.

* * * *

The doctrine of consular nonreviewability is based on “the principle that a consular officer’s decision to deny a visa is immune from judicial review.” *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 123 (2d Cir.2009). The doctrine has its basis in the plenary power doctrine: “The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention.” *Wan Shih Hsieh v. Kiley*, 569 F.2d 1179, 1181 (2d Cir.1978) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972)); see also *Castillo v. Rice*, 581 F.Supp.2d 468, 475 (S.D.N.Y.2008). The Second Circuit has recognized an exception to consular nonreviewability where certain kinds of constitutional claims are at issue, *Am. Acad. of Religion*, 573 F.3d at 125 (“[W]here a plaintiff, with standing to do so, asserts a First Amendment claim to have a visa applicant present views in this country, we should [not apply consular nonreviewability] to a consular officer’s denial of a visa.”), but the doctrine is otherwise treated as nearly absolute.

Plaintiffs do not meaningfully dispute the above. They contend, however, that the doctrine is limited to cases in which a plaintiff challenges an official’s discretionary decision to approve or deny a visa application. It has no applicability, they argue, where a plaintiff seeks to compel an official to simply adjudicate a visa application.

Other circuits have recognized that distinction as having some force. *See, e.g., Patel v. Reno*, 134 F.3d 929, 931–32 (9th Cir.1997) (“Normally a consular official’s discretionary decision to grant or deny a visa petition is not subject to judicial review. However, when the suit challenges the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul’s discretion, jurisdiction exists.” (citations omitted)). But, whatever this distinction’s merits, it is not one that has a basis in Second Circuit law. *See Hsieh*, 569 F.2d at 1181 (“[N]o jurisdictional basis exists for review of the action of the American Consul ... *suspending* or denying the issuance of immigration visas It is settled that the judiciary will not interfere with the visa-issuing process.” (emphasis added)); *Li v. Chertoff*, 06–CV–13679 (LAP), 2007 WL 541974, at *1 (S.D.N.Y. Feb. 16, 2007) (rejecting the plaintiff’s attempt “to circumvent ... long-standing precedent by contending that [consular nonreviewability] does not apply to a request that a visa be adjudicated (as opposed to granted) within a reasonable period of time”); *Saleh v. Holder*, — F.Supp.3d —, 2014 WL 7751230, at *3 (E.D.N.Y. Nov.4, 2014) (same); *Foad v. Holder*, 13–CV–6049, 2015 WL 1540522, at *3 (E.D.N.Y. Apr.7, 2015) (same). Accordingly, consular nonreviewability precludes jurisdiction over Plaintiffs’ action.

* * * *

b. Kerry v. Din: Supreme Court decision on consular nonreviewability

In 2015, the U.S. Supreme Court also considered a case relating to the longstanding doctrine of consular nonreviewability. *Din v. Kerry*, which is discussed in *Digest 2014* at 31-35 and *Digest 2013* at 19-22, involves the denial of a visa to Kanishka Berashk, a native and citizen of Afghanistan, under the statutory provision covering terrorist activities (8 U.S.C. 1182(a)(3)(B)). Berashk applied for a visa predicated on a petition filed by his U.S. citizen wife, Fauzia Din. The U.S. Court of Appeals for the Ninth Circuit held that Din had a liberty interest in her marriage that was protected under the Due Process Clause of the U.S. Constitution such that denying a visa to her husband without providing specific grounds for the denial implicated her rights. The U.S. Supreme Court granted the petition for certiorari brought by the U.S. government. *Kerry v. Din*, No. 13-1402. Excerpts follow from the reply brief of the United States (with footnotes omitted), which was filed on February 11, 2015.

* * * *

1. It is firmly established in this Court’s precedents that Congress has the power to “prescribe the terms and conditions upon which [aliens] may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention.” *Wong Wing v. United States*, 163 U.S. 228, 232-234 (1896) (citation omitted). The Ninth Circuit had no basis for imposing extra-statutory procedural requirements and a regime of judicial review of visa denials that is directly contrary to the doctrine of consular nonreviewability.

Respondent ignores the meaningful process that takes place in connection with immigrant visa applications. When a U.S. citizen submits a visa petition to classify an alien as an immediate relative, DHS reviews it. If the petition is approved, the alien submits a visa application; a consular officer scrutinizes that application, interviews the alien in person, and then takes action. In addition, final denial of a visa is subject to review by the principal consular officer at the relevant post (or that officer's designated alternate). See 22 C.F.R. 42.81(c) and (d); see also Gov't Br. 49 (noting that State Department analysts assist consular officers in connection with security-based denials).

Respondent nonetheless asserts that judicial review, and additional legal and factual explanation by the consular officer, are required as a matter of due process to guard against an "arbitrary" interference with the liberty interest she asserts. But the refusal of the visa was an action concerning respondent's husband, not her, and this Court has made clear that whatever procedure Congress prescribes even for the admission of aliens who have reached our shores is all the process that is due under the Constitution. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). A visa denial following such a process, here augmented by Executive Branch procedures, therefore cannot be deemed "arbitrary" in violation of the Due Process Clause, either for Berashk himself, who is outside the country, or for respondent, who is only indirectly affected.

* * * *

2. Even if some judicial review of the visa denial were required in this case, the decision below would still be wrong. The Ninth Circuit held that the government cannot defend a visa denial as facially legitimate without identifying the specific subsection of Section 1182 under which there was reason to believe the alien was inadmissible and the factual information on which the denial rested. There is no warrant in the Constitution for requiring provision of that detailed information, and such a requirement would threaten significant harm to national security at a time when the risk of undetected terrorist incursions into this Nation is high.

The review mandated by the Ninth Circuit calls for a far more intrusive inquiry than the "facially legitimate" standard deemed sufficient in *Mandel* [*Kleindeinst v. Mandel*, 408 U.S. 753 (1972)]. Respondent repeatedly tries to blur that point (e.g., Br. 14, 31-32) by asserting that "facially legitimate" is equivalent to "supported by some evidence," such that the denial cannot be sustained unless its underlying factual basis is established to the satisfaction of a court. But those standards are not at all equivalent. In *Mandel* itself, the Court deemed the government's reason for the waiver facially legitimate without asking whether there was any evidence supporting the reason provided. See Gov't Br. 53. And the cases on which respondent relies to show the asserted equivalency between the two standards illustrate their differences. See *Superintendent v. Hill*, 472 U.S. 445, 455-456 (1985), cited in *Hamdi v. Rumsfeld*, 542 U.S. 507, 527-528 (2004) (opinion of O'Connor, J.).

By expanding the scope of review to include a requirement that the government explain the legal and factual basis for a visa denial, the Ninth Circuit has rendered Congress's judgment in Section 1182(b)(3)—that when a denial is based on national-security grounds no specific reason need be provided to the alien—essentially meaningless for any alien with a U.S.-citizen spouse. See 8 U.S.C. 1182(b)(3); see also 8 U.S.C. 1202(f) (mandating confidentiality of visa records). The new requirement also would work an end-run around this Court's decisions

permitting information relating to the entry of aliens to be withheld if it would “endanger the public security.” *Knauff*, 338 U.S. at 544. Respondent virtually ignores those authorities; she says (e.g., Br. 49) that they do not apply directly to a claimant like her, without grappling with the fact they do not contemplate that a claim like hers could ever be permitted to proceed in the first place. See, e.g., 338 U.S. at 544 (permitting security analysis based on “confidential information”); *id.* at 547 (stating that when “members” of the “armed forces” married abroad, their alien spouses “had to stand the test of security”).

* * * *

All of these considerations lead to one conclusion: if the Court were now to fashion a judicial exception to the long-established consular nonreviewability doctrine, review should be no more expansive than that found sufficient in *Mandel*. In that case, the Court made clear that a balancing of the government’s interests against the citizen’s interests was not permitted. See 408 U.S. at 765-769 (describing the “dangers and the undesirability” of such balancing). Respondent traveled to Afghanistan to marry Berashk knowing that there was no guarantee that he could obtain an immigrant visa; her interest in the visa decision is indirect and derivative of the interest of a person who has no constitutional rights at all in connection with his request for the privilege of admission to the United States. In contrast, the government’s sovereign interest in controlling admission of aliens to the United States and ensuring that terrorists are excluded is an “urgent objective of the highest order,” *Humanitarian Law Project*, 561 U.S. at 28, and one that the review envisioned by the Ninth Circuit would threaten.

* * * *

If the narrow “facially legitimate” standard applied in *Mandel* were applied to this case, the reason for visa denial that the consular post provided to Berashk—a citation to Section 1182(a)(3)(B), indicating that the denial was based on terrorist activities—clearly suffices. Respondent’s plea for disclosure of evidence underlying a reason to believe that Berashk fits within the Section 1182(a)(3)(B) admissibility bar is contrary to the very limited scope of the facial-legitimacy review that disposed of *Mandel*, and would impermissibly “look behind” the consular officer’s decision, opening the way to substitution of a court’s assessment for the expert officer’s. *Mandel*, 408 U.S. at 770. So, too, would an attempt to assess interpretation of the statutory criteria, since that would occur in the abstract and lack the very analysis of underlying facts in which the *Mandel* Court refused to engage.

* * * *

The Supreme Court issued its decision, vacating the judgment of the Ninth Circuit Court of Appeals, on June 15, 2015. The plurality opinion focuses on whether or not Din had a due process right at issue in the case. The concurring opinion concludes that, even assuming implication of a due process interest, the process granted—simply identifying the broad statutory basis for the denial of the visa—was sufficient. Because neither the plurality nor the concurrence garnered a majority of the votes of the justices, the concurrence is the narrowest ruling that a majority of the Court would

support. Excerpts follow from the concurring opinion of the Court. *Kerry v. Din*, 135 S.Ct. 2128.

* * * *

The conclusion that Din received all the process to which she was entitled finds its most substantial instruction in the Court’s decision in *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972). There, college professors—all of them citizens—had invited Dr. Ernest Mandel, a self-described “ ‘revolutionary Marxist,’ ” to speak at a conference at Stanford University. *Id.*, at 756, 92 S.Ct. 2576. Yet when Mandel applied for a temporary nonimmigrant visa to enter the country, he was denied. At the time, the immigration laws deemed aliens “who advocate[d] the economic, international, and governmental doctrines of World communism” ineligible for visas. § 1182(a)(28)(D) (1964 ed.). Aliens ineligible under this provision did have one opportunity for recourse: The Attorney General was given discretion to waive the prohibition and grant individual exceptions, allowing the alien to obtain a temporary visa. § 1182(d)(3). For Mandel, however, the Attorney General, acting through the Immigration and Naturalization Service (INS), declined to grant a waiver. In a letter regarding this decision, the INS explained Mandel had exceeded the scope and terms of temporary visas on past trips to the United States, which the agency deemed a “ ‘flagrant abuse of the opportunities afforded him to express his views in this country.’ ” 408 U.S., at 759, 92 S.Ct. 2576.

The professors who had invited Mandel to speak challenged the INS’ decision, asserting a First Amendment right to “ ‘hear his views and engage him in a free and open academic exchange.’ ” *Id.*, at 760, 92 S.Ct. 2576. They claimed the Attorney General infringed this right when he refused to grant Mandel relief. See *ibid.*

The Court declined to balance the First Amendment interest of the professors against “Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’ ” *Id.*, at 766, 768, 92 S.Ct. 2576 (citation omitted). To do so would require “courts in each case ... to weigh the strength of the audience’s interest against that of the Government in refusing a [visa] to the particular applicant,” a nuanced and difficult decision Congress had “properly ... placed in the hands of the Executive.” *Id.*, at 769, 92 S.Ct. 2576.

Instead, the Court limited its inquiry to the question whether the Government had provided a “facially legitimate and bona fide” reason for its action. *Id.*, at 770, 92 S.Ct. 2576. Finding the Government had proffered such a reason—Mandel’s abuse of past visas—the Court ended its inquiry and found the Attorney General’s action to be lawful. See *ibid.* The Court emphasized it did not address “[w]hat First Amendment or other grounds may be available for attacking an exercise of discretion for which no justification whatsoever is advanced.” *Ibid.*

The reasoning and the holding in *Mandel* control here. That decision was based upon due consideration of the congressional power to make rules for the exclusion of aliens, and the ensuing power to delegate authority to the Attorney General to exercise substantial discretion in that field. *Mandel* held that an executive officer’s decision denying a visa that burdens a citizen’s own constitutional rights is valid when it is made “on the basis of a facially legitimate and bona fide reason.” *Id.*, at 770, 92 S.Ct. 2576. Once this standard is met, “courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against” the constitutional interests of citizens the visa denial might implicate. *Ibid.* This reasoning has

particular force in the area of national security, for which Congress has provided specific statutory directions pertaining to visa applications by noncitizens who seek entry to this country.

II

Like the professors who sought an audience with Dr. Mandel, Din claims her constitutional rights were burdened by the denial of a visa to a noncitizen, namely her husband. And as in *Mandel*, the Government provided a reason for the visa denial: It concluded Din's husband was inadmissible under § 1182(a)(3)(B)'s terrorism bar. Even assuming Din's rights were burdened directly by the visa denial, the remaining question is whether the reasons given by the Government satisfy *Mandel*'s "facially legitimate and bona fide" standard. I conclude that they do.

Here, the consular officer's determination that Din's husband was ineligible for a visa was controlled by specific statutory factors. The provisions of § 1182(a)(3)(B) establish specific criteria for determining terrorism-related inadmissibility. The consular officer's citation of that provision suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements. Given Congress' plenary power to "suppl[y] the conditions of the privilege of entry into the United States," *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543, 70 S.Ct. 309, 94 L.Ed. 317 (1950), it follows that the Government's decision to exclude an alien it determines does not satisfy one or more of those conditions is facially legitimate under *Mandel*.

The Government's citation of § 1182(a)(3)(B) also indicates it relied upon a bona fide factual basis for denying a visa to Berashk. Cf. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15, 47 S.Ct. 1, 71 L.Ed. 131 (1926). Din claims due process requires she be provided with the facts underlying this determination, arguing *Mandel* required a similar factual basis. It is true the Attorney General there disclosed the facts motivating his decision to deny Dr. Mandel a waiver, and that the Court cited those facts as demonstrating "the Attorney General validly exercised the plenary power that Congress delegated to the Executive." 408 U.S., at 769, 92 S.Ct. 2576. But unlike the waiver provision at issue in *Mandel*, which granted the Attorney General nearly unbridled discretion, § 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa. Din, moreover, admits in her Complaint that Berashk worked for the Taliban government, App. 27–28, which, even if itself insufficient to support exclusion, provides at least a facial connection to terrorist activity. Absent an affirmative showing of bad faith on the part of the consular officer who denied Berashk a visa—which Din has not plausibly alleged with sufficient particularity—*Mandel* instructs us not to "look behind" the Government's exclusion of Berashk for additional factual details beyond what its express reliance on § 1182(a)(3)(B) encompassed. See 408 U.S., at 770, 92 S.Ct. 2576.

The Government, furthermore, was not required, as Din claims, to point to a more specific provision within § 1182(a)(3)(B). To be sure, the statutory provision the consular officer cited covers a broad range of conduct. And Din perhaps more easily could mount a challenge to her husband's visa denial if she knew the specific subsection on which the consular officer relied. Congress understood this problem, however. The statute generally requires the Government to provide an alien denied a visa with the "specific provision or provisions of law under which the alien is inadmissible," § 1182(b)(1); but this notice requirement does not apply when, as in this case, a visa application is denied due to terrorism or national security concerns. § 1182(b)(3). Notably, the Government is not prohibited from offering more details when it sees fit, but the statute expressly refrains from requiring it to do so.

Congress evaluated the benefits and burdens of notice in this sensitive area and assigned

discretion to the Executive to decide when more detailed disclosure is appropriate. This considered judgment gives additional support to the independent conclusion that the notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses. See *Fiallo v. Bell*, 430 U.S. 787, 795–796, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977); see also *INS v. Aguirre–Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999). And even if Din is correct that sensitive facts could be reviewed by courts *in camera*, the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure in a case such as this. Under *Mandel*, respect for the political branches’ broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose about a consular officer’s denial of a visa to an alien abroad.

For these reasons, my conclusion is that the Government satisfied any obligation it might have had to provide Din with a facially legitimate and bona fide reason for its action when it provided notice that her husband was denied admission to the country under § 1182(a)(3)(B). By requiring the Government to provide more, the Court of Appeals erred in adjudicating Din’s constitutional claims.

* * * *

2. Visa Waiver Program

On December 18 2015, the “Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015” was enacted. Pub. Law No. 114-113. The Act restricts the use of the Visa Waiver Program (“VWP”) by those who have traveled on or after March 1, 2011 to Iraq, Syria, or countries designated as “State Sponsors of Terrorism” (“SSTs,” currently Syria, Iran, and Sudan), or other countries “of concern” designated by the Department of Homeland Security (“DHS”). Also restricted are those who are dual nationals of Iraq, Syria, or countries designated as SSTs, or other countries “of concern” designated by DHS. The Act sets forth criteria by which the Secretary of Homeland Security may designate countries or areas of concern. The new restrictions on VWP travelers do not bar travel to the United States, but require travelers to obtain a U.S. visa, which generally includes an in-person interview with a U.S. consular officer. See U.S. Customs and Border Protection frequently asked questions about the Act, available at <https://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq>. The Act also requires all VWP travelers to have an electronic passport for travel to the United States by April 1, 2016. Further implementation and reporting requirements of the Act will begin in 2016.

3. Visa Restrictions and Limitations

a. Venezuela

On February 2, 2015, the U.S. Department of State announced additional steps to impose visa restrictions against human rights abusers, individuals responsible for public

corruption, and their family members in Venezuela. The Department previously took actions to restrict travel pursuant to the INA of certain Venezuelan government officials believed to be responsible for human rights abuses in 2014. See *Digest 2014* at 50.

See Chapter 16 for a discussion of Executive Order 13692 “Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela.” 80 Fed. Reg. 12,747 (Mar. 11, 2015).

b. Burundi

The U.S. government has taken actions to restrict visas with respect to the situation in Burundi. See Chapter 16 for a discussion of Executive Order 13712 “Blocking Property of Certain Individuals Contributing to the situation in Burundi,” which suspends the entry of individuals meeting the criteria for designation for financial sanctions.

4. Agreements on Preventing and Combating Serious Crime

On November 19, 2015, representatives of the governments of the United States and Malaysia signed an agreement in Kuala Lumpur on “Enhancing Cooperation in Preventing and Combating Serious Crime” (“PCSC”). 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 U.S.-Malaysia PCSC Agreement will enter into force after completion of an exchange of notes indicating each government has taken the necessary steps to bring the agreement into force.

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; and *Digest 2014* at 54-57. In 2015, the United States extended TPS designations for El Salvador, Haiti, and Somalia, extended TPS and redesignated Syria, and designated Yemen, as discussed below.

a. Syria

On January 5, 2015, the Department of Homeland Security (“DHS”) announced the extension of the designation of Syria for TPS for 18 months from April 1, 2015 through September 30, 2016, and the redesignation of Syria for TPS for 18 months, effective April 1, 2015 through September 30, 2016. 80 Fed. Reg. 245 (Jan. 5, 2015). The extension and redesignation are based on the determination that the conditions in Syria that prompted the 2013 TPS redesignation continue to exist, specifically, the ongoing armed conflict and other extraordinary and temporary conditions that have not only persisted, but deteriorated, and these conditions pose a serious threat to the personal safety of Syrian nationals if they were required to return to their country. *Id.*

b. El Salvador

On January 7, 2015, DHS announced the extension of the designation of El Salvador for TPS for 18 months from March 10, 2015 through September 9, 2016. 80 Fed. Reg. 893 (Jan. 7, 2015). The extension was based on the determination that the conditions in El Salvador that prompted the original TPS designation continue to exist, specifically there continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from a series of earthquakes in 2001, and El Salvador remains unable, temporarily, to handle adequately the return of its nationals. *Id.*

c. Haiti

On August 25, 2015, DHS announced the extension of the designation of Haiti for TPS for 18 months from January 23, 2016 through July 22, 2017. 80 Fed. Reg. 51,582 (Aug. 25, 2015). The extension is based on the determination that the conditions in Haiti that prompted the TPS designation continue to be met, namely, the extraordinary and temporary conditions in that country that prevent Haitian nationals (or aliens having no nationality who last habitually resided in Haiti) from returning to Haiti in safety. *Id.*

d. Somalia

On June 1, 2015, DHS announced the extension of the designation of Somalia for TPS for 18 months from September 18, 2015 through March 17, 2017. 80 Fed. Reg. 31,056 (June

1, 2015). The extension is based on the determination that the conditions in Somalia that prompted the TPS designation continue to be met, namely, the disruption of living conditions due to ongoing armed conflict that would pose a serious threat to the personal safety of returning Somali nationals, as well as extraordinary and temporary conditions in the country that prevent Somali nationals from returning to Somalia in safety. *Id.*

e. Yemen

On September 3, 2015 DHS announced the designation of Yemen for TPS for 18 months from September 3, 2015 through March 3, 2017. 80 Fed. Reg. 53,319 (Sep. 3, 2015). Excerpts below from the Federal Register notice explain the basis for the designation.

* * * *

The Secretary has determined, after consultation with the Department of State and other appropriate Government agencies, that there is an ongoing armed conflict within Yemen and, due to such conflict, requiring the return of Yemeni nationals to Yemen would pose a serious threat to their personal safety.

In July 2014, the Houthis, a northern opposition group, began a violent territorial expansion across Yemen. The Houthis took over the capital, Sana'a, in September 2014, and placed the President, Prime Minister, and cabinet officials under house arrest in January 2015. President Abdo Rabo Mansur Hadi left Sana'a for Yemen's southern port city of Aden in February 2015 to resume his presidential duties. As the Houthis continued their military campaign, however, they eventually closed in on Aden and by the end of March 2015, President Hadi and many other members of the government relocated to the Kingdom of Saudi Arabia (Saudi Arabia).

On March 26, 2015, a coalition of more than ten countries, led by Saudi Arabia and at the request of President Hadi, initiated air strikes against the Houthis. Air strikes have occurred across the country, but have been concentrated in Sa'dah, Hajjah, Sana'a, Taiz, Marib, Al Dhale'e, and Aden. Houthi ground forces simultaneously engaged in fierce battles in Aden and Marib against local ethnic groups and pro-government fighters. The conflict has affected 21 out of Yemen's 22 governorates.

The conflict has caused an acute and rapidly deteriorating humanitarian crisis. The airstrikes and ground fighting have killed, wounded, and displaced noncombatants and destroyed and damaged hospitals, schools, roads, airports, the electric power grid, the water supply, and other critical infrastructure. The humanitarian situation is compounded by access constraints. Relief efforts and supplies have been hindered by the limited capacity of airports, seaports, and roadblocks. Furthermore, ongoing violence and airstrikes are restricting the movement of civilians to safe areas and restricting their ability to receive needed basic services and supplies.

While the exact number of housing units that have been destroyed or damaged by the airstrikes and ground fighting has not been determined, the United Nations (UN) is reporting that approximately 42,000 people, in 7,000 households, were identified as needing shelter as a direct

result of the conflict since March 2015. The UN has reported that nearly 1.3 million people in Yemen have become internally displaced since the start of the conflict.

Movement through or around the conflict zones is fraught with extreme danger. A full assessment by those reporting on the ground has been hindered by security concerns and infrastructure damage, but the UN has reported that as of July 2015, there have been approximately 3,700 registered deaths and over 18,000 registered injuries attributed to the conflict.

Because Yemen relies on imports for 90 percent of its food, the combination of severely reduced imports, low food stocks, and a shortage of fuel has increased the number of people experiencing food insecurity to 12.9 million, nearly half of the total population of Yemen, including 5 million who are classified as severely food insecure. Due to the conflict, 470,000 children under the age of 5 have lost access to nutrition services previously provided to them through 158 Outpatient Therapeutic Feeding Programs.

The impact on key logistical and civilian infrastructure across Yemen from the airstrikes and ground fighting has been devastating. Yemen has suffered heavy damage to its airports, harbors, bridges and roads, which presents significant obstacles to relief efforts. Damage to health facilities has also been substantial and the UN has reported that, as a result of the fighting, at least five hospitals were destroyed or suffered catastrophic damage in Sana'a, Al Dhale'e, and Aden. Nearly 3,600 schools remain closed due to insecurity, with over 330 schools directly affected by the conflict. Of these, 86 schools were reported damaged due to airstrikes or armed confrontations and a further 246 were reported as occupied by internally displaced persons.

The destruction and closure of numerous hospitals and medical facilities is resulting in increased fatalities, including among women, due to miscarriages and a lack of delivery and postnatal care.

Hospitals that remain open are operating at limited capacity and are unable to cope with the scale of needs, while others have shut down due to insecurity and a lack of fuel, staff and supplies. Internally displaced persons across Yemen indicate that among their most pressing needs are medicine and treatment for malaria, diarrhea, malnutrition, unspecified chronic diseases, and respiratory diseases.

* * * *

An estimated 500 to 2,000 nationals of Yemen (and persons without nationality who last habitually resided in Yemen) are (or are likely to become) eligible for TPS under this designation. This estimate is based on the total number of Yemeni nationals believed to be in the United States in a nonimmigrant status or without lawful immigration status.

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2. Refugee Admissions in the United States

On September 11, 2015, an unnamed official of the State Department provided a special briefing on the mechanics of the United States Refugee Admissions Program ("USRAP") in light of increasing refugee flows caused by unrest in the Mid-East and Africa, including

the ongoing conflict in Syria. The briefing is excerpted below and available at <http://www.state.gov/r/pa/prs/ps/2015/09/246843.htm>.

* * * *

... [T]he USRAP is an interagency process that includes three primary U.S. Government agencies. That's us, the Department of State, as the primary lead agency; the Department of Homeland Security ["DHS"], specifically U.S. Citizenship and Immigration Services; and the Department of Health and Human Services, their Office of Refugee Resettlement.

...USRAP involves those three government agencies as well as international organizations like the United Nations High Commissioner for Refugees, the International Organization for Migration, a number of nongovernmental organizations – these we normally refer to as resettlement agencies in the United States – as well as U.S. states, cities, private citizens, churches and mosques, and community groups. So it's a lot of people involved, big process, fairly standard procedures.

...[T]here are a number of processing requirements within the USRAP that cannot be waived, such as an in-person DHS interview, security checks, and a medical exam, including a TB test. And this is one way – one of the many ways in which our Refugee Resettlement Program differs from a lot of other countries' resettlement programs. ...So because of these very strict requirements that we have and because at any given time we're processing cases in 70 or more locations worldwide with a limited amount of resources, it currently takes anywhere from 18 to 24 months or even longer to process a case from referral or application to arrival in the United States.

* * * *

...I'm going to go over the main steps on the overseas processing side first. And the first important step in getting access to the USRAP is either a referral or an application. The vast majority of our referrals come from UNHCR, the UN High Commissioner for Refugees, also known as the UN Refugee Agency. U.S. embassies and certain NGOs are also qualified to refer cases to us, but we get very few from those two sources. About 75 percent of our referrals to the program come from UNHCR. Another 25 percent of the program – so about a quarter of the program – a quarter of our applicants gain access through direct applications. And so some of you are probably familiar with some of these direct application programs.

We have a program for U.S.-affiliated Iraqis. We operate that program in Baghdad, Jordan and Egypt. We also have a program for Iranian religious minorities that's mostly operated in Vienna. We have a program for former Soviet Union religious minorities mostly operated in Moscow. We have a program in Havana for various categories of Cubans. And our newest program is a program for Central American minors with a lawfully present parent in the United States. So again, just to repeat, the list of programs that I just described are what we call direct referral programs, and those in any given year make up about 25 percent of the people that come through the U.S. Refugee Admissions Program.

So once a case enters the USRAP, whether it's a referral from UNHCR or a direct application, they are all essentially treated the same once they're into our system. So once we receive those applications, the next step is to prepare the applications, and ...the State Department funds a network of what we call resettlement support centers that we have located around the world. We have nine primary locations. ...

We have a worldwide presence. And at those resettlement support centers, there's something close to a thousand people working for us. Those – these are not U.S. Government officials. They are – these resettlement support centers are mostly run by NGOs like the International Rescue Committee or international organizations like the International Organization for Migration.

So at these RSCs, that's where our case workers are doing things like collecting biographic and other information from applicants so that they can present the files to a DHS officer when they arrive in town to conduct the adjudication.

So the next big step overseas is the USCIS adjudications, so these again are officers of U.S. Citizenship and Immigration Services from the Department of Homeland Security. Refugees are interviewed in person by USCIS officers who travel to where they are located. And so this includes – this involves teams of officers that are based in Washington, D.C., and they send them out in teams ranging from, say, four or five people up to – I think we currently have a team in Istanbul of 17 people doing interviews of Syrians and others.

So USCIS officers get on the road and go to where the refugees are. The main purpose of the USCIS adjudication is to determine whether applicants meet the U.S. legal definition of a refugee and are admissible, so just to – for those who don't know, the legal definition of a refugee includes having a well-founded fear of persecution based on one of the five protected grounds – so race, religion, nationality, political opinion, or membership in a particular social group.

The next big check in – the next big step is security checks. All refugees undergo multiple security checks in order to be approved for U.S. resettlement. Refugees are subject to the highest level of security checks of any category of traveler to the United States. The screening includes involvement of the National Counterterrorism Center, NCTC; the FBI's Terrorist Screening Center; DHS; the Department of Defense; and other agencies. Most of the details of the security checks are classified.

At the same time, refugees are undergoing a health screening. All refugees approved by USCIS have to undergo a screening to identify diseases of public health significance such as TB.

...

Finally, cultural orientation: most refugees attend a three-day class providing information about the United States and what to expect from the resettlement agencies and other things when they arrive.

Let me quickly move to the domestic piece of the portion. All of our travel is arranged by the International Organization for Migration. We pay IOM up front for the cost of the air travel, but before departing for the U.S., refugees sign a promissory note agreeing to repay the loan to the U.S. for their travel costs.

We work with nine domestic agencies to resettle refugees in the U.S. These nine agencies have about 315 affiliates in about 180 communities throughout the United States. Each year, each of these nine agencies and any new agencies that would like to be considered for the program – it's an open, competitive process – these agencies submit proposals describing their capacity to resettle refugees at each of these affiliates, and that would include everything from

staff capacity, how large is the office, what languages do they speak, what sort of special needs cases can they handle, what sort of special relationships might they have with medical centers to handle complex cancer cases or other cases.

Once we've collected all that information, reviewed the proposals and usually made a few tweaks here and there and come up with an overall numerical placement plan by location, it's actually up to the individual resettlement agencies on a weekly basis to determine where the cases are placed...

It's important to note that a refugee, once they arrive, have the ability to pick up and leave the minute they arrive in the United States. ...

These local domestic resettlement agency affiliates arrange – they welcome refugees at the airport and begin the process of helping them to be resettled in their new communities. And these resettlement agencies are responsible for providing initial reception and placement services in the first 30 to 90 days after the refugees arrive. That includes finding safe and affordable housing and providing a variety of services to promote early self-sufficiency and cultural adjustment.

The Office of Refugee Resettlement at the Department of Health and Human Services also funds programs for which refugees are eligible up to five years after arrival. So although the State Department role in the domestic resettlement is limited to the first 90 days, it's ORR funding that takes over after that.

* * * *

[in response to a question]

...UNHCR does focus on the most vulnerable when they are referring cases to us and the 28 or so other countries who have agreed to accept Syrians. This would include female-headed households. It could include victims of torture or violence. It could include religious minorities. It could include LGBT refugees, people who need medical care that they can't get in their country of origin. So basically, people who are not thriving or expected to thrive in their country of origin. The vast majority of referrals that we have gotten from UNHCR have come from five countries, and I believe I – this will be in the correct order of magnitude: first Jordan, then Turkey, then Lebanon, Egypt, and Iraq.

* * * *

[in response to a question]

...[R]esettlement is not the first solution that the international community turns to when you're looking at a major refugee crisis. In general, UNHCR does not refer refugees for resettlement in the first five years of a conflict because the hope is that people will eventually return home that – after the crisis is over, and people will shelter in the region in the meantime; and we, the United States and others, will help support the countries of asylum that are sheltering them.

So the vast majority of refugees that we resettle to the United States have been in situations of asylum for decades. So some of the Somalis that we have resettled have been in asylum since the early 1990s. ...So they actually started referring Syrians earlier than they would have normally.

* * * *

3. Migrant Children and Families with Children

As discussed in *Digest 2014* at 60-65, the United States responded in 2014 to questions from multiple special rapporteurs about treatment of unaccompanied children migrating into the United States. On February 13, 2015, U.S. Permanent Representative to the UN in Geneva, Ambassador Pamela Hamamoto, sent a letter in response to a further inquiry on the subject of migrant children from Kirsten Sandberg, Chairperson of the Committee on the Rights of the Child. Ambassador Hamamoto's letter appears below and is available at www.state.gov/s/l/c8183.htm.

* * * *

On behalf of Secretary of State John Kerry, I am writing in response to your November 12 letter regarding child migrants. We appreciate the concerns you have raised and share your belief that unaccompanied migrant children are a vulnerable population that must be protected. The U.S. government draws from a wide range of available resources to safely process unaccompanied migrant children, in accordance with applicable laws. As a courtesy, we are happy to provide you with the following information to address your concerns, and will endeavor to address related issues in our upcoming periodic report under the Convention on the Rights of the Child Optional Protocols to the extent they relate to our treaty obligations.

Upon encountering unaccompanied children at the border, U.S. Department of Homeland Security (DHS) Customs and Border Protection (CBP) officers provide them information on their rights, conduct a basic health screening, and provide them with basic necessities such as initial shelter and emergency medical care. DHS also screens such unaccompanied children for persecution or trafficking concerns.

For an unaccompanied child to withdraw his or her application for admission and return voluntarily, the child must be a national or habitual resident of a contiguous country (i.e., Canada or Mexico), and CBP must determine that the child meets three criteria: the child (1) does not fear returning due to a credible fear of persecution; (2) is not a victim of trafficking or at risk of being trafficked upon return; and (3) is able to make an independent decision to withdraw his or her application for admission. Many unaccompanied children from Mexico who are encountered by CBP officers at the border voluntarily withdraw their applications for admission and are returned directly to their country.

During the limited time unaccompanied children are in DHS care, they are separated from the general adult population to minimize any potential for coercion or abuse. DHS is committed to ensuring that all individuals in its custody are treated in a safe, dignified, and secure manner. DHS has a zero-tolerance policy for all forms of abuse or assault. All accusations of unlawful conduct are investigated thoroughly and appropriate action is taken whenever a claim is substantiated. DHS's independent Office of the Inspector General (OIG) conducts unannounced, random site visits of CBP holding facilities as well as interviews with unaccompanied children. In a recent report covering field visits in July, the Inspector General did not observe misconduct by DHS employees. The OIG did observe some concerns about shelter conditions, and provided recommendations to address these concerns, which are being

addressed by the DHS. The full report can be found on the Inspector General's website, <http://www.oip.dhs.gov>.

Unaccompanied children from contiguous countries who are determined not to meet any of the aforementioned criteria (e.g., are at risk of trafficking, or fear persecution upon return), as well as unaccompanied children from noncontiguous countries, are transferred to the care and custody of the U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR), within 72 hours of determining that the child is unaccompanied, absent exceptional circumstances, as required by U.S. law. HHS conducts a complete medical exam and provides them with medical care, including dental care, opportunities for extracurricular activities, counseling, and access to educational programs. Children are also screened again to determine if they are victims of abuse, crime, or human trafficking, or if there are any immediate mental health needs that require special services. Children are given regular telephone access to speak with family members or their consulates on a routine basis while in HHS custody. ORR then seeks to release the child to sponsors in the United States, including family members. The majority of these children are released within 30 days to the sponsorship of a parent or close family member in the United States.

HHS takes very seriously allegations of physical, sexual, and verbal abuse of children in HHS care and custody. HHS published in December 2014 a rule setting forth national standards to prevent, detect, and respond to sexual abuse and sexual harassment in HHS facilities. This rule includes a comprehensive set of standards that include topics such as prevention planning, training and educating, reporting, health care, and data collection. Furthermore, all permanent HHS facilities are licensed by the state in which the facility is located and are overseen by the licensing authority for everything from staffing ratios to the size of the space a child must be provided in a bedroom. HHS makes it a priority to provide all children in its care a safe and healthy environment.

The U.S. government helps facilitate access to legal representation for unaccompanied children who will be subject to immigration removal proceedings. For instance, unaccompanied children in HHS custody are given information on their legal rights and possible legal representation, and are provided individualized legal screenings. In addition, HHS provided \$9 million in grants to nonprofit organizations to hire attorneys to provide immigration representation. Furthermore, HHS is authorized to appoint independent child advocates for trafficking victims and other especially vulnerable unaccompanied children to promote the best interests of the child. A child may be eligible for various forms of immigration relief, including, but not limited to, asylum, Special Immigrant Juvenile Status (for children who have been abused, abandoned, or neglected and meet other qualifying criteria), U visa status for victims of certain crimes, and T visa status for victims of human trafficking. The Department of Justice has provided funding through the Corporation for National and Community Service's "Justice AmeriCorps" grants program to enable legal services organizations to enroll lawyers and paralegals to represent and assist unaccompanied children in immigration removal proceedings. Custodians of unaccompanied children may receive a variety of voluntary legal orientation trainings, assistance with pro bono referrals, and referrals to providers of social services.

The United States is committed to working closely with other governments to address the complex underlying factors that impact irregular migration from Central America. Representatives from the Department of State and DHS participate in the Regional Conference on Migration, a consensus-based conference of regional states that allows for

technical discussions of regional migration issues. The Department of State also partners with the International Organization for Migration (IOM) to implement programs that build the capacity of Central American governments to identify, screen, protect, and refer unaccompanied child migrants to appropriate services, and supports the Office of the UN High Commissioner for Refugees in Central America and Mexico to strengthen asylum systems and to track and address forced displacement due to criminal violence. Through its partnership with IOM, the United States Agency for International Development is working with government officials, civil society organizations, and other partners in Honduras, Guatemala, and El Salvador to provide immediate care, child protection services, and onward assistance for returning families and unaccompanied children. The United States has also launched a program to provide refugee admission to certain children in El Salvador, Honduras, and Guatemala, providing a safe, orderly alternative to the dangerous journey many migrant children have taken north from Central America.

Although the United States is not a party to the UN Convention on the Rights of the Child, the United States has signed the treaty and has laws at the state and federal level that support the treaty's overall goal of protecting the well-being of children. We continue to promote the rights and well-being of children in the United States through vigorous enforcement of laws at the federal, state, and local level. The United States also sends senior delegations to appear before the UN Committee on the Rights of the Child to present our periodic reports on U.S. implementation of the two Optional Protocols to which the United States is a party.

Thank you for reaching out to us regarding your concerns on child migrants. We assure you that we continue to strive for the advancement of migrant children's rights.

* * * *

On June 30, 2015, the United States submitted to the Inter-American Commission on Human Rights ("IACHR") its observations on the IACHR draft report on the situation of refugee and migrant families and unaccompanied children in the United States. Excerpts follow from the U.S. submission (with footnotes omitted). The full text of the U.S. submission is available at www.state.gov/s/l/c8183.htm.

* * * *

The United States respects and supports the Commission and the strong sense of integrity and independence which historically has characterized its work. Nevertheless, the United States notes that the report contains omissions and inaccuracies that would usefully be corrected, and therefore requests that the Commission review its analysis of applicable law and procedures prior to final publication.

The United States is proud of its history as a nation of immigrants. As the Commission recognizes in the report, the United States remains the principal destination country for international migrants in the world and is one of the leading countries for granting asylum and resettling refugees. Of the more than 190 million migrants in the world today, one out of five

resides in the United States, and we value the contributions they make to our economy, our culture, and our social fabric.

* * * *

RELEVANT INTERNATIONAL LEGAL FRAMEWORK:

Immigration is an issue of critical importance to the United States, and is extensively addressed by U.S. law and policy. As the Commission knows, international law recognizes that every state has the sovereign right to control admission to its territory, and to regulate the admission and expulsion of foreign nationals consistent with any international obligations it has undertaken. This principle has long been recognized as a fundamental attribute of state sovereignty.

As we have stated before, the United States notes that contrary to the Commission's assertions, neither the American Declaration of the Rights and Duties of Man ("American Declaration") nor international law establishes a presumption of liberty for undocumented migrants who are present in a country in violation of that country's immigration laws. Rather, states assume legal obligations, or undertake political commitments, to protect the right of freedom of movement to persons *lawfully* within a state's territory.

For example, Article VIII of the American Declaration, on freedom of movement, by its own terms extends only to nationals. Article XXXIII of the Declaration also recognizes "the duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be." Non-nationals seeking to enter a state are bound to respect the state's immigration laws and may be subject to various measures, including detention, as appropriate, when they fail to obey the law. In fact, immigration detention can be an important tool employed by states in ensuring public order and safety and removing as expeditiously as possible individuals who are not eligible to remain or who may pose a threat to the security of the country or the safety of its citizens and lawful residents. Accordingly, immigration detention, provided it is employed in a manner consistent with a state's international human rights obligations, is permitted under international law.

The United States places significant import on the necessity that immigration laws and policies, including those pertaining to immigration detention, must be enforced in a lawful, safe, and humane manner that respects the human rights of migrants regardless of their immigration status. At the same time, the United States notes that many of the sources referred to by the Commission do not give rise to binding legal obligations on the United States and are not within the Commission's mandate to apply with respect to the United States.

The United States has undertaken a political commitment to uphold the American Declaration, a non-binding instrument that does not itself create legal rights or impose legal obligations on states. Article 20 of the Statute of the Inter-American Commission on Human Rights ("IACHR Statute") sets forth the powers of the Commission that relate specifically to Organization of American States member states which, like the United States, are not parties to the legally binding American Convention on Human Rights ("American Convention"), including to pay particular attention to the observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the state, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted.

The United States wishes to reiterate its respect and support for the Commission. The United States acknowledges the work of the Commission in researching and compiling its draft report. We request, however, that in keeping with its mandate under Article 20 of the IACHR Statute, the Commission center its review of applicable international standards on the American Declaration and U.S. observance of the rights enumerated therein.

For example, the Commission has cited jurisprudence of the Inter-American Court of Human Rights (“Inter-American Court”) interpreting the American Convention. The United States has not accepted the jurisdiction of the Inter-American Court, nor is it party to the American Convention. Accordingly, the jurisprudence of the Inter-American Court interpreting the Convention or other international conventions, including the Court’s advisory opinions, does not govern U.S. commitments under the American Declaration. The Commission also erroneously cites the definition of “refugee” contained in the Cartagena Declaration on Refugees. The Cartagena Declaration is a non-binding statement issued in 1984 by a number of countries in Central and South America, which has no application to the United States. The United States is a party to the 1967 Protocol Relating to the Status of Refugees, which is implemented, *inter alia*, through 8 U.S.C. §§1158 and 1231(b)(3) (respectively, §§ 208 and 241(b)(3) of the Immigration and Nationality Act). The definition of “refugee” for purposes of U.S. law is set forth in 8 U.S.C. § 1101(a)(42).

INCREASE OF UNACCOMPANIED CHILDREN AND FAMILIES WITH CHILDREN IN 2014:

In summer 2014, the United States saw a sharp rise in the number of unaccompanied children from Central America attempting to enter the United States along our Southwest border. In fact, the number of children and families had reached such a high level that it strained the ability of the United States to care for and process them. During the United States’ fiscal year 2014 (October 1, 2013 to September 30, 2014), 68,631 unaccompanied children were apprehended along the U.S. Southwest border, nearly doubling the number of unaccompanied children apprehended during the previous fiscal year. In addition, during fiscal year 2014, 68,445 individuals who are part of a family unit were apprehended along the U.S. Southwest border.

The United States is proud of its record in addressing the humanitarian crisis involving unaccompanied children last summer. We acted swiftly, reallocated resources, and were able to comprehensively address the issue in a fair and humane manner. In this regard, the United States believes the Commission’s report does not adequately address the extraordinary efforts undertaken to address the dramatic rise in the flow of migrants into the United States last year. The protections afforded to unaccompanied children and families by the United States under federal law—both then and now—are extensive and are implemented by multiple federal agencies, including the Department of Homeland Security (DHS), which includes U.S. Customs and Border Protection (DHS/CBP), U.S. Immigration and Customs Enforcement (DHS/ICE), and U.S. Citizenship and Immigration Services (DHS/USCIS); the Department of Health and Human Services (HHS); the Department of Justice (DOJ); the Department of Labor (DOL); and the Department of State (DOS).

The majority of unaccompanied children were between the ages of 15 and 17, but many were younger, some considerably so. In general, many of these children had abandoned their home countries for a complex set of motives that are a combination of push and pull factors, including a desire to be with their parents or relatives already in the United States, the threat of

violence in their home country, fears that criminal gangs would either forcibly recruit or harm them, or to pursue a life of greater opportunity.

Continued economic hopelessness, weak public institutions, and violence by criminal groups suggest that a resurgent increase in the number of migrant children to the border of the United States is possible. This would—once again—put pressure on domestic institutions in transit and destination countries along the route and presage greater social and political instability in the region. Central America’s youth bulge threatens even greater turmoil: without increased economic opportunity, the region cannot absorb the estimated six million people who will enter the workforce over the next decade. Over half the population in Guatemala and Honduras lives below the poverty line.

To address the push and pull factors of the migration of unaccompanied children, the United States continues to focus on seeking solutions not only at home but also abroad, particularly in Honduras, Guatemala, and El Salvador, the three main source countries in Central America. The United States works closely with these countries on the key concerns that led to expanded migration in 2014 and to better address the long-term underlying factors that lead to migration in the first place. For example, in April 2015, DOL announced that it will fund a \$13 million project to help at-risk youth in El Salvador and Honduras develop marketable skills and secure and retain good employment in their home countries.

The U.S. Strategy for Engagement in Central America seeks to promote three interconnected objectives—prosperity, governance, and security. Our efforts in the region are designed to mitigate the underlying factors driving outbound migration. Domestic U.S. agencies are responsible for properly addressing international protection concerns, protecting those who need it, and then beginning timely repatriation to the home countries of those who are found to not merit protection. We have committed significant resources to address the problem and will be increasing our funding to assist these countries with economic development, anti-corruption efforts, and institution building. The Administration has requested \$1 billion for Central America in FY 2016. This request includes the level of resources necessary to improve security, advance systemic reforms to improve government accountability, and support a stronger foundation for economic growth and prosperity in Central America, especially in the Northern Triangle countries of El Salvador, Guatemala, and Honduras. The U.S. Strategy complements the regional Alliance for Prosperity Plan, developed by El Salvador, Guatemala, and Honduras.

During the influx last July, the United States quickly reallocated resources to assist with repatriations of children. For instance, through a \$7.6 million grant to the International Organization for Migration (IOM), USAID is enhancing Central American countries’ ability to process and provide assistance to children and families. We acted swiftly to ensure that we adequately protected and processed these individuals, including establishing a cross-government working group to address the needs of these children at the direction of President Obama. The “Unified Coordination Group” was led by DHS’ [Federal Emergency Management Agency](#) (FEMA) to coordinate the government-wide response to address the needs of the influx of unaccompanied children crossing into the United States.

U.S. LEGAL FRAMEWORK AND RELEVANT POLICIES:

Contrary to allegations in the report, families with children are not “automatically and arbitrarily being detained.” Individual assessments are made in accordance with U.S. law and legal processes, and parents with children are not detained with single migrants. The legal requirements for family detention appear in 8 U.S.C. Sections 1225, 1236, and 1241, and implementing regulations.

Moreover, on June 24, 2015, DHS Secretary Jeh C. Johnson announced a substantial change in the DHS's detention practices with respect to families apprehended with children. The new approach recognizes that, once a family has established initial eligibility for asylum or other relief under U.S. law, long-term detention of the family is an inefficient use of detention resources. Building on the reforms that were announced in May of this year, Secretary Johnson also announced that families who establish credible or reasonable fear of persecution will generally be released on a monetary bond or other appropriate condition of release; bond criteria will be to set bond at a level that is reasonable and realistic, taking into account the family's ability to pay, risk of flight, and public safety. Reasonable and credible fear interviews will take place within a reasonable time frame. Space in the family detention centers will, in general, be used to allow prompt removal of individuals who have not stated a claim for relief under applicable law.

The United States also has a comprehensive legal framework in place to address the needs of the vulnerable population of unaccompanied children. The 2008 Trafficking Victims Protection Reauthorization Act (TVPRA) sets forth detailed procedures for processing all unaccompanied children who do not have lawful status in the United States. Most Mexican unaccompanied children are permitted to voluntarily return expeditiously to Mexico if they express no fear of return and it has been determined that they are able to make an independent decision to withdraw their application for admission to the United States; if they are not a victim of a severe form of trafficking; and if there is no credible evidence that they are at risk of being trafficked upon return. There is no such voluntary return provision for Central American children, who must be placed in the custody of HHS within 72 hours after determining that such child falls within the protections outlined in the TVPRA. HHS provides special care and services for unaccompanied children, including placing them in the "least restrictive setting that is in the best interest of the child," subject to considerations of danger to self, danger to others, and risk of flight. 8 U.S.C. § 1232(c)(2)(A).

Whether or not required by law, all unaccompanied children are screened by CBP for risks, such as the risk that they will be subjected to severe forms of human trafficking or to persecution if they are returned. While in the care and custody of HHS, unaccompanied children receive an array of services, including educational services, case management, medical and mental health services, and legal services information, including information on the availability of some free legal assistance. HHS also must seek wherever possible to safely and expeditiously release a child to a parent or relative, or other qualified sponsor in the United States, which is usually accomplished within a month of the child's apprehension at the border.

By statute, all respondents—adults or children— have a right to representation in immigration court proceedings. While this right does not entail a right to government-funded representation, the U.S. government has taken measures to improve access to free or affordable representation. DHS, DOJ, and HHS have taken numerous steps to support and encourage voluntary organizations to provide *pro bono* counsel and accredited non-attorney representatives to provide representation and services to unaccompanied children. On September 12, 2014, DOJ and the Corporation for National and Community Service, which administers AmeriCorps national service programs, awarded more than \$1.8 million in grants to legal aid organizations for a new direct representation program, "justice AmeriCorps." Some children are also provided legal representation either during their time in HHS care or after their release. On September 30, 2014, HHS announced \$9 million in funding over two years to provide additional representation

for children after release. In cases where children do lack counsel, immigration judges are instructed and trained to assist those appearing before them.

The U.S. government has also taken measures to help educate unaccompanied children and their caregivers about immigration procedures. While in HHS care, children are provided “Know Your Rights” presentations and screenings for immigration relief. Additionally, through the Legal Orientation Program (LOP), representatives from nonprofit organizations provide information to detained aliens on their rights, immigration court, and the detention process. The Legal Orientation Program for Custodians (LOPC) provides the custodians (adult sponsors) of unaccompanied children with important information on the sponsors’ roles and responsibilities and the immigration court process.

Further, the United States has taken numerous other steps to respond to humanitarian needs and ensure both appropriate treatment in custody, and appropriate consideration and adjudication of claims to humanitarian protection under our refugee and asylum laws and policies.

These include:

- Creation of a Dangers of the Journey awareness campaign, to discourage parents from putting their children’s lives at risk by sending them on a dangerous journey to an illegal crossing of the U.S. border;
- Initiating an in-country refugee and parole processing program for certain children in El Salvador, Honduras, and Guatemala;
- President Obama’s assigning FEMA Administrator to coordinate the federal government’s response;
- Opening new processing centers, increasing DHS/CBP’s capacity to appropriately house children and adults following apprehension;
- Expanding efforts to prosecute criminal human smuggling organizations;
- Through bilateral diplomatic engagement in Central America, encouraging increased efforts to prosecute human trafficking offenses – including the forced criminal activity of children by gangs;
- Working with partner governments and civil society in Mexico and Central America, including through ongoing dialogue in the Regional Conference on Migration;
- Reassigning immigration judges and DHS attorneys to prioritize the cases of these recent entrants, including consideration of claims for asylum or other forms of protection;
- Providing legal services to unaccompanied children through a DOJ grant program, enrolling lawyers and paralegals in the justice AmeriCorps national service program to provide legal services to unaccompanied children;
- Reducing length of stay for unaccompanied children in HHS care and custody through streamlined release policy and procedures;
- Arranging for juvenile dockets in the immigration courts to help promote *pro bono* representation by allowing non-governmental organizations and private attorneys to have predictable scheduling and to represent multiple children without multiple hearing dates (every immigration court has now arranged for a juvenile docket); and
- Ensuring appropriate Legal Orientation Programs at DHS/ICE’s family residential facilities.

Finally, the United States takes very seriously any allegations of mistreatment and has launched numerous investigations. The DHS Inspector General issued reports following

unannounced inspections of various DHS/CBP holding facilities, and the ICE Family Residential Centers at Artesia, New Mexico and Karnes, Texas. DHS's Office for Civil Rights and Civil Liberties has also investigated numerous allegations regarding both DHS/CBP and DHS/ICE, including apprehension and custody of both unaccompanied children and adults traveling with children. On May 13, 2015, DHS/ICE announced changes in a number of its family detention practices as well as increased review and oversight.

The Commission may find more information on these changes at: <https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers>

REGIONAL OUTREACH:

The U.S. government has worked closely with the governments of El Salvador, Guatemala, and Honduras, each of which increased consular staffing in cities along the U.S. Southwest border to ensure provision of services to their citizens and to register any complaints. In December 2014, the United States also established an "in-country" refugee and parole processing program for certain children. The program allows parents from El Salvador, Guatemala, and Honduras who are lawfully present in the United States to request access to the U.S. Refugee Admissions Program for their children under the age of 21 who are still in one of these three countries. Children who are found ineligible for refugee admission, but are still at risk of harm, may be considered on a case-by-case basis for parole. Parole is a discretionary mechanism under U.S. law to allow someone to come to the United States for urgent humanitarian reasons or significant public benefit. The United States established this program to provide a safe, legal, and orderly alternative to the dangerous journey that some children are currently undertaking to join parents in the United States.

* * * *

4. Refugees in Other States

On July 9, 2015, the U.S. Department of State issued a statement condemning Thailand's forced deportation of over 100 ethnic Uighurs to China. The statement is available at <http://www.state.gov/r/pa/prs/ps/2015/07/244754.htm> and includes the following:

This action runs counter to Thailand's international obligations as well as its long-standing practice of providing safe haven to vulnerable persons. We remain deeply concerned about the protection of all asylum seekers and vulnerable migrants in Thailand, and we strongly urge the Government of Thailand, and other governments in countries where Uighurs have taken refuge, not to carry out further forced deportations of ethnic Uighurs.

We further urge Chinese authorities to uphold international norms and to ensure transparency, due process, and proper treatment of these individuals. We will continue to stress to all parties concerned the importance of respecting human rights and honoring their obligations under international law.

We have consistently urged Thai authorities at all levels to adhere to Thailand's international obligations under the Convention Against Torture, which mandates that countries refrain from refoulement. International humanitarian

organizations should also have unfettered access to them to ensure that their humanitarian and protection needs are met. We urge Thailand to allow those remaining ethnic Uighurs to depart voluntarily to a country of their choice.

Cross References

Evacuation of U.S. citizens in Yemen, **Chapter 2.A.2. Chapter 5.C.1.**

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

Diplomatic relations, **Chapter 9.A.**

Zivotovsky decision, **Chapter 9.C**

Airline discrimination against Israel citizen (Gatt case), **Chapter 11.A.4.**

Venezuela sanctions, **Chapter 16.A.8.b.**

CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. State Actions Relating to *Avena*

For further background on efforts to facilitate compliance with the Vienna Convention on Consular Relations, as well as the decision of the International Court of Justice in *Avena*, see *Digest 2004* at 37-43; *Digest 2005* at 29-30; *Digest 2007* at 73-77; *Digest 2008* at 35, 153, 175-215; *Digest 2011* at 11-23; *Digest 2012* at 15-16; *Digest 2013* at 26-29; and *Digest 2014* at 68-69.

On July 28, 2015, Secretary Kerry sent a letter to Ohio Governor John Kasich regarding Jose Trinidad Loza Ventura, a Mexican national whose case was addressed by the International Court of Justice in the *Avena* case. Secretary Kerry's letter appears below.

* * * *

I am writing you today regarding an important matter that implicates the welfare of U.S. citizens traveling abroad, including the members of our Armed Forces and their families, our relations with key allies, and our nation's reputation as a country that upholds the rule of law.

As you may know, a Mexican national named Jose Trinidad Loza Ventura is currently on death row in Ohio. Mr. Loza was named in a decision issued by the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals (Mex. v. US)*, 2004 I.C.J. 12 (Mar. 31) (*Avena*). The *Avena* case involved consideration of Article 36 of the Vienna Convention on Consular Relations (VCCR), which requires parties to the convention to inform detained foreign nationals of their option to have their consulate notified of their detention without delay and permit consular access to those individuals. The ICJ found that the United States breached these obligations with respect to 51 Mexican nationals, including Mr. Loza. As a remedy, the ICJ ordered the United

States to provide judicial “review and reconsideration, of their convictions and sentences to determine whether they were prejudiced by the VCCR violations. Mr. Loza has not yet received review and reconsideration of his conviction and sentence to determine whether the violation caused actual prejudice, and therefore, his execution would place the United States in irreparable breach of its legal obligations.

The Federal Executive Branch has worked hard to bring the United States into compliance with its obligations under the *Avena* decision. Former President George W. Bush sought compliance by issuing a Presidential Memorandum directing the state courts to provide the review and reconsideration required by the ICJ. In *Medellin v. Texas*, 552 U.S.491 (2008), the Supreme Court held that effort to be legally insufficient, but found that *Avena* imposed a binding legal obligation that could be discharged through the adoption of federal legislation. Accordingly, we have been working with Congress to pass compliance legislation. Such legislation was most recently included in the President’s Fiscal Year 2016 budget request for the Department of State and Other International Programs. We have also made significant efforts to ensure prospective compliance with our VCCR obligations by, among other things, amending the Federal Rules of Criminal Procedure to require a federal judge to inform a foreign national charged with a federal crime of his or her consular notification option at the initial appearance.

While the Federal Executive Branch remains committed to pursuing *Avena* compliance legislation, I cannot predict when Congress will act. The State of Ohio and the other relevant states, however, can provide judicial review and reconsideration to the Mexican nationals named in *Avena* without federal legislation. Two states—Oklahoma and Nevada—have, in fact, taken steps to secure review and reconsideration for *Avena* defendants in their states. I am writing to respectfully request that Ohio do likewise by providing judicial review and reconsideration to Mr. Loza. If, for whatever reason, the State of Ohio is unable to provide Mr. Loza with review and reconsideration at this time, I would respectfully ask that you take all measures available to ensure Mr. Loza is not executed until he receives review and reconsideration.

I would like to emphasize this request is not a comment on either the conviction or sentence in Mr. Loza’s case, or on whether Mr. Loza would be able to demonstrate actual prejudice resulting from the VCCR violations. Rather, it is simply a request that Ohio take the necessary steps to enable the United States to comply with our binding legal obligations, just as the States of Oklahoma and Nevada have done. Taking these steps, and thus ensuring the United States can comply with our binding legal obligations under *Avena*, is critical to the national security and foreign policy interests of the United States.

Noncompliance would undercut our ability to protect U.S. citizens traveling and working abroad, including the thousands of Ohioans who travel abroad every year and the members of our Armed Forces and their families stationed abroad. The United States is severely hampered in our efforts to compel other countries to respect their obligations under the VCCR when U.S. citizens are detained abroad, if we do not respect our own obligations with respect to detained foreign nationals here. It would thus not only create uncertainty as to whether the United States can follow through on our own commitments, but would also damage U.S. credibility in our insistence that other countries respect their obligations. The protection of U.S. citizens overseas will always be our highest priority, and it is important that we can continue to rely on the protections of VCCR so our consular officers can continue to provide essential consular assistance.

In addition, our failure to comply with our *Avena* obligations has placed great strains on our bilateral relationship with Mexico. Proceeding with Mr. Loza's execution before providing him with review and reconsideration could jeopardize our collaboration with Mexico in many vital areas, including law enforcement, security, and immigration. Mexico has written to us about *Avena* compliance on numerous occasions and raises this subject in bilateral and multilateral forums regularly. Most recently, the Mexican Legal Adviser wrote to highlight the urgency of Mr. Loza's case. In addition to Mexico, many other key U.S. partners and allies—including the United Kingdom—have also repeatedly urged the United States to comply with our obligations.

If an execution date is set for Mr. Loza without first fulfilling the legal condition of judicial review and reconsideration, it would unquestionably damage these vital U.S. interests. It is our sincere hope that the State of Ohio will do everything possible to avoid such an outcome.

* * * *

2. Lawsuits Seeking Evacuation from Yemen

In 2015, U.S. citizens filed suit in two courts, claiming the United States government was required to evacuate them from Yemen. The dismissal of these lawsuits, based on the political question doctrine, is discussed in Chapter 5. Excerpts below from the U.S. briefs seeking dismissal explain further the legal context surrounding evacuation decisions.

First, in *Sadi v. Obama*, No. 15-11314 (E.D. Mich. June 8, 2015), the district court dismissed the claims. In the U.S. brief in support of its motion to dismiss, filed on May 11, 2015, the background section, excerpted below, explains the statutory and regulatory framework pertaining to evacuations. (The United States also submitted a brief in opposition to plaintiffs' motion for a preliminary injunction containing a similar background section on the same date.) The U.S. brief in support of its motion to dismiss in another case, *Mobarez v Kerry*, No. 1:15-cv-0516 (D.D.C. 2015), in federal court in the District of Columbia, includes a similar background section and remains pending.

* * * *

The statutory and regulatory authorities related to overseas evacuation activities of the U.S. government address two general matters: (1) planning and preparation for the possibility of evacuation of private U.S. citizens; and (2) the actual expenditure of funds to carry out any appropriate evacuation. However, no authorities govern as to what circumstances an evacuation of private U.S. citizens should be carried out by the Government, nor do any authorities require the Government to conduct such an evacuation.

A. PLANNING AND PREPARATION FOR EVACUATIONS

1. Statutory Authorities.

The Secretary of State bears responsibility for: develop[ing] and implement[ing] policies and programs to provide for the safe and efficient evacuation of United States Government personnel, dependents, and private United States citizens when their lives are endangered.

22 U.S.C. § 4802(b). This responsibility involves 1) developing a model contingency plan for evacuation; 2) developing a mechanism by which United States citizens can request to be placed on a list to be contacted in the event of an evacuation, or which, in the event of an evacuation, can maintain information on the location of U.S. citizens in high risk areas submitted by their relatives; 3) assessing the transportation and communications resources in the area being evacuated; and 4) developing a plan for coordinating communications regarding the whereabouts of U.S. citizens abroad. *Id.* §§ 4802(b)(1)(2)(3)(4). Nothing in these provisions establishes or mandates when the Government should evacuate U.S. citizens from a foreign country.

2. Other Authorities.

Executive Order 12656, 53 Fed. Reg. 47491 (Nov. 18, 1988), as amended by E.O. 13074, 63 Fed. Reg. 7277 (Feb. 9, 1988) (attached as Ex. 1 hereto), assigns to the Secretary of State the responsibility to

(2) Prepare to carry out Department of State responsibilities in the conduct of the foreign relations of the United States during national security emergencies, under the direction of the President and in consultation with the heads of other appropriate Federal departments and agencies, including, but not limited to:

(f) Protection or evacuation of United States citizens and nationals abroad . . .

E.O. 12656 § 1301(2)(f), 53 Fed. Reg. at 47503-04. Under that Executive Order, the Secretary of Defense is to “[a]dvise and assist the Secretary of State . . . as appropriate, in planning for the protection, evacuation, and repatriation of United States citizens in threatened areas overseas.” *Id.* § 502(2), 53 Fed. Reg. at 47498. The amendment to Executive Order 12656 adds that the Secretary of Defense:

Subject to the direction of the President, and pursuant to procedures to be developed jointly by the Secretary of Defense and the Secretary of State, [is] responsible for the deployment and use of military forces for the protection of United States citizens and nationals and, in connection therewith, designated other persons or categories of persons, in support of their evacuation from threatened areas overseas.

E.O. 13074, 63 F.R. 7277.

On July 14, 1998, the Departments of State (“DOS”) and Defense (“DoD”) entered into a Memorandum of Agreement (“MOA”) concerning their “respective roles and responsibilities regarding the protection and evacuation of U.S. citizens and nationals and designated other persons from threatened areas overseas.” MOA, 1 (July 14, 1998) (attached as Ex. 2). The MOA clarifies that DOS retains ultimate responsibility for such evacuations from foreign countries. MOA, §§ C.2; C.3.b. In addition, “[o]nce the decision has been made to use military personnel and equipment to assist in the implementation of emergency evacuation plans, the military commander is solely responsible for conducting the operations . . . in coordination with and under policies established by the Principal U.S. Diplomatic or Consular Representative.” *Id.* § E.2. The MOA further notes that while “[t]he safety of U.S. Citizens is of paramount concern . . . successful evacuation operations must take into account risks for evacuees and U.S. forces.” *Id.* App. 1. Again, nothing in this executive authority purports to establish any requirements as to when or under what circumstances an evacuation shall take place.

B. IMPLEMENTATION OF EVACUATIONS

Once a decision to evacuate has been reached, statutory law provides authority to the Secretary of State to “make expenditures, from such amounts as may be specifically appropriated therefor, for unforeseen emergencies arising in the diplomatic and consular service and, to the extent authorized in appropriation Acts” for the evacuation of “private United States citizens or third-country nationals, on a reimbursable basis to the maximum extent practicable.” This statute provides that the Secretary of State is authorized, but not required, to make certain expenditures “for unforeseen emergencies arising in the diplomatic and consular service . . .” 22 U.S.C. § 2671. Activities subject to such expenditures must, inter alia, “serve to further the realization of foreign policy objectives,” and must be “a matter of urgency to implement.” *Id.* § 2671(b)(1). Such activities may include “the evacuation when their lives are endangered by war, civil unrest, or natural disaster of . . . private United States citizens or third-country nationals.” *Id.* § 2671(b)(2)(A)(ii). Here again, these provisions merely authorize the expenditure of funds to carry out a decision to evacuate, but do not purport to direct or control when an evacuation should occur.

* * * *

B. CHILDREN

1. Adoption

a. *Assistant Secretary Bond’s Senate Judiciary Committee Testimony*

On November 18, 2015, Assistant Secretary of State for Consular Affairs Michele Bond testified before the U.S. Senate Judiciary Committee at a hearing on intercountry adoption. Assistant Secretary Bond’s statement is excerpted below and available at <http://www.judiciary.senate.gov/imo/media/doc/11-18-15%20Bond%20Testimony3.pdf>.

* * * *

...Over the past 15 years, U.S. families have welcomed more than 250,000 adopted children from more than 100 different countries. In a sense, intercountry adoption also reflects our country’s history as a nation of immigrants made stronger by our diversity.

* * * *

My testimony today highlights recent steps the Department has taken to advance U.S. intercountry adoption policy and diplomacy in a complex and dynamic global environment. The Bureau of Consular Affairs is the U.S. Central Authority under The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Convention). I will describe our efforts to encourage countries to further the goals of the Convention and

become a party when they have established the procedures necessary to do so. I will share examples of how the Department of State provides technical consultation to countries around the world. I will touch on two of our most challenging bilateral adoption relationships, with the Democratic Republic of the Congo and Russia, to provide context to some of the heart-wrenching situations that U.S. adoptive parents have faced in the course of intercountry adoption. Finally, I will highlight the Department's unwavering commitment to intercountry adoption by citing the work of our embassies in Port-au-Prince and Guatemala City. Both have worked consistently over a number of years to assist U.S. adoptive families by working with the host governments to clarify intercountry adoption policies and procedures and to resolve pending U.S. cases.

The Bureau of Consular Affairs' Intercountry Adoption Strategy

The Bureau of Consular Affairs has taken several steps over the past year to enhance our efforts in support of our belief that intercountry adoption must be among the range of options to provide for the welfare and best interests of children around the world. Intercountry adoption remains one of our highest priorities. We work diligently to establish and maintain intercountry adoption as a viable option for children throughout the world who need permanent families.

Under our new intercountry adoption strategy, we are assessing the state of intercountry adoption worldwide, and developing specific initiatives and tools to strengthen intercountry adoption processes. For example, we are developing tools to map the intercountry adoption process in other countries. This enhances our knowledge of and insight into each country's procedures. From Cambodia to Haiti to Zambia, this detailed understanding of individual countries' procedures helps us to be more focused and productive in bilateral discussions with foreign government officials. It provides effective communication support to our work to establish the long-term, personal relationships essential to cooperation on intercountry adoption. And because we recognize that intercountry adoption is in the best interests of some children in the United States, we work with foreign counterparts and colleagues at the Department of Health and Human Services to expand outgoing Convention adoption opportunities for children in U.S. foster care.

In collaboration with U.S. Citizenship and Immigration Services (USCIS) and the Council on Accreditation, we organized and hosted the first Adoption Service Provider (ASP) Symposium here in Washington, D.C., in September this year. More than 70 ASPs from across the United States attended this two-day conference. We discussed the Department's intercountry adoption strategic plan and critical issues at play in the field today, including unregulated custody transfers, often referred to as "rehoming." While intercountry adoption is truly beneficial for many children, some families confront difficulties that stem from early trauma, institutionalization, and other challenges that are difficult to overcome. When parents place a child with others outside of existing safeguards, including appropriate authorities such as social services, medical professionals, counselors, and the court, that lack of oversight creates a risk of harm for that child. At the ASP Symposium, we updated ASPs on efforts by several USG agencies to assess the breadth of the issue, and our work on strategic initiatives aimed specifically at intervention and prevention; we also support their ideas and input. The Department of State leads a working group dedicated to unregulated custody transfers, convened by Ambassador Susan Jacobs, the Special Advisor for Children's Issues, and comprised of experts from the Departments of Justice, Health and Human Services, and Homeland Security, and the Association of Administrators of the Interstate Compact on the Placement of Children. After working with the Department to research state laws, the National Association of Attorneys

General offered to participate in the working group. In September, we were pleased to welcome the Attorney General from Utah, who volunteered to share his expertise and commitment to child protection.

Over the last year, we have focused on engagement with countries that have announced their intent to ratify or accede to the Convention. U.S. embassies and consulates overseas are actively encouraging those countries to establish intercountry adoption procedures that protect children and parents and are consistent with the Convention and U.S. immigration procedures. We encourage them to develop robust domestic child welfare systems that support family reunification or domestic adoption, and intercountry adoption when permanent placements in the country of origin have been given due consideration. We encourage the continued availability of intercountry adoption, even as a country is developing new procedures in anticipation of becoming a party to the Convention. We offer technical consultation to all countries interested in working with us, regardless of whether they are a party to the Convention, in the form of information resources, training materials, guidance regarding U.S. adoption and immigration laws and procedures, and visits from experts in our government. Always, we are brainstorming new and creative ways to facilitate more assistance – governmental and nongovernmental – to address specific needs in countries of origin and support intercountry adoptions between the United States and those countries.

To illustrate, while I was the Ambassador to the Kingdom of Lesotho, I worked closely with adoption officials and stakeholders as the country prepared to accede to the Convention. The Convention entered into force for Lesotho in December 2012. There were some initial procedural difficulties with regard to processing adoption cases consistently. However, the Convention provides a framework for cooperation to improve the effectiveness of the adoption process, and the United States and Lesotho have worked together to address out-of-order cases and process them in a manner consistent with the Convention and U.S. immigration law.

As an even more recent example, the Convention entered into force for Côte d'Ivoire and Zambia on October 1, 2015, making those countries the 94th and 95th States Parties. Prior to their accession, the Department of State offered and provided technical consultation to both countries, through our Embassies in Abidjan and Lusaka and through direct communication between their adoption authorities and the Bureau of Consular Affairs in Washington, D.C. We discussed how to facilitate processing under the Convention in a way that was compatible with U.S. immigration law and sought to promote a smooth transition to adoption processing under the Convention. Côte d'Ivoire is still developing Convention adoption procedures, and in the interim, the United States will process intercountry adoption petitions under the Convention on a case-by-case basis. We are already processing intercountry adoptions consistent with the Convention in Zambia.

The Bureau of Consular Affairs' Technical Consultation on Intercountry Adoptions

Another part of the world, East and Southeast Asia, illustrates our context-specific approach to intercountry adoption diplomacy and technical consultation. Ambassador Susan Jacobs recently returned from meetings in Cambodia, the Republic of Korea (ROK), and Vietnam. In Cambodia, which acceded to the Convention in 2007, Ambassador Jacobs hand-delivered to government officials a letter requesting clarification of Cambodia's envisioned Convention adoption process, a request endorsed by the Central Authorities of Belgium, France, Luxembourg, the Netherlands, the United Kingdom, and the United States. She made clear that the Government of Cambodia's response is necessary for the United States to fully understand how Cambodia will supervise and monitor ASPs authorized by the Cambodian Government.

Ambassador Jacobs advocated for permanency for all children, and for intercountry adoption to be included in the range of permanency options. She congratulated the Government of Cambodia on progress to establish a foster care system that removes children from institutions in favor of living as part of a family, which we all recognize to be better for children's physical, social, emotional, and cognitive development.

In the ROK, which has expressed its intent to ratify the Convention next year, Ambassador Jacobs advocated for intercountry adoption as a viable option for Korean children after due consideration has been given to domestic placements. She recognized the ROK's social, cultural, and political reforms, which have generated efforts to encourage more domestic adoption – a positive step for both the country and its children.

In Vietnam, the Convention entered into force in 2012, and recently [Vietnam] established a Special Adoption Program for children with special needs, older children, and children in sibling groups. Ambassador Jacobs received updates on the Convention adoption system and on the progress of the Special Adoption Program.

We also have ongoing efforts in several countries in Eastern Europe. For example, Ambassador Jacobs will soon visit Moldova and Romania to advance U.S. policy goals with respect to both intercountry adoption and international parental child abduction. The Romanian Central Authority provided the Department with draft amendments to its adoption code, and requested our comments. We are conducting our review and Ambassador Jacobs will personally deliver the results. We continue to raise our belief that intercountry adoption opportunities in Romania should be expanded beyond Romanian citizens residing abroad, to increase the availability of permanent placement options for children. In Chisinau, Ambassador Jacobs will work with Moldova's Central Authority to expand intercountry adoption opportunities and establish a more efficient process.

In addition to our important work in support of the Convention, we regularly engage with countries that are not party to the Convention and that are not planning to become party to the Convention. The Department has developed intermediary programs for countries that wish to improve their adoption processes.

An example is the Pre-Adoption Immigration Review (PAIR) program, developed in coordination with USCIS, and currently in place in Ethiopia and Taiwan. PAIR helps governments confirm children are eligible for U.S. orphan visas before they are adopted in the foreign country. PAIR represents the U.S. government's innovative response to the diverse intercountry adoption realities in different countries, and helps maintain intercountry adoption as a[n] option for children around the world.

Challenging Intercountry Adoption Environments

Consular Affairs constantly and actively pursues solutions to problems that U.S. families face in the course of their intercountry adoptions. Some of those problems are very grave. Resolving the cases from the Democratic Republic of the Congo (DRC) is a top U.S. government priority. The DRC government recently agreed to allow 14 children adopted by U.S. parents to leave the country. That is a cruelly small number. Nearly 400 more children legally adopted by U.S. parents are awaiting permission to leave the DRC, with no indication of when this permission might be granted. The more than two-year-old exit permit suspension for legally adopted children must be lifted now. It is unacceptable that children adopted by U.S. citizens and several other countries are languishing in institutional care, and in some cases dying, when they have loving, permanent families waiting for them. There is no excuse for the continuation of the DRC's exit permit suspension. I have personally pressed this point with Congolese officials

during two trips to Kinshasa this year and in multiple meetings with the Congolese Ambassador to the United States. I know that many Members of Congress share these views, and I thank you for supporting the actions taken by President Obama and the Department of State to push the Government of the DRC to do the right thing and release the children to their families.

The Department also remains committed to continued dialogue and engagement with Russia, a non-Convention country, on intercountry adoption and the protection of the interests of children. The Russian Federation banned the adoption of Russian children by U.S. families on January 1, 2013, in response to the Magnitsky Act. This followed the conclusion of a U.S.-Russia Adoption Agreement created in part to address Russian concerns over Russian children adopted by U.S. parents, which was in force for only one month when Russia provided notice of its intent to terminate the Agreement effective January 1, 2014. Since the ban entered into force, the Department has worked for a resolution to all adoptions from Russia initiated prior to January 1, 2013, and has formally proposed several options to the Russian government to resolve more than 250 pending adoptions. Despite our attempts, the Russian government has not allowed any exceptions to the ban. We unfortunately have no reason to believe there is a path forward for these U.S. prospective adoptive parents and children at this time.

Our Focus on Bilateral Engagement to Assist U.S. Adoptive Families

We remain focused on intercountry adoptions from Haiti, which is now a Convention country. Well before the Convention's entry into force for Haiti, the Department of State and USCIS were closely engaged with Haitian officials to promote smooth adoption processing and to provide technical consultation in support of Haiti's plans to ratify the Convention. The Department and USCIS sent delegations to Haiti in March and October of 2015. These trips provided a wealth of knowledge about Haiti's processing procedures, which we have communicated to the U.S. adoption community. We are in daily contact with U.S. Embassy Port-au-Prince to discuss adoption issues. Our goals are to clarify Haiti's intercountry adoption procedures for transition cases (cases initiated prior to the Convention's entry into force for Haiti) and for new cases (initiated after entry into force), while addressing procedural problems that affect U.S. prospective adoptive parents.

We know that our persistence, our dedication, and our commitment to serving children and families in intercountry adoption can produce results. We remain resolute in support of intercountry adoption. We have seen its life-changing impact on so many lives. For example, Guatemala's 2007 suspension of intercountry adoptions amid concerns about child-buying, kidnapping, and fraud, left approximately 3,000 adoptions by U.S. citizens in limbo. The Department and USCIS have repeatedly urged Guatemalan authorities to resolve the pending cases, and we are hopeful that the last five remaining cases will be resolved soon.

* * * *

b. Report on Intercountry Adoption

In April 2016, the State Department released its Annual Adoption Report to Congress. The report is available at https://travel.state.gov/content/dam/aa/pdfs/2015Annual_Intercountry_Adoption_Report.pdf. The report includes several tables showing numbers of intercountry

adoptions by country during fiscal year 2015, average times to complete adoptions, and median fees charged by adoption service providers.

c. *Meeting of the Special Commission to Review the Hague Convention*

See Chapter 15 for discussion of the fourth meeting of the Special Commission to review the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

2. Abduction

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’ compliance with the 1980 Hague Convention on the Civil Aspects of International Child (“Convention”). 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, <http://travel.state.gov/content/childabduction/en/legal/compliance.html>.

The 2015 Report on International Parental Child Abduction is available at [http://travel.state.gov/content/dam/childabduction/complianceReports/\(S_238726\)FINALNCC - 2015 ICAPRA Annual Report \(5-5-15\).pdf](http://travel.state.gov/content/dam/childabduction/complianceReports/(S_238726)FINALNCC-2015%20ICAPRA%20Annual%20Report%20(5-5-15).pdf). The reporting period for the 2015 Annual Report was October 1 to December 31, 2014, only a partial year due to ICAPRA taking effect late in the year. The 90-day report on actions taken is available at [http://travel.state.gov/content/dam/childabduction/complianceReports/2015 - Report on Actions.pdf](http://travel.state.gov/content/dam/childabduction/complianceReports/2015-Report%20on%20Actions.pdf). For the reporting period ending July 31, 2015, the Department identified 22 countries as demonstrating patterns of noncompliance: Argentina, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, Guatemala, Honduras, India, Jordan, Lebanon, Nicaragua, Oman, Pakistan, Peru, Poland, Romania, Saudi Arabia, Slovakia, The Bahamas, 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.

On November 19, 2015, Assistant Secretary Bond testified before the Foreign Affairs Committee of the U.S. House of Representatives regarding implementation of ICAPRA. Her testimony is excerpted below and available at <http://docs.house.gov/meetings/FA/FA16/20151119/104208/HHRG-114-FA16-Wstate-BondM-20151119.pdf>.

* * * *

... The law has given us an important framework to leverage our diplomatic engagement both with our partners under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Convention) and with countries with whom we are not yet partners under the Convention. ...

* * * *

The Bureau of Consular Affairs' Office of Children's Issues coordinates the many dedicated officials of the Department of State, in Washington, at passport agencies across the United States, and in our diplomatic missions worldwide, who are committed to preventing abductions, safeguarding the welfare of children abducted across international borders, facilitating the return of abducted children to their place of habitual residence, and helping parents resolve these complex cases. The Office of Children's Issues, a team of over 80 dedicated and well-trained professionals, serves as the U.S. Central Authority (USCA) under the Convention and leads U.S. government efforts within the Department and with other U.S. government agencies, to prevent international parental child abduction, to assist children and families involved in abduction cases, and to promote the principles of the Convention.

Prevention of International Parental Child Abduction

From a child's first U.S. passport application, we work to protect children from international parental child abduction. U.S. law and regulation requires the consent of both parents for passport issuance to children under the age of 16. This minimizes the possibility that a passport could be issued to a child without the consent of both parents. In addition, enrolling a child in the Children's Passport Issuance Alert Program (CPIAP) provides an extra notification check to the enrolling parent to ensure they are either aware of or supportive of the passport application. When children are enrolled in the CPIAP the application and all supporting documents are sent to the Prevention Branch of the Office of Children's Issues for review and clearance. Prevention officers reach out to the requesting parent to notify them of the application and confirm their consent to the passport application.

In addition to administering the CPIAP, prevention officers conduct extensive outreach to judges, law enforcement, and parent groups, among others. They also work closely with non-governmental organizations dedicated to seeking the return of abducted children. When the unthinkable occurs and a parent reports that an abduction is in progress, the Prevention Branch works with parents, legal guardians, or their attorneys, to try to stop the travel of the child out of the United States.

If parents have a court order that prohibits the child's removal from the United States, or can obtain one, the Prevention Branch can contact the Department of Homeland Security (DHS) Customs and Border Protection (CBP) and/or law enforcement to ask them to take action. The child is added to CBP's Prevent Departure list which will notify CBP if international travel reservations are made for the child. If international travel reservations are located for the child, CBP alerts law enforcement and appropriate airport security personnel in an effort to stop the child's travel.

Depending on the circumstances of the child's custody arrangement, other law enforcement tools can be utilized including having Interpol notices activated for the taking parent and child and having the child added to the FBI's National Crime Information Center

missing person database.

To strengthen these critical working relationships, the Department of State's Interagency Working Group on Prevention, which includes representatives from State, DHS (Immigration and Customs Enforcement and CBP), and the Department of Justice (Federal Bureau of Investigation), as well as the Department of Defense and other federal entities, meets twice annually to discuss ways to collaborate on abduction prevention measures. The Department of State works closely with CBP to help ensure that parents who have court orders that prohibit the international travel of a child can request assistance from CBP and U.S. law enforcement to prevent outbound abduction attempts. Key to the program's success, and a byproduct of the law's mandated interagency working group, has been streamlined communications and information sharing among agencies on child abduction prevention initiatives. These new measures were instrumental in preventing the more than 140 potential abductions since the law took effect.

How We Work to Resolve Abduction Cases

As we assist U.S. citizens overseas and protect the integrity of our processes and treaty obligations, we are on the front lines of U.S. diplomacy. We coordinate with our colleagues throughout the Department about your constituents' abduction cases using a variety of diplomatic tools to ensure host governments fully appreciate our deep concern for the welfare of our citizens, especially children. We hold our Convention partners responsible for complying with the Convention, raising concerns with them at the highest levels. In the Bureau of Consular Affairs and throughout the Department of State, U.S. diplomats raise these issues and your constituents' cases at every opportunity with our foreign government counterparts.

When an international parental child abduction does occur, left-behind parents turn to the Office of Children's Issues outgoing abductions divisions for information and assistance. The country officers and case assistants of Children's Issues' two outgoing abduction divisions work to return children who have been wrongfully removed from and/or retained outside their habitual residence in the United States. They also facilitate access requests in countries that are Convention partners and evaluate the compliance of signatory partners to the Convention.

The Convention provides the most effective way to facilitate the prompt return of abducted children. When a child has been abducted to or retained in a country that is one of the U.S.'s 73 partners under the Convention, a country officer helps the left-behind parent file a Convention application for the child's return, explains the parent's civil options under the Convention, works with law enforcement to file reports, and pursues criminal remedies if appropriate. Officers work with U.S. and foreign authorities and resources to facilitate the return of the abducted child. Country officers are the left-behind parent's (LBP) point of contact in the Department of State. In addition, country officers are responsible for sending completed Convention application materials to foreign central authorities, and monitoring the progress of cases, ensuring that they move forward as expeditiously as possible, keeping the LBP apprised of case progress, and advocating for effective implementation of the Convention in the foreign government, courts, and legal system.

Many of the abduction cases handled by the USCA involve abductions to countries not yet parties to the Convention. In these cases, country officers work closely with U.S. embassies and consulates overseas to provide parents with information about foreign legal options, conduct welfare visits to monitor the well-being of the child, and engage foreign government officials to seek the child's return.

In addition to handling cases, the Outgoing Abductions Divisions are responsible for

pursuing the Department's objectives to strengthen and expand the Convention worldwide. Officers work with the Department's regional bureaus to engage foreign governments in discussion about why the United States believes the Convention is the best mechanism for protecting a child's best interests when custody disputes cross international borders. When working with countries that are already members of the Convention, officers engage bilaterally to ensure both governments work together to implement the treaty properly so that abducted children may benefit through swift return to the country of habitual residence.

Country officers are specialists within the consular field and function as desk officers in their capacity to apply country-specific expertise to the pursuit of the Department's policies on abduction. Country officers liaise with law enforcement officials (local and federal), foreign authorities, attorneys, and organizations in the United States (such as the National Center for Missing and Exploited Children) in order to assist parents and move cases toward resolution.

Using all of the tools available in abduction cases, we assisted in the return of 374 children to the United States in 2014. Yet, because of the differences in laws, legal systems, and enforcement mechanisms, achieving the return of children, even with the treaty relationship and law enforcement tools, can be difficult. The laws of the country where an abducted child is physically located apply, and although it can be frustrating to endure delays, the U.S. government cannot interfere with the legal system or judiciary of another sovereign nation, just as no other country may interfere with the law enforcement or judicial system of the United States.

The law identifies actions the United States may consider to encourage better alignment with Hague goals and standards. Many of these measures are the same tools the State Department uses in diplomacy with nations around the world on a range of important issues. For those countries that have not yet partnered with us under the Convention, we appeal to the universal interest in safeguarding children, even as we urge countries to turn to the Convention as a reliable way to protect these interests in future abduction cases.

We are committed to fully and successfully implementing the law. The tools it contains reflect the constant balance diplomats seek in advancing the many interests of the United States around the world. Your support and this law underscore the fact that IPCA is a priority for the U.S. government.

The 90-Day Report on International Parental Child Abduction

In compliance with the law, which took effect on August 8, 2014, the Department presented an annual report to Congress that provided data and other information about cases around the world and the Department's efforts to resolve them. The 2015 Annual Report covers the period of October 1 to December 31, 2014. It reflected the fact that the law had been in effect only for part of the year. The Department identified 22 countries as demonstrating patterns of noncompliance. Subsequently, the Department reported to Congress (90-Day Report) on the specific actions taken against countries determined to have been engaged in a pattern of noncompliance as reported in the 2015 Annual Report.

Diplomacy and Actions

As noted in the 90-Day Report, which covers actions through July 31, 2015, diplomatic engagement remains one of our most effective tools with all countries to assist in resolving abduction cases. In Convention partner countries, we have reiterated that we expect our partners to implement the Convention effectively. In non-Convention countries, we take every appropriate opportunity to raise abduction cases with foreign government officials at the highest appropriate levels and to ensure host governments understand the high priority the U.S.

government attaches to resolution of these cases.

As part of the process of demarcating each of the countries cited in the 2015 Annual Report for demonstrating patterns of noncompliance, our embassies held frank conversations with foreign government officials, discussing what actions their countries could take to avoid being cited in the future. The Department also met with foreign missions in Washington to deliver the same clear message.

For example, we have requested the Government of India's assistance in resolving reported abduction cases. In May, Special Advisor for Children's Issues Ambassador Susan Jacobs pressed India to resolve reported cases. In September, I urged India to make progress on its accession to the Convention and resolve reported cases. In October, Principal Deputy Assistant Secretary for South and Central Asian Affairs Ambassador William Todd encouraged India to resolve reported cases. I again reiterated our strong interest that India make progress on its accession to the Convention and resolve reported cases at the annual U.S.-India Consular Dialogue this month. Officials at the U.S. Embassy in New Delhi are in regular contact with ministry officials on these issues.

We continue to have serious concerns in some countries we could not cite in the annual report as demonstrating a pattern of noncompliance per the criteria established in the law. These include countries with pending abduction cases that do not benefit from the Convention, such as abduction cases in Japan that occurred before Japan became party to the Convention. We are keenly aware of the pre-Convention cases and are as actively engaged on them as we are on all of our non-Convention cases. We continue to engage with Japan intensively through bilateral visits, digital video conferences, and in coordination with the U.S. Embassy in Tokyo and the Department's Bureau of East Asia and Pacific Affairs to resolve these cases.

Beyond the Reports

The diplomatic tools and engagement noted in the 90-Day Report have yielded important results. For example, Slovakia was cited for demonstrating patterns of noncompliance in the 2015 Annual Report. In January 2016, Slovakia will implement legislation that limits the number of court appeals in Convention cases and mandates that Convention cases be adjudicated within 12 weeks. This important step should improve Slovakia's compliance with the Convention and resolution of cases. It also has the potential to make Slovakia a European leader on Convention compliance.

As we continue to coordinate and interact with our partner central authorities in foreign countries to monitor individual cases, we are obtaining critical information to assess countries' compliance with the Convention. At the same time, we are developing the personal contacts and relationships with our counterparts that build trust and make our interactions more productive over time.

In addition, the USCA and other Department officials regularly engage with non-Convention countries in Washington and overseas, to encourage them to ratify or accede to the Convention. In September 2015, the U.S. Embassy in Abu Dhabi hosted a symposium on the Convention to follow up on an October 2014 regional symposium held in Amman, Jordan. The event educated government officials about the Convention and how it can be implemented in countries with Islamic law traditions. An official from the Moroccan Central Authority joined presenters from the Department, the Hague Conference on Private International Law, and the Canadian Ministry of Foreign Affairs to discuss the Convention and its implementation. We continue to press countries such as Egypt, Tunisia, and the United Arab Emirates to follow in the footsteps of Morocco, with which we partnered in 2012, to become party to the Convention.

In the 2015 Annual Report, we cited Brazil for demonstrating patterns of non-compliance in the area of judicial performance. As a result of the citation and follow-up meetings, the U.S. Embassy in Brasilia coordinated an International Visitor Leadership Program that brought Brazilian judges and federal prosecutors to the United States to see and experience firsthand how the United States implements the Convention. These exchange programs are a prime opportunity to share best practices and Convention obligations with the same judges who will decide abduction cases. They met the judges who handle abduction cases in the United States. We also used the opportunity to discuss significant delays we have observed in pending abduction cases.

During my discussions with Brazilian officials in Brasilia last month, we agreed that their slow, deliberate judicial process does not align well with the Convention's emphasis on a narrowly-focused and rapid judicial decision. Brazil is working to increase judges' familiarity with the Hague Convention, and to develop a network of expert judges to whom family court judges can turn for guidance. I was also informed Brazil is drafting legislation intended to address shortcomings in its performance to date. I note that we have seen positive developments in our Hague cooperation with Brazil, notably with respect to communication and cooperation with the Brazilian Central Authority. During my visit to Brasilia I learned of an additional resource, mediation, which may enable some parents to resolve their situations outside the judicial process.

On November 14, I returned to Washington following bilateral discussions with the Russian government, which included examination of the status of our cooperation on abduction. Russia has acceded to the Hague Convention but has not yet been accepted by the U.S. as a partner; we seek additional information to determine whether they have laws and procedures in place to enable full compliance with Convention requirements. Both countries expressed strong interest in partnering under the Convention and I will work to accelerate realization of that goal. Meanwhile we also seek agreement on how to resolve outstanding cases which at the time of my meetings involved 39 families and 47 children since the Convention does not apply retroactively.

* * * *

Cross References

Evacuations from Yemen, **Chapter 5.C.1.**

Rights of the Child, **Chapter 6.C.**

Child abduction in UN annual report on children in armed conflict, **Chapter 6.C.2.a.**

Diplomatic relations, **Chapter 9.A.**

Enhanced consular immunities, **Chapter 10.D.3.**

Family law, **Chapter 15.B.**

CHAPTER 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. Extradition Treaty with the Dominican Republic

On January 12, 2015, U. S. Ambassador to the Dominican Republic James Brewster and Minister of Foreign Affairs of the Dominican Republic Andres Navarro signed a new extradition treaty between the two countries. See press release, available at <http://santodomingo.usembassy.gov/pr-150112.html>. The new treaty replaces one dating back to 1909, expanding the scope of extraditable offenses and establishing more up-to-date extradition procedures.* As described in the press release:

The language of the new treaty was agreed upon in October of 2014 after a three-day negotiation between delegations of technical experts from both governments. The United States delegation was comprised of attorneys from the U.S. Department of State and the U.S. Department of Justice. The Dominican delegation included experts from the Office of the Attorney General, the Ministry of Foreign Affairs, and the Office of the Presidency.

2. Mutual Legal Assistance Treaties

a. *Kazakhstan*

On February 20, 2015, the United States and Kazakhstan signed a Treaty on Mutual Legal Assistance in Criminal Matters. See February 20, 2015 State Department media

* Editor's note: In February 2016, the President transmitted the treaty to the Senate for its advice and consent.

note, available at <http://www.state.gov/r/pa/prs/ps/2015/02/237732.htm>. As described in the media note:

The Treaty provides a formal intergovernmental mechanism for the provision of evidence and other forms of law enforcement assistance in criminal investigations, prosecutions, and related proceedings. Under the Treaty, assistance can be provided in taking testimony of witnesses, releasing documents and records, locating and identifying persons or evidence, serving documents, executing requests for searches and seizures, transferring persons in custody for testimony or other purposes, tracing and forfeiting the proceeds of crime, and any other form of assistance not prohibited by the laws of the requested State.

b. *Algeria*

On October 5, 2015, President Obama transmitted, for the advice and consent of the Senate to ratification, the Treaty between the Government of the United States of America and the Government of the People's Democratic Republic of Algeria on Mutual Legal Assistance in Criminal Matters, signed at Algiers on April 7, 2010. Daily Comp. Pres. Docs. 2015 DCPD No. 00701 (Oct. 5, 2015). The transmittal includes the report of the Department of State with respect to the treaty. The President's message to the Senate transmitting the treaty summarizes some of its provisions:

The Treaty provides for a broad range of cooperation in criminal matters. Under the Treaty, the Parties agree to assist each other by, among other things: producing evidence (such as testimony, documents, or items) obtained voluntarily or, where necessary, by compulsion; arranging for persons, including persons in custody, to travel to provide evidence; serving documents; executing searches and seizures; locating and identifying persons or items; and freezing and forfeiting assets or property that may be the proceeds or instrumentalities of crime.

The text of the treaty and the overview with an article-by-article analysis prepared by the State Department are available at <https://www.congress.gov/114/cdoc/tdoc3/CDOC-114tdoc3.pdf>.

c. *Jordan*

On December 8, 2015, President Obama transmitted, for the advice and consent of the Senate to ratification, the Treaty between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan on Mutual Legal Assistance in Criminal Matters, signed at Washington on October 1, 2013. Daily Comp.

Pres. Docs. 2015 DCPD No. 00875 (Dec. 8, 2015). The text of the treaty as transmitted, with an overview prepared by the State Department, is available at <https://www.congress.gov/114/cdoc/tdoc4/CDOC-114tdoc4.pdf>.

3. Extradition Cases

a. Patterson

As discussed in *Digest 2014* at 74-78, the United States responded to an appeal to the U.S. Court of Appeals for the Ninth Circuit from a district court decision denying a habeas petition by a U.S. citizen certified for extradition to the Republic of Korea to face a murder charge. *Patterson v. Wagner*, No. 13-56080. Patterson contended that the statute of limitations provision in the U.S.-Republic of Korea extradition treaty (“Treaty”) and the Status of Forces Agreement (“SOFA”) between the two countries both presented bars to his extradition. The Court of Appeals agreed with the United States that neither the extradition treaty nor the SOFA prevents Patterson’s extradition. 785 F.3d 1277 (9th Cir. 2015). Excerpts follow from the Court’s opinion.

* * * *

Patterson first argues that the 1998 extradition treaty between the United States and South Korea prohibits his extradition because his prosecution would be untimely. The question is whether the treaty’s lapse-of-time provision, which states that extradition “may be denied” when the prosecution would have been barred by the relevant statute of limitations in the United States, imposes a mandatory bar to extradition. We conclude that it does not impose a mandatory bar.

Article 6 of the extradition treaty between the United States and South Korea provides, in part:

Lapse of Time

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

Extradition Treaty, U.S.-S. Kor., art. VI, June 9, 1998, T.I.A.S. No. 12,962 (“Treaty”) (emphasis added). That is, if a person cannot be prosecuted for a crime in the United States because the relevant statute of limitations has expired, extradition to South Korea for that crime “may be denied.” *Id.*

The parties agree that Patterson has been certified for extradition for a crime for which he cannot now be prosecuted in the United States. The magistrate judge certified Patterson for extradition only for second-degree murder, concluding that the evidence did not support a finding of probable cause for premeditated murder. The magistrate judge then applied the five-

year federal statute of limitations for second-degree murder, *see* 18 U.S.C. § 3282(a), for the purpose of addressing the lapse-of-time provision of Article 6. The government challenges neither the finding of probable cause nor the application of the federal statute of limitations. However, the government contends that the lapse-of-time provision of Article 6 is not judicially enforceable.

We begin with the text of the treaty. *Medellin v. Texas*, 552 U.S. 491, 506, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008) (“The interpretation of a treaty, like the interpretation of a statute, begins with its text.”). Article 6 provides, “Extradition *may be denied*.” Treaty, art. VI (emphasis added). The normal reading of “may” is permissive, not mandatory. The most natural reading of Article 6, therefore, is that untimeliness is a discretionary factor for the Secretary of State to consider in deciding whether to grant extradition. That is, the Secretary “may” decline to extradite someone whose prosecution would be time-barred in the United States, but he or she is not required to do so. Under this reading, there is no mandatory duty that a court may enforce. *Cf. Trinidad y Garcia v. Thomas*, 683 F.3d 952, 960 (9th Cir.2012) (en banc) (Thomas, J., concurring) (“[I]t is the Secretary’s role, not the courts’, to determine whether extradition should be denied on humanitarian grounds....” (internal quotation marks omitted)).

This reading of Article 6 is consistent with our decision in *Vo*. In that case, *Vo* was arrested in the United States for bombing the Vietnamese embassy in Thailand. 447 F.3d at 1238–39. When Thailand sought to extradite him, *Vo* argued that the relevant treaty barred his extradition. The treaty stated that extradition “*may be denied* when the person sought is being or has been proceeded against” (*i.e.*, prosecuted) in the extraditing country for a related crime. *Id.* at 1238 (emphasis added). We rejected *Vo*’s argument that the “may-be-denied” language barred the judge from certifying his extradition, holding that the language meant that a proceeding for a related crime was a discretionary factor to be considered by the Secretary of State in deciding whether to extradite. *Id.* at 1246. ...

Patterson contends that our reading of “may be denied” in *Vo* does not apply to that same language in Article 6. Patterson argues that evidence from the treaty’s drafting and negotiating history demonstrate that, despite the use of the “may-be-denied” language, Article 6 was intended to be a mandatory bar to untimely extradition requests. Patterson further argues that the magistrate judge erred by ignoring this evidence. We agree with Patterson that extra-textual evidence is relevant to treaty interpretation, but we disagree with him on the significance of that evidence in this case.

While “[t]he interpretation of a treaty ... begins with its text,” *Medellin*, 552 U.S. at 506, 128 S.Ct. 1346, it does not end there. Because the purpose of treaty interpretation is to “give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties,” *Air France v. Saks*, 470 U.S. 392, 399, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985), courts—including our Supreme Court—look to the executive branch’s interpretation of the issue, the views of other contracting states, and the treaty’s negotiation and drafting history in order to ensure that their interpretation of the text is not contradicted by other evidence of intent. *See Abbott v. Abbott*, 560 U.S. 1, 15–20, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010) (examining these factors following its textual analysis); *Medellin*, 552 U.S. at 508–13, 128 S.Ct. 1346 (same); *see also Vo*, 447 F.3d at 1246 n. 13 (consulting a letter of submittal from the Secretary of State).

In this case, the extra-textual evidence, considered as a whole, reinforces the interpretation of Article 6 for which the government argues. Patterson points to evidence that he contends shows that both the Senate and the executive branch understood Article 6 to impose a

mandatory bar. But this evidence falls short of establishing that either the Senate or the executive branch understood the treaty in this way.

First, Patterson argues that the Senate Report accompanying the treaty shows that the Senate understood Article 6 to be mandatory. He points to the Report's summary, which states, "The Treaty with the Republic of Korea precludes extradition of offenses barred by an applicable statute of limitations." S. Exec. Rep. No. 106-13, at 5 (1999) ("Report"). Patterson argues that this language shows that the lapse-of-time provision of Article 6 is mandatory, not permissive. But the body of the Report calls that reading into question. The more detailed technical analysis of the treaty, contained in the body of the Report, describes Article 6 in permissive terms, stating that extradition "may be denied" and explaining that the Korean and U.S. statutes of limitations operate so differently that "this provision could be very difficult to implement." *Id.* at 14. The technical analysis points to three extradition treaties that have what it characterizes as "similar provisions." *Id.* Tellingly, two of those treaties use the word "shall," and one uses the word "may." *Compare* Extradition Treaty, U.S.-Fr., art. 9(1), Apr. 23, 1996, S. Treaty Doc. No. 105-13 ("shall"), *and* Extradition Treaty, U.S.-Japan, art. IV(3), Mar. 3, 1978, 31 U.S.T. 892 ("shall"), *with* Extradition Treaty, U.S.-Lux., art. 2(6), Oct. 1, 1996, S. Treaty Doc. No. 105-10 ("may"). When parties to a treaty intend to make an exception to extradition mandatory, in other words, they know how to state that it "shall" apply.

Second, Patterson argues that the hearings on the treaty show that the Senate understood Article 6 to be mandatory. He points to an exchange between Senator Rod Grams and John Harris, the Acting Director of the Office of International Affairs at the Department of Justice, during the Senate hearing. But to the extent the exchange supports either reading of Article 6, it only weakly supports Patterson's contention that the Senate understood the provision to be mandatory, and it shows fairly clearly that the executive branch understood it to be permissive. The exchange is as follows:

SENATOR GRAMS:

Article 6 of the proposed treaty bars extradition in cases where the law of the requested State would have barred the crime due to a statute of limitations having run out.

...

So the question is are you confident that this article of the treaty adequately insures that fugitives cannot simply run out the clock by fleeing to Korea?

MR. HARRIS:

Senator, this article of the treaty was the subject of considerable negotiation. As you may recall, of the treaties that were before the Senate last fall, most of them had slightly different language. Many of our most modern extradition treaties flatly state that the statute of limitations of the requesting State will apply.

We have a few in which it was not possible to reach that resolution. In this case, because of the specific provisions of Korean law, we did agree that the statute of limitations of the requested State would apply. But, as you have indicated, the specific language in the article is crafted so that those factors which toll the statute of limitations under the law of the requesting State would be given weight.

Report at 37 (emphasis added).

The import of the italicized portion of Senator Grams's question is not clear. Senator

Grams may have thought that Article 6 was a mandatory bar, as indicated in the italicized words, but he may have been speaking imprecisely. But even if Senator Grams was speaking precisely, he may have considered himself to have been informed to the contrary, and persuaded and corrected, by Mr. Harris's answer. And even if he was speaking precisely, and even if he did not change his view after hearing Mr. Harris's answer, Senator Grams was not speaking for the full Senate. By contrast, the import of Mr. Harris's words, given on behalf of the executive branch, is fairly clear. He stated that Article 6 was the subject of "considerable negotiation," and that the "specific language in the article is crafted" to give "weight" to a statute of limitations determination. *Id.*

Additional evidence of the executive branch's interpretation of Article 6 shows that the executive branch has interpreted Article 6 to grant discretion to the government to which the extradition request is made. The State Department's official submittal letter, which accompanied the treaty when President Clinton submitted it to the Senate, described the treaty provisions. *See* S. Treaty Doc. No. 1062, at v (1999). In that letter, Deputy Secretary of State Strobe Talbott explained that "Article 6 *permits* extradition to be denied" when the prosecution would be untimely. *Id.* at vii (emphasis added). The submittal letter's use of the word "permits" rather than "requires" indicates that the executive branch believed that Article 6 was permissive rather than mandatory.

Taken as a whole, the extra-textual evidence reinforces the natural reading of Article 6. Under that reading, the Secretary of State may choose, in his or her discretion, whether to grant or deny extradition in a case where the statute of limitations in the United States has expired. Federal courts thus have no authority under Article 6 to dictate to the Secretary of State what he or she must do in such a case.

2. Status of Forces Agreement

Patterson next argues that the Status of Forces Agreement ("SOFA") governing American military personnel and their dependents in South Korea prohibits his extradition. Specifically, he argues that his extradition to Korea would expose him to double jeopardy in contravention of the SOFA, and that the SOFA confers a judicially enforceable right not to be extradited. The premise of Patterson's argument is that rights conferred by the SOFA may be enforced by the judiciary to block extradition. We disagree with this premise.

The United States and South Korea entered into the SOFA in 1966 pursuant to the mutual defense treaty between the two countries. Under the agreement, U.S. military personnel and their dependents in Korea are entitled to enumerated rights, including, as relevant here, the right "not [to] be prosecuted or punished more than once for the same offense." Facilities and Areas and the Status of United States Armed Forces in Korea, U.S.-S. Kor., July 9, 1966, 17 U.S.T. 1677, 1780 ("SOFA"). The parties agree that the SOFA applies to Patterson, as he was the dependent of an American serviceman stationed in South Korea at the time of the murder.

Patterson argues that his prosecution in South Korea for murder would violate the SOFA provision protecting against double jeopardy. He argues that his conviction for destruction of evidence required a finding by the South Korean court in that proceeding that he did not commit the murder for which extradition is now sought. This is so, he argues, because the statute under which he was convicted prohibits the destruction of evidence in connection with "a criminal ... case *against another*." Criminal Act, Act No. 293, Sept. 18, 1953, art. 155(1), *amended by* Act No. 5057, Dec. 29, 1995 (S. Kor.) (emphasis added). Thus, Patterson argues, the South Korean court was required to find in his earlier criminal trial that he was not the person who murdered

Cho.

We need not reach the question whether the SOFA forbids Patterson’s prosecution for murder in South Korea. A threshold question is whether, even if the double jeopardy provision of SOFA forbids the prosecution, we can enforce that provision by blocking his extradition. We conclude that the answer to this question is “no.”

For purposes of our decision, we assume that there is no categorical prohibition against a federal statute, or a treaty or other international agreement to which the United States is a party, providing a basis for a judicial order blocking extradition. *Cf. Trinidad y Garcia*, 683 F.3d at 956–57. But it is clear that the SOFA is not such an international agreement. We agree with the Seventh and D.C. Circuits that a relator seeking to block extradition by relying on an international agreement must show, at a minimum, that the agreement upon which he relies establishes a judicially enforceable right. *See In re Burt*, 737 F.2d 1477, 1487–88 (7th Cir.1984); *Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C.Cir.1972); *cf. Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 598, 5 S.Ct. 247, 28 L.Ed. 798 (1884) (a treaty, though primarily “a compact between independent nations,” may contain “provisions which confer certain rights upon the citizens or subjects of one of the nations ... which are capable of enforcement as between private parties in the courts of the country”).

Though the SOFA appears to establish individual rights, we conclude that they are not judicially enforceable. Confronted with a similar question regarding the NATO status of forces agreement, the Seventh and D.C. Circuits looked to whether the agreement established judicial or diplomatic mechanisms for adjudicating disputes. *Burt*, 737 F.2d at 1487–88; *Holmes*, 459 F.2d at 1222. In *Burt*, the Seventh Circuit held that recourse for a violation was “diplomatic, not judicial,” and on that basis rejected the relator’s petition for a writ of habeas corpus. 737 F.2d at 1488. Similarly, in *Holmes*, the D.C. Circuit held that because the agreement required the parties to negotiate disputes “relating to the interpretation or application of this Agreement,” the “enforcement mechanism” for the assertion of individual rights under the agreement was “diplomatic recourse only.” 459 F.2d at 1222.

Here, as in *Burt* and *Holmes*, the U.S.-Korea SOFA establishes diplomatic procedures for resolution of matters arising under its provisions. It provides that “[a] Joint Committee shall be established as the means for consultation between [the United States and South Korea] on all matters requiring mutual consultation regarding the implementation of this Agreement except where otherwise provided.” SOFA at 1704. Amendments adopted in 2001 specify a procedure by which the Joint Committee’s jurisdiction is invoked: the state parties have ten days to resolve any complaint at the local level; the matter is then referred the Joint Committee, which has 21 days to resolve it; if the Committee cannot do so, the matter is referred to the two governments. *Facilities and Areas and the Status of United States Armed Forces, U.S.-S. Kor.*, art. XXII, ¶¶ 5(c), 9, Jan. 18, 2001, T.I.A.S. No. 13,138. Like the NATO agreement, the SOFA establishes an enforcement mechanism that is “diplomatic, not judicial.” *Burt*, 737 F.2d at 1488.

The SOFA’s provisions thus establish a diplomatic conflict resolution scheme with no role for the judiciary. Even if prosecution of Patterson for murder violates the SOFA’s provision protecting against double jeopardy (a question we do not decide), that provision does not provide a basis for a court to bar his extradition.

* * * *

b. Trabelsi

As discussed in *Digest 2014* at 78-84, the United States opposed defendant Nizar Trabelsi's motion to dismiss the indictment against him based on his claim that his extradition to the United States violated the extradition treaty between the United States and the Kingdom of Belgium. For additional background on Trabelsi's 2013 extradition to the United States, see *Digest 2013* at 33. In 2015, the United States opposed Trabelsi's attempt to obtain correspondence and documents related to his extradition exchanged by the United States and Belgium. On May 8, 2015, the U.S. District Court for the District of Columbia ordered the production of certain correspondence. The United States sought and obtained partial reconsideration of the district court's order compelling production, such that the requested correspondence would be produced *ex parte* and *in camera* and any documents ultimately produced to Trabelsi would be under seal. The court's opinion notes:

The government asserts that substantial damage to the United States' relationship with Belgium, as well as to the United States' foreign relations with other extradition partners, might flow from traditional production of the requested correspondence. The government also notes Belgium's explicit objection to production of the requested correspondence and concerns regarding access to correspondence sent with an expectation of confidentiality. ... In light of the potential harm to the United States' foreign relations with Belgium and other nations posed by unfettered disclosure, as well as the need to balance the government's expressed interests with Trabelsi's interest in obtaining the requested correspondence, *in camera ex parte* review is appropriate...

On November 4, 2015, the U.S. District Court for the District of Columbia denied Trabelsi's motion to dismiss the superseding indictment, finding that Trabelsi had not shown that the offenses charged in the superseding indictment were the same as those for which he was prosecuted in Belgium and that he could not show that his extradition violated the extradition treaty. Trabelsi filed a notice of appeal on November 6, 2015.

c. Munoz Santos

On July 27, 2015, the United States filed its response to a petition for rehearing *en banc* filed by a fugitive who had been found extraditable by a magistrate judge. *Munoz Santos v. Thomas*, No. 12-56506 (9th Cir.). Mexico sought the extradition of Jose Luis Munoz Santos on kidnapping for ransom charges relating to the kidnapping of a woman and her two daughters in Mexico, which resulted in the death of one of the daughters. In concluding that there was probable cause to believe that Munoz Santos had committed the criminal offenses for which Mexico sought his extradition, the magistrate judge

relied in part on witness statements from the fugitive’s alleged co-conspirators, the adult kidnapping victim and her husband, and another person who was allegedly invited to join the kidnapping conspiracy but declined. In attempting to challenge the evidence proffered in support of probable cause, Munoz Santos sought to introduce evidence that the testimony against him from his alleged co-conspirators (Rosas and Hurtado) had been obtained through torture and had subsequently been recanted. The extradition judge excluded the torture allegations and recantations and issued a certification of extraditability. Munoz Santos filed a *habeas* petition challenging the certification in part on the ground that the torture allegation and recantations should not have been excluded. The district court denied the *habeas* petition; the U.S. Court of Appeals for the Ninth Circuit affirmed that denial; and Munoz Santos filed a petition for a rehearing *en banc*. Excerpts follow (with footnotes omitted) from the U.S. brief, which is available in full at www.state.gov/s/l/c8183.htm.

* * * *

A. The Panel Properly Affirmed the Extradition Judge’s Exclusion of the Fugitive’s Recantation Evidence

1. *The Extradition Habeas Process Is Sharply Limited By Precedent, Statute, Treaty, and Separation of Powers and Comity Principles*

The extradition process begins with the political branches’ decision to enter into an extradition treaty, a decision that rests on those branches’ determination that the foreign country’s legal and penal system is one into which the United States is willing to extradite fugitives. “[I]t is for the[se] political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.” *Munaf v. Geren*, 553 U.S. 674, 700-01 (2008). As the Supreme Court recently explained:

The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government’s ability to speak with one voice in this area. . . . In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture

Id. at 702. The political branches do not lightly enter into extradition treaties, and once they do, reciprocal obligations and principles of comity follow.

One of those obligations—reflecting an important comity principle and codified in 18 U.S.C. §§ 3181-3195—is that “judicial officers conduct a circumscribed inquiry in extradition cases.” *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1208 (9th Cir. 2003). Extradition judges do not hold trials on the fugitive’s guilt, or resolve evidentiary challenges, or look past the evidence to whether the legal procedures in the requesting country are akin to those of the United States. “It is not the business of [United States] courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.” *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir. 1976). As the Second Circuit

explained with some force in the context of a fugitive's claims that he would be tortured if extradited to the requesting country, "consideration of the procedures that will or may occur in the requesting country is not within the purview of a [U.S. court]." *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990). In fact, it is "improper" for the court to make that sort of examination: "[t]he interests of international comity are ill-served by requiring a foreign nation such as [Mexico] to satisfy a United States [court] concerning the fairness of its laws and the manner in which they are enforced." *Id.* at 1067. The same concerns counsel against U.S. judges conducting inquiries into the manner in which evidence has been obtained in a foreign country. *See Koskotas v. Roche*, 931 F.2d 169, 174 (1st Cir. 1991) ("Extradition proceedings are grounded in principles of international comity, which would be ill-served by requiring foreign governments to submit their purposes and procedures to the scrutiny of United States courts."). It is for the courts in the requesting country to determine whether law enforcement agents in that country have procured evidence improperly and, if so, whether any impropriety so taints the evidence that it should not be considered in the underlying judicial proceedings.

Thus, an extradition judge may not deny extradition on the ground that the requesting country will not provide a fugitive the procedures and rights available in a U.S. criminal case, even if those rights are guaranteed under the U.S. Constitution. *Neely v. Henkel*, 180 U.S. 109, 123 (1901). Nor may a judge entertain challenges that a requesting country has not followed its own laws in bringing a criminal case or extradition request. *Skaftouros v. United States*, 667 F.3d 144, 155-56 (2d Cir. 2011). As the Supreme Court explained over a century ago—in a far more difficult case than this one—U.S. courts "are bound by the existence of an extradition treaty to assume that the [foreign] trial will be fair." *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911) (extradition of Jewish fugitive to tsarist Russia); *cf. Munaf*, 553 U.S. at 700-02; *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 978 (9th Cir. 2012).

2. U.S. Courts Must Exclude Evidence That Contradicts the Extraditing Country's Proffered Evidence

Under the Extradition Treaty Between the United States and Mexico, signed May 4, 1978, 31 U.S.T. 5059, to meet the standard for certification, the evidence must only establish probable cause that the fugitive committed the charged offense. *See, e.g., Emami v. U.S. Dist. Court for N. Dist.*, 834 F.2d 1444, 1447 (9th Cir. 1987). Moreover, "[t]his circuit has held that the self-incriminating statements of accomplices are sufficient to establish probable cause in an extradition hearing." *Zanazanian v. United States*, 729 F.2d 624, 627 (9th Cir. 1984).

An extradition hearing resembles a preliminary hearing or grand jury investigation into the existence of probable cause, *see, e.g., Benson v. McMahon*, 127 U.S. 457, 463 (1888) (an extradition hearing is "of the character of [a] preliminary examination" to determine whether to hold an accused to be tried on criminal charges), except that a fugitive's procedural rights are more limited, *see, e.g., Bingham v. Bradley*, 241 U.S. 511, 517 (1916) (no right to cross-examination if witnesses testify at the hearing); *Eain v. Wilkes*, 641 F.2d 504, 511 (7th Cir. 1981) (no right to introduce contradictory or impeaching evidence). Because of the limited purpose of an extradition hearing and the comity owed other nations under an extradition treaty, a fugitive's ability to present evidence is very limited. In *Collins v. Loisel*, the Supreme Court held that a fugitive's right to present evidence must be sharply limited lest an extradition hearing become a contested trial:

If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties.

259 U.S. 309, 316 (1922). The Court further explained that evidence offered to “contradict” the government’s evidence was not properly admitted under this standard. *Id.*

For that reason—and “[b]ecause extradition courts do not weigh conflicting evidence in making their probable cause determinations,” *Barapind*, 400 F.3d at 749 (internal quotation marks and citation omitted)—a fugitive may not introduce evidence that contradicts the evidence submitted on behalf of the requesting country. In other words, the fugitive cannot offer evidence that would lead to an evidentiary dispute. *See Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978). As the fugitive concedes (PFR 7), this includes evidence of recantations of inculpatory statements. *See Barapind*, 400 F.3d at 750; *Eain*, 641 F.2d at 511-12 (“The alleged recantations are matters to be considered at the trial, not the extradition hearing.”).

Only precluding evidentiary disputes can maintain the essential nature of extradition hearings, defined by the preliminary nature of the proceeding, the practical fact that the relevant evidence and witnesses are located abroad, and the need for comity between the Treaty parties. To resolve disputed issues would compel the requesting country to send its evidence and witnesses to the United States, and requiring “the demanding government to send its citizens to another country to institute legal proceedings would defeat the whole object of the treaty.” *Charlton v. Kelly*, 229 U.S. 447, 461 (1913); *Bingham*, 241 U.S. at 517; *Mainero v. Gregg*, 164 F.3d 1199, 1206 (9th Cir. 1999) (“[T]he very purpose of extradition treaties is to obviate the necessity of confronting the accused with the witnesses against him.”) (internal quotation marks omitted).

3. *The Torture Allegations Are Inextricably Intertwined With Recantation Evidence and Were Properly Excluded*

While the fugitive now asserts that the torture allegations may be considered separately from the recantations (PFR 7, 12), he conceded below “that the district court correctly characterized the evidence as ‘inextricably intertwined,’ and that Rosas and Hurtado are essentially saying, ‘I was tortured so the things I said the first time are not credible.’” *Santos*, 779 F.3d at 1027; (ER 15). The panel thus correctly held that the extradition judge properly excluded all such evidence:

[I]n order to evaluate Rosas’ and Hurtado’s torture allegations, the extradition court would necessarily have had to evaluate the veracity of the recantations and weigh them against the conflicting inculpatory statements. Doing so would have exceeded the limited authority of the extradition court.

Santos, 779 F.3d at 1027 (citing *Barapind*, 400 F.3d at 749-50; *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir. 1986)).

The fugitive contends that *Barapind* supports his position that the recantations and torture allegations can be detached from each other. (PFR 10-12.) He relies on a sentence in which the Court *rejected* the fugitive's argument that some evidence was unreliable "because it was fabricated or obtained by torture," but also (1) commented that the extradition judge had "conducted a careful, incident-by-incident analysis as to whether there was impropriety" on the part of the requesting government, and (2) held that the judge's findings that evidence supporting certain charges "was not the product of fabrication or torture were not clearly erroneous." (PFR 10 (quoting *Barapind*, 400 F.3d at 748).) Read in context, that sentence cannot carry the tremendous weight the fugitive asks it to bear.

To begin with, the *Barapind* Court was never asked whether evidence allegedly obtained under duress could be excluded. The extradition judge in *Barapind* admitted and considered such evidence, but nonetheless found probable cause on both charges without regard to *Barapind*'s evidence because resolution of that disputed evidence would require an improper trial. 400 F.3d at 749, 752. *Barapind* appealed that probable cause finding, and the government never challenged the admission of the torture evidence. The question of whether the extradition judge was required to admit and consider such evidence simply was not before the Court. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

More importantly, *Barapind* did not—and could not—upend the decades of precedent, including Supreme Court precedent, holding that a fugitive cannot submit contradictory evidence and an extradition judge cannot hold mini-trials to resolve evidentiary disputes. Thus, the panel in this case—after carefully analyzing *Barapind*—properly held that the decision required affirmance here. *Santos*, 779 F.3d at 1025-28. The fugitive's "evidence was properly excluded because its consideration would require a mini-trial on whether the initial statements of Rosas and Hurtado were procured by torture." *Id.* at 1027-28 (citing *Barapind*, 400 F.3d at 749-50).

4. Mexico Disputes the Fugitive's Torture Allegations

The Mexican government maintains that Hurtado and Rosas were not tortured (ER 16 (habeas judge noting proffer by government counsel that the claims of torture were unfounded)) and, notwithstanding the conclusory assertions of the fugitive (PFR 1) and *amici curiae* (AB 2, 3 n.4), there has never been a judicial finding to the contrary. Rather, the only evidence of torture in the record are Rosas's and Hurtado's self-serving allegations that their inculpatory statements were coerced. *See Santos*, 779 F.3d at 1026 n.4 (noting that Rosas and Hurtado had incentives to falsely recant).

The allegations of torture were properly excluded because they contradicted evidence proffered by the government and would have created an evidentiary dispute, independent of the torture allegations being inextricably intertwined with the recantations. (*See GAB* 31-36 (citing *Hooker*, 573 F.2d at 1368; *Barapind*, 400 F.3d at 749-50).) The panel, however, did not reach this broader question and instead expressly limited its holding to requiring the exclusion of evidence of duress when such evidence is inextricably intertwined with recantations. *Santos*, 779 F.3d at 1028 n.5.

5. The Fugitive's Torture Allegations Are Properly Considered by Mexican Courts

The responsibility for addressing the fugitive's torture allegations properly rests with Mexican, not U.S., courts. In addition to the well-established case law recognizing that the courts of the requesting country, with full access to the necessary evidence and witnesses, are better qualified to consider the fugitive's allegations, comity between Treaty partners counsels deference. Consistent with the determination previously made by the Executive and Legislative branches, the Mexican legal system can be relied on to adjudicate the fugitive's claims fairly. Indeed, Mexican courts already granted the fugitive relief on the homicide charge that was originally brought against him. (*See* ER 28.) There is no reason to believe that the Mexican courts cannot fairly examine the allegations concerning the co-conspirators' statements.

B. The Panel Decision Does Not Conflict With Precedent

The fugitive contends that the panel's decision conflicts with the Supreme Court's decision in *Collins* and this Court's *en banc* decision in *Barapind*. (PFR 1.) As explained above, however, those decisions unambiguously support the government's position as they hold that an extradition judgment must exclude evidence that contradicts evidence proffered by a foreign country seeking extradition. *Collins*, 259 U.S. at 316; *Barapind*, 400 F.3d at 749. Moreover, the panel noted that *Barapind* is consistent with other circuits. *Santos*, 779 F.3d at 1026 n.2. In addition, because there has not been a finding that any statements were procured through torture, this case does not present a matter of exceptional importance and *en banc* review is unwarranted. Fed. R. App. P. 35(a).

* * * *

d. Cruz Martinez

On September 4, 2015, the United States filed a petition for rehearing *en banc* of a panel decision reversing a district court's denial of a *habeas* petition brought by a fugitive sought by Mexico. *Avelino Cruz Martinez v. United States*, No. 14-5860 (6th Cir.). The majority of the divided panel of the appeals court agreed with the fugitive that the lapse-of-time provision in the extradition treaty with Mexico incorporates the speedy trial clause of the Sixth Amendment of the U.S. Constitution. One member of the three-judge panel, Judge Sutton, dissented from the majority's opinion, reasoning that the lapse-of-time provision in extradition treaties was intended to refer to traditional statutes of limitations and not to speedy trial rights. Mexico sought the extradition of Cruz Martinez to face charges that he murdered two men in Oaxaca, Mexico in December 2005. Cruz Martinez was a U.S. resident at the time of the murders and later became a U.S. citizen, but frequently traveled to Oaxaca. A prosecutor in Oaxaca secured an arrest warrant for Cruz Martinez in February 2006. In May 2012, Mexico sent a diplomatic note to the United States requesting provisional arrest, and, two months later, formally requested extradition of Cruz Martinez. After Cruz Martinez was certified for extradition by a magistrate judge, he filed a petition for *habeas corpus* relief, arguing that the certification was unlawful under the extradition treaty's lapse of time provision. The district court denied his *habeas* petition. A divided panel of the court of appeals reversed. Excerpts follow (with footnotes omitted) from the U.S. petition, which is available in full at www.state.gov/s/l/c8183.htm.

* * * *

The Sixth Amendment’s speedy-trial guarantee is limited, by its terms, to “criminal prosecutions.” It does not apply to other settings, including the extradition proceedings here. The panel majority reached a contrary conclusion by imbuing a common treaty phrase—“barred by lapse of time”—with constitutional significance. But historical practice undercuts any suggestion that the drafters of this language, U.S. diplomats and their foreign counterparts, intended to import U.S. constitutional protections into this arena. The majority’s leap, if left unchecked, will alter the course of this country’s extradition proceedings and the diplomatic relationships that undergird them.

A. The lapse-of-time provision does not import the Speedy Trial Clause.

Judge Sutton’s dissent persuasively explains that the “lapse of time” text alone demonstrates that Article 7 of the U.S.-Mexico Treaty is a standard statute-of-limitations provision. *Id.* at 29-30. That analysis squares with historical practice, which has long equated the “lapse of time” phrase—when employed in the extradition setting—with limitations defenses. *See* Restatement (Third) of the Foreign Relations Law § 476 cmt. e (1987); *see also* 1 J. Moore, *A Treatise of Extradition* § 373, at 569-570 (1891) (treaty provisions that prohibit extradition when prosecution is “barred by lapse of time” or “barred by limitation” incorporate the statutes of limitations of the requesting (or requested) signatory nation). These guideposts prompted the Eleventh Circuit to conclude that “for over a century, the term ‘lapse of time’ has been commonly associated with a statute of limitations violation.” *Yapp*, 26 F.3d at 1567; *id.* at 1569 (Carnes, J., dissenting) (agreeing on this point).

Any inference that lapse-of-time provisions incorporate constitutional speedy-trial protections is dispelled by the fact that the modern-day speedy-trial right had not been announced when such provisions first appeared. Two U.S. treaties in the late 1800s employed the “lapse of time” phrase when identifying exceptions to extradition—a practice that grew common in the 1900s. The ratifying histories of these treaties contain no mention of the Speedy Trial Clause. It is also unlikely that the State Department officials who negotiated these early treaties would have grasped any connection to the Sixth Amendment. The Supreme Court did not announce the modern-day speedy-trial right until 1905, *see Beavers v. Haubert*, 198 U.S. 77 (1905), and a full exposition emerged only in 1972, *see Barker*, 407 U.S. at 515, long after the United States had adopted the lapse-of-time phrase as standard treaty language.

Furthermore, when many of these treaties were renegotiated decades later, the Senate Reports accompanying their ratification announced that the lapse-of-time clause innocuously referred to “statute of limitation” bars. *See* S. Exec. Rep. No. 93-19, at 3 (1973) (Paraguay); S. Exec. Rep. No. 96-20, at 24 (1979) (Germany); S. Exec. Rep. No. 98-29, at 5 (1984) (Thailand); S. Exec. Rep. No. 98-30, at 6 (1984) (Costa Rica); S. Exec. Rep. No. 98-31, at 6 (1984) (Jamaica). In one notable instance, the Senate Report stated that “[f]ugitives often attempt to avoid extradition to a requesting state by asserting that the statute of limitations has expired (also known as ‘lapse of time’ or ‘prescription’).” S. Exec. Rep. No. 106-26, at 6 (2000). At no point did the Senate mention constitutional speedy-trial considerations.

The ratification history of the renegotiated U.S.-Germany extradition treaty bears special mention. *See* Ext. Treaty, U.S.-Ger., June 20, 1978, T.I.A.S. 9785. The State Department prepared comments about Article 9, the Treaty's lapse-of-time provision: "Article 9, which discusses statute of limitations, is a standard provision in U.S. extradition treaties." *Hearing on Nine United States Treaties on Law Enforcement and Related Matters Before the S. Comm. on Foreign Relations*, 96th Cong. 24 (Nov. 13, 1979) (prepared statement of Deputy Legal Adviser James H. Michel). When the Senate Committee on Foreign Relations recommended ratification, it too observed that the treaty's lapse-of-time clause "discusses statutes of limitations" and "is a standard provision in U.S. extradition treaties." S. Exec. Rep. No. 96-20, at 24 (1979).

Although the ratification history for the U.S.-Mexico Treaty omits a similar discussion about its lapse-of-time provision, the same U.S. officials and legislators drafted and ratified both treaties. In fact, the Senate Committee on Foreign Relations discussed and approved the treaties on the same days (November 13 and 15, 1979), and the Senate ratified them on back-to-back days (November 29 and 30, 1979). Against this backdrop, it is unthinkable that either the Executive Branch or the Senate endorsed a radical expansion of the lapse-of-time provisions in the U.S.-Mexico Treaty, the U.S.-Germany Treaty, and other contemporaneous extradition instruments without a peep of debate.

The panel majority's reasoning on these points is not persuasive. After acknowledging that the words "lapse of time" do not unambiguously incorporate speedy-trial rights, the panel resorted to a principle of treaty construction—derived from *Factor v. Laubenheimer*, 290 U.S. 276 (1933)—that it understood as requiring courts to resolve ambiguities "in favor of a broader reading of the rights [the Treaty] grants to persons facing extradition." Op. 13. As Judge Sutton's dissent explained, *Factor* requires that an extradition treaty be construed liberally in favor of the rights of state parties—not the individuals subject to it. *Id.* at 35, 43. That means favoring treaty constructions that facilitate, rather than frustrate, the extradition of fugitives. The panel's contrary approach establishes the Sixth Circuit as an outlier on this issue. *See Nezirovic v. Holt*, 779 F.3d 233, 239 (4th Cir. 2015); *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997); *United States v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984).

The panel majority also highlighted differences in language between the 12 current and former versions of the U.S.-Mexico Treaty. Op. 14. But the current formulation ("barred by lapse of time") is no broader than the prior one ("barred by limitation"), which, as a textual matter, conceivably encompassed any criminal procedure device that might "limit" a criminal prosecution, but, as a historical matter, operated as a narrow statute-of-limitations provision. *Id.* at 37 (Sutton, J., dissenting). Nor is there historical evidence backing the majority's suggestion that the revision meant to capture the 1960 district court decision in *Mylonas*, which read Speedy Trial Clause protections into the U.S.-Greece extradition treaty. As recounted above, the lapse-of-time phrasing predates that case by decades. The Executive Branch's decision in 1978 to insert this language into the U.S.-Mexico Treaty should be interpreted as a desire to standardize the Treaty's provisions with other agreements then in force, not a far-reaching effort to introduce speedy-trial rights into extradition proceedings.

B. The panel's contrary conclusion warrants en banc review.

The panel's decision creates a circuit conflict. The majority rejected the *Yapp* decision, where the Eleventh Circuit declined to read a lapse-of-time provision in the U.S.-Bahamas extradition treaty to incorporate the Speedy Trial Clause. This divergence is untenable; foreign partners now face uncertain expectations when seeking to exercise treaty rights in this country.

The decision also presents an issue of exceptional importance. Mexico is a key law enforcement partner; up to 25 percent of incoming extradition requests recently litigated in U.S. courts have come from that country. Those fugitives will raise speedy-trial defenses. In addition, the United States and several dozen other countries have entered extradition agreements with lapse-of-time provisions. The majority's analysis invites speedy-trial claims for each of them.

Finally, the majority overlooked the perils of injecting the Speedy Trial Clause inquiry into these proceedings. That inquiry classifies delays exceeding one year as "presumptively prejudicial" to defendants. *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992). Extraditions, however, are lengthy processes. The time between the issuance of the foreign charges and the filing of an extradition request in the United States generally exceeds one year. Every fugitive with a speedy-trial claim will accordingly receive the presumption.

In addition, because the Speedy Trial Clause inquiry requires the assignment of blame for any delay, magistrate judges and district courts must decide whether a foreign government pursued the fugitive with "reasonable diligence." *Id.* at 656. Two problems will infect this process. First, the panel elected to measure a foreign country's diligence in pursuing its investigation and seeking extradition assistance by reference to Sixth Amendment benchmarks. But those benchmarks were developed for, and are tailored to, American criminal investigations and trials, not to dissimilar judicial systems or the sensitive consular negotiations attendant to extradition requests. *See Yapp*, 26 F.3d at 1568. Second, this inquiry would scrutinize a foreign government's extradition procedures, pace of execution, and justifications for delay, including the credibility of declarations submitted by foreign officials. Federal courts traditionally shy away from such tasks for fear of entangling themselves "in the conduct of [this country's] international relations." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 357, 383 (1959); *see Koskotas v. Roche*, 931 F.2d 169, 174 (1st Cir. 1991) ("[P]rinciples of international comity . . . would be ill-served by requiring foreign governments to submit their . . . procedures to the scrutiny of United States courts."). These concerns, and the diplomatic repercussions that follow them, are sufficiently weighty to warrant the full Court's attention.

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B. INTERNATIONAL CRIMES

1. Terrorism

a. *Determination of Countries Not Fully Cooperating with U.S. Antiterrorism Efforts*

On May 11, 2015, Secretary Kerry issued his determination and certification pursuant to section 40A of the Arms Export Control Act (22 U.S.C. § 2781), and Executive Order 13637, as amended, that certain countries "are not cooperating fully with United States antiterrorism efforts." 80 Fed. Reg. 30,319 (May 27, 2015). The countries are: Eritrea, Iran, Democratic People's Republic of Korea, Syria, and Venezuela.

b. Country reports on terrorism

On June 19, 2015, the Department of State released the 2014 Country Reports on Terrorism. The annual report is submitted to Congress pursuant to 22 U.S.C. § 2656f, which requires the Department to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria set forth in the legislation. The report is available at <http://www.state.gov/j/ct/rls/crt/index.htm>. Tina S. Kaidanow, Ambassador-at-Large and Coordinator for Counterterrorism, provided a special briefing at the release of the 2014 report, which is excerpted below and available in full at <http://www.state.gov/r/pa/prs/ps/2015/06/244030.htm>.

* * * *

...I'd like to talk about the content of the report itself and some of the trends we noted in 2014.

Despite significant blows to al-Qa'ida's (AQ) leadership, weak or failed governance continued to provide an enabling environment for the emergence of extremist radicalism and violence, notably in Yemen, Syria, Libya, Nigeria, and Iraq. We are deeply concerned about the continued evolution of the Islamic State of Iraq and the Levant (ISIL), the emergence of self-proclaimed ISIL affiliates in Libya, Egypt, Nigeria and elsewhere, and tens of thousands of foreign terrorist fighters who are exacerbating the violence in the Middle East and posing a continued threat to their home countries.

The ongoing civil war in Syria has been a spur to many of the worldwide terrorism events we have witnessed. Since the report covers calendar year 2014, it notes that the overall flow of foreign terrorist fighter travel to Syria was estimated at more than 16,000 foreign terrorist fighters from over 90 countries as of late December—a number that exceeds any similar flow of foreign terrorist fighters traveling to other countries in the last 20 years. Many of the foreign terrorist fighters joined ISIL, which has seized contiguous territory in western Iraq and eastern Syria. Iraqi forces and the Counter-ISIL Coalition have dealt significant blows to ISIL, but it continues to control substantial territory.

As with many other terrorist groups worldwide, ISIL has brutally repressed the communities under its control and used ruthless methods of violence such as beheadings and crucifixions. Uniquely, however, it demonstrates a particular skill in employing new media tools to display its brutality, both as a means to shock and terrorize, but equally to propagandize and attract new recruits. Boko Haram shares with ISIL a penchant for the use of brutal tactics, which include stonings, indiscriminate mass casualty attacks, and systematic oppression of women and girls, including enslavement, torture, and rape.

Though AQ central leadership has indeed been weakened, the organization continues to serve as a focal point of inspiration for a worldwide network of affiliated groups, including al-Qa'ida in the Arabian Peninsula—a long-standing threat to Yemen, the region, and the United States; al-Qa'ida in the Islamic Maghreb; al-Nusra Front; and al-Shabaab in East Africa.

We saw a rise in “lone offender attacks,” including in Ottawa and Quebec in October and Sydney in December of 2014. In many cases it was difficult to assess whether attacks were

directed or inspired by ISIL or AQ and its affiliates. These attacks may presage a new era in which centralized leadership of a terrorist organization matters less, group identity is more fluid, and violent extremist narratives focus on a wider range of alleged grievances and enemies. Enhanced border security measures among Western states since 9/11 have increased the difficulty for known or suspected terrorists to travel internationally; therefore, groups like AQ and ISIL encourage lone actors residing in the West to carry out attacks on their behalf.

ISIL and AQ affiliates, including al-Nusrah Front, continued to use kidnapping for ransom operations, profits from the sales of looted antiquities, and other criminal activities to raise funds for operational purposes. Much of ISIL's funding, unlike the resources utilized by AQ and AQ-type organizations, did not come from external donations but was internally gathered in Iraq and Syria. ISIL earned up to several million dollars per month through its various extortion networks and criminal activity in the territory where it operated, including through oil smuggling. Some progress was made in 2014 in constraining ISIL's ability to earn money from the sale of smuggled oil as a result of anti-ISIL Coalition airstrikes that were conducted on ISIL-operated oil refineries, but the oil trade was not fully eradicated.

ISIL and AQ were not the only serious threats that confronted the United States and its allies. Iran continued to sponsor terrorist groups around the world, principally through its Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF). These groups included Lebanese Hizballah, several Iraqi Shia militant groups, Hamas, and Palestine Islamic Jihad.

Addressing this evolving set of terrorist threats, and the need to undertake efforts that span the range from security to rule of law to efficacy of governance and pushing back on terrorist messaging in order to effectively combat the growth of these emerging violent extremist groups, requires an expanded approach to our counterterrorism engagement. President Obama has emphasized repeatedly that we need to bring strong, capable, and diverse partners to the forefront and enlist their help in the mutually important endeavor of global counterterrorism.

A successful approach to counterterrorism must therefore revolve around partnerships. The vital role that our partners play has become even clearer in the last year with the emergence of ISIL as the hugely destructive force in Iraq and Syria that I have described. We have worked to build an effective counter-ISIL coalition, a coalition that is clearly crucial because the fight against ISIL is not one the United States can or should pursue alone. More than 60 partners are contributing to this effort, which is multi-faceted in its goals—not only to stop ISIL's advances on the ground, but to combat the flow of foreign fighters, disrupt ISIL's financial resources, and counteract ISIL's messaging and undermine its appeal, among other objectives. I would also highlight the adoption of UN Security Council Resolution 2178 in September as a particularly significant step forward in international efforts to cooperate in preventing the flow of foreign terrorist fighters to and from conflict zones.

The notion of finding and enabling partners, of course, is not new or limited to the counter-ISIL effort, and indeed many of our most significant counterterrorism successes in the past have come as a result of working together with partners on elements ranging from intelligence to aviation security.

The United States needs partners who can not only contribute to military operations, but also conduct arrests, prosecutions, and incarceration of terrorists and their facilitation networks. Addressing terrorism in a rule of law framework, with respect for human rights, is critical both for ensuring the sustainability of our efforts and for preventing the rise of new forms of violent extremism. Multilateral entities such as the United Nations and the Global Counterterrorism

Forum can also play a critical role in promoting good practices and mobilizing technical assistance in this regard.

As we develop partnerships to disrupt terrorist plots and degrade terrorist capabilities, we also need partners—both governmental and non-governmental—who can help counter the spread of violent extremist recruitment and address the conditions that make communities susceptible to violent extremism. We must do more to address the cycle of violent extremism and transform the very environment from which these terrorist movements emerge. That is why we are committed to enlarging our strategy in ways that address the underlying conditions conducive to the spread, and not just the visible symptoms of, violent extremism. This was a major theme of the White House Summit on Countering Violent Extremism (CVE) earlier this year, which brought together 300 participants from over 65 countries representing national and local governments, civil society, the private sector, and multilateral organizations. The Summit highlighted the especially vital role that partnering with civil society plays in our counterterrorism efforts.

In addition to counterterrorism assistance rendered in the fields of rule of law and countering recruitment, we provide a wide array of expertise and programmatic support for our partners to help them identify and disrupt the financing of terrorism, strengthen aviation and border security, and sharpen their law enforcement and crisis response tools to respond to the terrorist threat.

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c. Global Counterterrorism Forum

The Global Counterterrorism Forum (“GCTF”) held its sixth ministerial-level plenary in September 2015. The co-chairs of the Coordinating Council of the GCTF, the United States and Turkey, issued a fact sheet on September 27, 2015, detailing deliverables of the plenary. The fact sheet is available at <http://www.state.gov/r/pa/prs/ps/2015/09/247368.htm>. For background on the GCTF, see *Digest 2012* at 35-37 and *Digest 2011* at 55.

d. UN Security Council

As discussed in *Digest 2014* at 87-91, the UN Security Council adopted resolution 2178 on foreign terrorist fighters (“FTFs”) in 2014. The United States took several steps in 2015 to support multilateral implementation of resolution 2178. On February 18, 2015, the State Department issued a fact sheet on the ministerial the United States hosted on countering FTFs. The fact sheet is available at <http://www.state.gov/r/pa/prs/ps/2015/02/237575.htm>. Among other efforts led by the United States, the fact sheet identifies the White House Summit on Countering Violent Extremism (“CVE”) (held in conjunction with the State Department ministerial on countering FTFs); cooperation by the Departments of State, Justice, and Homeland Security with foreign counterparts; and the new working group on FTFs at the Global Counterterrorism Forum. Participants in the ministerial on countering FTFs included:

Albania, Algeria, Australia, Belgium, Bulgaria, Canada, Denmark, EU, France, Germany, Indonesia, INTERPOL, Italy, Jordan, Kosovo, Macedonia, Malaysia, Morocco, Netherlands, Norway, Qatar, Russia, Saudi Arabia, Singapore, Spain, Sweden, Tunisia, Turkey, UAE, UK, and the UN.

On November 20, 2015, Michele J. Sison, U.S. Deputy Permanent Representative to the UN, delivered the U.S. explanation of vote at the adoption of UN Security Council resolution 2249 on counterterrorism. Ambassador Sison's remarks are excerpted below and available at <http://usun.state.gov/remarks/6994>.

* * * *

Mr. President, in recent weeks barbaric terrorist attacks have startled the world's conscience. From Europe to Africa to the Middle East, innocent men and women have been slaughtered. Families destroyed in Beirut. Concertgoers slain in Paris. Air passengers bombed in the sky. Tourists killed on the beach in Tunisia.

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...[W]e welcome and applaud this resolution's resolute call on states to take all necessary measures in compliance with international law to counter ISIL and the al-Nusrah Front. We must also choke off funding, arms, recruitment, and other kinds of support to ISIL and the al-Nusrah Front.

As the resolution recognizes, Iraq has made it clear that it is facing a serious threat of continuing attacks from ISIL, in particular coming out of safe havens in Syria; and the Assad regime in Syria has shown that it cannot and will not suppress this threat, even as it undertakes actions that benefit the extremists' recruiting. In this regard, working with Iraq, the United States has been leading international efforts to provide assistance to combat the threat that ISIL poses to the security of its people and territory, and we are taking, in accordance with the UN Charter and its recognition of the inherent right of individual and collective self-defense, necessary and proportionate military action to deny ISIL safe haven.

The United States, along with 64 other nations and international organizations, has formed a Coalition whose central aim is to degrade ISIL's capabilities and achieve its lasting defeat. Militarily, the Coalition is working to deny ISIL safe-havens, disrupt its ability to project power, and build partner capacity. It is also actively working to disrupt ISIL's financing and economic sustainment and the flow of foreign terrorist fighters to and from territories it has seized, and to counter its message of hatred and violence. To stabilize areas liberated from ISIL's control, the Coalition further supports the efforts of the United Nations Development Program and Iraqi government.

Today's resolution recalls the Security Council's already well-established framework to respond to terrorist threats generally and to ISIL, al-Nusrah Front, and others associated with al-Qaida in particular. Multiple past resolutions—1267, 1373, 2170, 2178, and 2199—lay out specific obligations and actions states must take to respond to these threats. In the Security Council, we look forward to continuing cooperation, including in the relevant sanctions

committees and counterterrorism entities, to enhance our will and capacities to implement these tools to counter ISIL and related groups.

To vanquish these groups, we must also tackle the violent extremism that drives them.

These violent ideologies capture and motivate individuals worldwide, including those likely responsible for today's tragic hotel attack in Bamako.

We therefore look forward to the Secretary-General's Plan for Preventing Violent Extremism.

Finally, we must urgently work together to support a political transition process in Syria, in accordance with the Geneva Communiqué, and the Statement of the International Syria Support Group, to reduce the operating space for these groups, and establish a political process leading to credible, inclusive, nonsectarian governance, followed by a new constitution and elections.

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e. *Countering violent extremism*

On September 29, 2015, leaders from more than 100 countries, 20 multilateral bodies, and 120 civil society and private sector organizations convened in New York for the UN Leaders' Summit on Countering ISIL and Violent Extremism. President Obama's remarks at the summit are excerpted below. Daily Comp. Pres. Docs. 2015 DCPD No. 00664 (Sep. 29, 2015). President Obama also delivered a statement as Chair of the UN Leaders' Summit on Countering ISIL and Violent Extremism. Daily Comp. Pres. Docs. 2015 DCPD No. 00665 (Sep. 29, 2015).

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Together, we're pursuing a comprehensive strategy that is informed by our success over many years in crippling the Al Qaida core in the tribal regions of Afghanistan and Pakistan. And we are harnessing all of our tools: military, intelligence, economic, development, and the strength of our communities.

Now, I have repeatedly said that our approach will take time. This is not an easy task. We have ISIL taking root in areas that already are suffering from failed governance, in some cases; in some cases, civil war or sectarian strife. And as a consequence of the vacuum that exists in many of these areas, ISIL has been able to dig in. They have shown themselves to be resilient, and they are very effective through social media and have been able to attract adherents not just from the areas in which they operate, but in many of our own countries.

There are going to be successes and there are going to be setbacks. This is not a conventional battle. This is a long-term campaign, not only against this particular network, but against its ideology. And so, with the few minutes I have, I want to provide a brief overview of where we stand currently.

Our coalition has grown to some 60 nations, including our Arab partners. Together, we welcome three new countries to our coalition: Nigeria, Tunisia, and Malaysia. Nearly two dozen nations are in some way contributing to the military campaign, and we salute and are grateful for all the servicemembers from our respective nations who are performing with skill and determination.

In Iraq, ISIL continues to hold Mosul, Fallujah, and Ramadi. But Iraqi forces, backed by coalition air power, have liberated towns across Kirkuk province and Tikrit. ISIL has now lost nearly a third of the populated areas in Iraq that it had controlled. Eighteen countries are now helping to train and support Iraqi forces, including Sunni volunteers who want to push ISIL out of their communities. And, Prime Minister Abadi, I want to note the enormous sacrifices being made by Iraqi forces and the Iraqi people in this fight every day.

In Syria, which has obviously been a topic of significant discussion during the course of this General Assembly, we have seen support from Turkey that has allowed us to intensify our air campaign there. ISIL has been pushed back from large sections of northeastern Syria, including the key city of Tal Abyad, putting new pressure on its stronghold of Raqqa. And ISIL has been cut off from almost the entire region bordering Turkey, which is a critical step toward stemming the flow of foreign terrorist fighters.

Following the special Security Council meeting I chaired last year, more than 20 additional countries have passed or strengthened laws to disrupt the flow of foreign terrorist fighters. We share more information, and we are strengthening border controls. We've prevented would-be fighters from reaching the battlefield and returning to threaten our countries. But this remains a very difficult challenge, and today we're going to focus on how we can do more together. In conjunction with this summit, the United States and our partners are also taking new steps to crack down on the illicit finance that ISIL uses to pay its fighters, fund its operations, and launch attacks.

Our military and intelligence efforts are not going to succeed alone; they have to be matched by political and economic progress to address the conditions that ISIL has exploited in order to take root. Prime Minister Abadi is taking important steps to build a more inclusive and accountable Government, while working to stabilize areas taken back from ISIL. And our nations need to help Prime Minister Abadi in these efforts.

In Syria, as I said yesterday, defeating ISIL requires, I believe, a new leader and an inclusive Government that unites the Syrian people in the fight against terrorist groups. This is going to be a complex process. And as I've said before, we are prepared to work with all countries, including Russia and Iran, to find a political mechanism in which it is possible to begin a transition process.

As ISIL's tentacles reach into other regions, United States is increasing our counterterrorism cooperation with partners like Tunisia. We're boosting our support to Nigeria and its neighbors as they push back against Boko Haram, which has pledged allegiance to ISIL. And we're creating a new clearinghouse to better coordinate the world's support for countries' counterterrorism programs so that our efforts are as effective as possible.

Ultimately, however, it is not going to be enough to defeat ISIL in the battlefield. We have to prevent it from radicalizing, recruiting, and inspiring others to violence in the first place. And this means defeating their ideology. Ideologies are not defeated with guns, they're defeated by better ideas, a more attractive and compelling vision. Building on our White House summit

earlier this year and summits around the world since then, we're moving ahead, together, in several areas.

We're stepping up our efforts to discredit ISIL's propaganda, especially online. The UAE's new messaging hub—the Sawab Center—is exposing ISIL for what it is, which is a band of terrorists that kills innocent Muslim men, women, and children. We're working to lift up the voices of Muslim scholars, clerics, and others—including ISIL defectors—who courageously stand up to ISIL and its warped interpretations of Islam.

We recognize that we have to confront the economic grievances that exist in some of the areas that ISIL seeks to exploit. Poverty does not cause terrorism. But as we've seen across the Middle East and North Africa, when people, especially young people, are impoverished and hopeless and feel humiliated by injustice and corruption, that can fuel resentments that terrorists exploit, which is why sustainable development—creating opportunity and dignity, particularly for youth—is part of countering violent extremism.

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Remember that violent extremism is not unique to any one faith, so no one should be profiled or targeted simply because of their faith. Yet we have to recognize that ISIL is targeting Muslim communities around the world, especially individuals who may be disillusioned or confused or wrestling with their identities.

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f. U.S. hostage recovery policy

On June 24, 2015, President Obama announced that the U.S. government had concluded a review of its hostage policy and that he was issuing a new presidential policy directive regarding the recovery of American hostages. Daily Comp. Pres. Docs. 2015 DCPD No. 00456, pp. 1-4 (June 24, 2015). The President's statement on the hostage recovery policy is excerpted below. The June 2015 Report on U.S. Hostage Policy is available

at https://www.whitehouse.gov/sites/default/files/docs/report_on_us_hostage_policy_final.pdf.

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Today, I'm formally issuing a new presidential policy directive to improve how we work to bring home American hostages and how we support their families. I've signed a new executive order to ensure our government is organized to do so. And we're releasing the final report of our review, which describes the two dozen specific steps that we're taking. Broadly speaking, they fall into three areas.

First, I'm updating our hostage policy. I'm making it clear that our top priority is the safe and rapid recovery of American hostages. And to do so, we will use all elements of our national

power. I am reaffirming that the United States government will not make concessions, such as paying ransom, to terrorist groups holding American hostages. And I know this can be a subject of significant public debate. It's a difficult and emotional issue, especially for the families. As I said to the families who are gathered here today, and as I've said to families in the past, I look at this not just as a President, but also as a husband and a father. And if my family were at risk, obviously I would move heaven and earth to get those loved ones back.

As President, I also have to consider our larger national security. I firmly believe that the United States government paying ransom to terrorists risks endangering more Americans and funding the very terrorism that we're trying to stop. And so I firmly believe that our policy ultimately puts fewer Americans at risk.

At the same time, we are clarifying that our policy does not prevent communication with hostage-takers—by our government, the families of hostages, or third parties who help these families. And, when appropriate, our government may assist these families and private efforts in those communications—in part, to ensure the safety of family members and to make sure that they're not defrauded. So my message to these families was simple: We're not going to abandon you. We will stand by you.

Second, we're making changes to ensure that our government is better organized around this mission. Every department that is involved in our national security apparatus cares deeply about these hostages, prioritizes them and works really hard. But they're not always as well coordinated as they need to be. Under the National Security Council here at the White House, we're setting up a new Hostage Response Group, comprised of senior officials from across our government who will be responsible for ensuring that our hostage policies are consistent and coordinated and implemented rapidly and effectively. And they will be accountable at the highest levels; they'll be accountable to me.

Soon I'll be designating, as well, a senior diplomat as my Special Presidential Envoy for Hostage Affairs, who will be focused solely on leading our diplomatic efforts with other countries to bring our people home.

At the operational level, we're creating for the first time one central hub where experts from across government will work together, side-by-side, as one coordinated team to find American hostages and bring them home safely. In fact, this fusion cell, located at the FBI, is already up and running. And we're designating a new official in the intelligence community to be responsible for coordinating the collection, analysis and rapid dissemination of intelligence related to American hostages so we can act on that intelligence quickly.

Third—and running through all these efforts—we are fundamentally changing how our government works with families of hostages. Many of the families told us that they at times felt like an afterthought or a distraction; that, too often, the law enforcement, or military and intelligence officials they were interacting with were begrudging in giving them information. And that ends today. I'm making it clear that these families are to be treated like what they are—our trusted partners and active partners in the recovery of their loved ones. We are all on the same team, and nobody cares more about bringing home these Americans than their own families, and we have to treat them as partners.

So, specifically, our new fusion cell will include a person dedicated to coordinating the support families get from the government. This coordinator will ensure that we communicate with families better, with one clear voice, and that families get information that is timely and

accurate. Working with the intelligence community, we will be sharing more intelligence with families.

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As mentioned in the President's remarks above, the Presidential Policy Directive describes the roles of the Hostage Response Group ("HRG"), the interagency Hostage Recovery Fusion Cell ("HRFC"), and the special envoy for hostage affairs within the Department of State. Excerpts follow from the Presidential Policy Directive ("PPD-30"). Daily Comp. Pres. Docs. 2015 DCPD No. 00458, pp. 1-8 (June 24, 2015). Executive Order 13698 of June 24, 2015 "Hostage Recovery Activities," establishes the HRFC, the HRG, and the Special Presidential Envoy for Hostage Affairs. 80 Fed. Reg 37,131 (June 29, 2015).

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The taking of a U.S. national hostage abroad requires a rapid, coordinated response from the United States Government. The Hostage Response Group (HRG), in support of the National Security Council (NSC) Deputies and Principals Committees, and accountable to the NSC chaired by the President, shall coordinate the development and implementation of United States Government policy and strategy with respect to U.S. nationals taken hostage abroad. The interagency Hostage Recovery Fusion Cell (HRFC), in support of the HRG, shall coordinate United States Government efforts to ensure that all relevant department and agency information, expertise, and resources are brought to bear to develop individualized strategies to secure the safe recovery of U.S. nationals held hostage abroad.

The Special Presidential Envoy for Hostage Affairs, who shall report to the Secretary of State, shall lead diplomatic engagement on U.S. hostage policy as well as coordinate all diplomatic engagements in support of hostage recovery efforts, in coordination with the HRFC and consistent with policy guidance communicated through the HRG. United States Embassies that have established Personnel Recovery Working Groups or other interagency bodies to coordinate overseas activities in response to a hostage-taking shall ensure that those bodies operate pursuant to policy guidance provided by the HRG and in coordination with the HRFC and with the Special Presidential Envoy for Hostage Affairs.

a. Hostage Response Group (HRG)

The HRG shall be chaired by the Special Assistant to the President and Senior Director for Counterterrorism and shall convene on a regular basis and as needed at the request of the National Security Council. Its regular members shall include the director of the HRFC, the HRFC's Family Engagement Coordinator, and senior representatives from the Department of State, Department of the Treasury, Department of Defense, Department of Justice, Federal Bureau of Investigation, Office of the Director of National Intelligence, and such other executive branch departments, agencies, or offices as the President, from time to time, may designate.

In support of the Deputies Committee chaired by the Assistant to the President for Homeland Security and Counterterrorism, the HRG shall: (1) identify and recommend hostage recovery options and strategies to the President through the National Security Council; (2)

coordinate the development and implementation of U.S. hostage and personnel recovery policies, strategies, and procedures, consistent with the policies set forth in this directive; (3) receive regular updates from the HRFC on the status of U.S. nationals being held hostage abroad and measures being taken to effect the hostages' safe recovery; (4) coordinate the provision of policy guidance to the HRFC, including reviewing recovery options proposed by the HRFC and resolving disputes within the HRFC; and (5) where higher-level guidance is required, make recommendations to the Deputies Committee.

b. Hostage Recovery Fusion Cell (HRFC)

The HRFC shall serve as the United States Government's dedicated interagency coordinating body at the operational level for the recovery of U.S. national hostages abroad. The HRFC shall: (1) identify and recommend hostage recovery options and strategies to the President through the NSC; (2) coordinate efforts by participating departments and agencies to ensure that information regarding hostage events, including potential recovery options and engagements with families and external actors (to include foreign governments), is appropriately shared within the United States Government to facilitate a coordinated response to a hostage-taking; (3) assess and track all hostage-takings of U.S. nationals abroad and provide regular reports to the President through the NSC on the status of such cases and any measures being taken toward the hostages' safe recovery; (4) provide a forum for intelligence sharing and, with the support of the Director of National Intelligence, coordinate the declassification of relevant information; (5) coordinate efforts by participating departments and agencies to provide appropriate support and assistance to hostages and their families in a coordinated and consistent manner and to provide families with timely information regarding significant events in their cases; (6) make recommendations to executive departments and agencies in order to reduce the likelihood of U.S. nationals being taken hostage abroad and enhance United States Government preparation to maximize the probability of a favorable outcome following a hostage-taking; and (7) coordinate with departments and agencies regarding congressional, media, and other public inquiries pertaining to hostage events.

Upon receipt of credible information that a U.S. national has been taken hostage or has been reported missing in a region where hostage-taking is a significant threat, any department or agency with such information shall report that information, along with any action already taken or anticipated in response, to the HRFC and the relevant Chiefs of Mission. If, at any point in a given hostage event, the HRFC has reason to believe that a U.S. national is being held hostage by an entity or individual designated as a Foreign Terrorist Organization or designated for sanctions by the President, Secretary of State, or Secretary of the Treasury, the HRFC Director shall promptly inform the HRG of the designated individual or entity involved and the circumstances of the hostage-taking.

c. Special Presidential Envoy for Hostage Affairs

The Special Presidential Envoy for Hostage Affairs (Special Envoy) shall report to the Secretary of State and shall: (1) lead diplomatic engagement on U.S. hostage policy; (2) coordinate all diplomatic engagements in support of hostage recovery efforts, in coordination with the HRFC and consistent with policy guidance communicated through the HRG; (3) coordinate with the HRFC proposals for diplomatic engagements and strategy in support of hostage recovery efforts; (4) provide senior representation from the Special Envoy's office to the HRFC and in the HRG; and (5) in coordination with the HRFC as appropriate, coordinate diplomatic engagements regarding cases in which a foreign government confirms that it has

detained a U.S. national but the United States Government regards such detention as unlawful or wrongful.

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6. Prosecution

The investigation and prosecution of hostage-takers is an important means of deterring future acts of hostage-taking and ensuring that hostage-takers are brought to justice. The United States shall diligently seek to ensure that hostage-takers of U.S. nationals are arrested, prosecuted, and punished through a due process criminal justice system in the United States or abroad for crimes related to the hostage-taking.

The United States has jurisdiction over the taking of a U.S. national hostage abroad, as well as over other criminal acts that may be committed against the hostage, and the Department of Justice will seek to prosecute hostage-taking of U.S. nationals and related violations of U.S. law in the U.S. court system whenever possible. The Federal Bureau of Investigation shall investigate violations of U.S. law and shall collect evidence and conduct forensics in furtherance of a potential prosecution, consistent with its statutory authorities and, where applicable, the permission of the foreign government in whose territory it is operating.

The HRFC shall coordinate efforts by relevant departments and agencies to ensure that all relevant material and information acquired by the United States Government in the course of a hostage-taking event is made available for use in the effort to recover the hostage and, where possible and consistent with that goal, is managed in such a way as to allow its use in an ongoing criminal investigation or prosecution.

The United States Government shall work with foreign governments to apprehend hostage-takers in their territory. In coordination with one another, the Department of State, Department of Justice, and Department of the Treasury shall engage with foreign governments to seek commitments to punish hostage-takers and their aiders and abettors. In coordinating with the Department of State, relevant departments and agencies should also work to develop the capacity of partner nations, through technical assistance and training in best practices, to collect intelligence for use in hostage recovery efforts while preserving, when possible, opportunities for a criminal prosecution by the United States or the relevant nation.

7. General Provisions

For the purposes of this directive, hostage-taking is defined as the unlawful abduction or holding of a person or persons against their will in order to compel a third person or governmental organization to do or abstain from doing any act as a condition for the release of the person detained. This directive applies to both suspected and confirmed hostage-takings in which a U.S. national, as defined in either 8 U.S.C. 1101(a)(22) or 8 U.S.C. 1408, or a lawful permanent resident alien with significant ties to the United States is abducted or held outside of the United States. This directive shall also apply to other hostage-takings occurring abroad in which the United States has a national interest, such as (but not limited to) hostage-takings of individuals who are not U.S. nationals but who have close links through family, employment, or other connections to the United States, as specifically referred to the HRFC by the Deputies Committee. This directive does not apply if a foreign government confirms that it has detained a U.S. national; such cases are handled by the Department of State in coordination with other relevant departments and agencies. In dealing with such cases, however, the Department of State

may draw on the full range of experience and expertise of the HRFC as appropriate, including the HRFC's Family Engagement Coordinator's proficiency in providing and ensuring professionalism, empathy, and sensitivity to the psychological and emotional distress experienced by families in such cases. Additionally, the U.S. response to the detention of U.S. military personnel by non-state forces in the context of armed conflict should, in appropriate circumstances, be informed by the law of war.

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g. 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 2015, the Department of State announced the Secretary of State's designation of one additional organization and associated aliases as a Foreign Terrorist Organization ("FTO") under § 219 of the Immigration and Nationality Act: Jaysh Rijal al-Tariq al-Naqshabandi (80 Fed. Reg. 58,804 (Sep. 30, 2015)). See Chapter 16 for a discussion of the simultaneous designation pursuant to Executive Order 13224.

U.S. financial institutions are required to block funds of designated FTOs or their agents within their possession or control; representatives and members of designated FTOs, if they are aliens, are inadmissible to, and in some cases removable from, the United States; and U.S. persons or persons subject to U.S. jurisdiction are subject to criminal prohibitions on knowingly providing "material support or resources" to a designated FTO. 18 U.S.C. § 2339B. See www.state.gov/j/ct/rls/other/des/123085.htm for background on the applicable sanctions and other legal consequences of designation as an FTO.

(ii) Reviews of FTO designations

During 2015, 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: FARC (80 Fed. Reg. 19,728 (Apr. 13, 2015); Popular Front for the Liberation of Palestine (80 Fed. Reg. 25,766 (May 5, 2015); al-Qa'ida (80 Fed. Reg. 27,432 (May 13, 2015); Revolutionary Struggle (80 Fed. Reg. 53,382 (Sep. 3, 2015)).

In 2015, the Secretary also revoked the designations of two organizations: Revolutionary Organization 17 November (80 Fed. Reg. 53,382 (Sep. 3, 2015)) and the Libyan Islamic Fighting Group (80 Fed. Reg. 76,611 (Dec. 9, 2015)).

(3) *Rewards for Justice Program*

On September 29, 2015, the State Department announced a reward offer under the Rewards for Justice Program for information leading to the disruption of the financing of ISIL. See September 29, 2015 media note, available at <http://www.state.gov/r/pa/prs/ps/2015/09/247470.htm>. As stated in the media note, the Department authorized rewards of up to \$5 million for information “that will disrupt the trade of oil and trafficking of antiquities that benefit the terrorist group Islamic State of Iraq and the Levant (ISIL).” This reward offer is the first under the Rewards for Justice Program seeking information that could be used to disrupt sale or trade in oil or antiquities by, or on behalf of, a terrorist organization.

On November 10, 2015, the State Department announced reward offers under the Rewards for Justice Program for information on six key leaders of al-Shabaab: up to \$6 million for information on the whereabouts of Abu Ubaidah (Direye); up to \$5 million each for information on Mahad Karate, Ma’alim Daud, and Hassan Afgooye; and up to \$3 million each for information on Maalim Salman and Ahmed Iman Ali. See November 10, 2015 media note, available at <http://www.state.gov/r/pa/prs/ps/2015/11/249374.htm>. The media note provides background on al-Shabaab’s terrorist activities and the roles of each of these six leaders.

On November 18, 2015, the State Department announced a reward offer of up to \$5 million for information leading to the location or identification of Tirad al-Jarba, better known as Abu-Muhammad al-Shimali, a key leader of the terrorist group ISIL. See November 18, 2015 media note, available at <http://www.state.gov/r/pa/prs/ps/2015/11/249666.htm>. As related in the media note, al-Shimali serves as a key leader in ISIL’s Immigration and Logistics Committee, facilitating the travel of foreign terrorist fighters, coordinating smuggling activities, financial transfers, and the movement of supplies. Al-Shimali has been designated by the Treasury Department for acting for or on behalf of ISIL and is also sanctioned pursuant to UN Security Council resolutions 1267(1999)/1989(2011).

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.

(4) *State Sponsors of Terrorism*

See Chapter 16 for discussion of the rescission of Cuba's designation as a state sponsor of terrorism.

2. Narcotics

a. *Majors list process*

(1) *International Narcotics Control Strategy Report*

In March 2015, the Department of State submitted the 2015 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 key countries to address all aspects of the international drug trade in calendar year 2014. Volume 1 of the report covers drug and chemical control activities and Volume 2 covers money laundering and financial crimes. The report is available at <http://www.state.gov/j/inl/rls/nrcrpt/index.htm>.

(2) *Major drug transit or illicit drug producing countries*

On September 14, 2015, President Obama issued Presidential Determination 2015-12 "Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2015." Daily Comp. Pres. Docs. DCPD No. 00620, pp. 1-5 (Sep. 14, 2015). 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. See State Department Media Note, available at <http://www.state.gov/r/pa/prs/ps/2015/09/246884.htm>. 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, Burma, and Venezuela "failed demonstrably" during the last twelve months to make sufficient or meaningful efforts to adhere to their obligations under international counternarcotics agreements. Simultaneously, the President determined that support for programs to aid the promotion of democracy in Burma and

Venezuela is vital to the national interests of the United States, thus ensuring that such U.S. assistance would not be restricted during fiscal year 2016 by virtue of § 706(3) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1424.

b. *Interdiction assistance*

During 2015 President Obama again certified, with respect to Colombia (Daily Comp. Pres. Docs., 2015 DCPD No. 00550, p. 1, Aug. 5, 2015) that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft. President Obama did not make this determination with respect to Brazil in 2015. President Obama made his determinations pursuant to § 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended, 22 U.S.C. §§ 2291–4, following a thorough interagency review. For background on § 1012, see *Digest 2008* at 114.

c. *UN*

On October 8, 2015, Luis E. Arreaga, Principal Deputy Assistant Secretary, in the State Department's Bureau of International Narcotics and Law Enforcement Affairs, delivered a statement for the United States on crime prevention, criminal justice and International drug control at the Third Committee of the UN General Assembly. Mr. Arreaga's remarks are excerpted below and available in full at <http://www.state.gov/j/inl/rls/rm/2015/248064.htm>.

* * * *

When the [1961] Single Convention [on Drugs] was last revised, drug addiction was considered principally as a criminal matter; today science informs us that substance abuse is primarily a public health challenge. We have also learned that a comprehensive approach to drugs produces the best outcomes. Not just the best outcomes for addicts and traffickers, but for all touched by drugs. We have also learned that we cannot consider the challenge of drugs in a vacuum. Drug trafficking and use are not isolated from society, but interconnected with it. This comprehensive approach to drugs is integral to successful criminal justice reforms as a whole. Having strong enforcement without a capable, fair judiciary does not advance our cause—indeed, it is harmful to it. To have prisons filled with criminals or addicts without a path to reintegration results in a

continuing cycle of abuse and violence. Without a fair, effective, humane, and transparent criminal justice system, all our efforts, including comprehensive global drug reform, will be impaired.

We have a collective responsibility to act and to implement programs that work. One step we can take is the final adoption of the revised UN Standard Minimum Rules for the Treatment of Prisoners, the “Mandela Rules.” Now is the time to adopt them. Doing so will provide a rulebook that incorporates the extraordinary advancements in our knowledge, and this can lead to improved outcomes for both prisoners and society alike.

Another opportunity that cannot pass us by is a reaffirmation of the critical role of the drug conventions, and the implementation of their mandates, based on debates within many UN fora that we have all been party to over the last 18 months. This includes a stronger public health approach that responds to both long established threats, such as heroin, and emerging ones, such as new psychoactive substances. As we prepare for the UNGA Special Session in April we must also ensure that the UN Commission on Narcotic Drugs receives the support it needs from all member states so it can focus on developing concrete operational objectives.

Those here must seize this moment to advance the cause of reducing the impact of drugs, and advance the sustainable development goals that our leaders discussed last month. In all this the UN Office on Drugs and Crime continues to play a leadership role in program development.

Soon we must coalesce around a platform and a plan that reflects both ageless truths about addiction and the human condition, while acknowledging how much our understanding has changed.

This is our mandate, and our challenge, and in the United States you will find an ally, a leader, and a partner in the cause of criminal justice reform.

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3. Trafficking in Persons

a. Trafficking in Persons report

In July 2015, the Department of State released the 2015 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 2014 through March 2015 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 2015 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 <http://www.state.gov/j/tip/rls/tiprpt/2015/index.htm>. Chapter 6 in this *Digest* discusses the determinations relating to child soldiers.

On July 27, 2015, Sarah Sewall, Under Secretary of State for Civilian Security, Democracy, and Human Rights, delivered remarks and answered questions on the release of the 2015 report. A transcript of the remarks and question and answer period is available at <http://www.state.gov/r/pa/prs/ps/2015/07/245294.htm>. Secretary Kerry also delivered remarks on July 27, 2015 on the release of the report, which are excerpted below and available at <http://www.state.gov/secretary/remarks/2015/07/245298.htm>.

* * * *

This [report](#) is the product of really an entire year-long effort. These folks will leave here today and they begin on next year's report. And it is a constant process of following up with the employees at our diplomatic posts around the world, gathering facts, information, and helping to lay it out. And this report is important because it really is one of the best means that we have as individuals to speak up for adults and children who lack any effective platform whatsoever through which they are able to speak for themselves. Because of its credibility, this report is also a source of validation and inspiration to activists on every single continent who are striving to end this scourge of modern slavery.

I want to emphasize, as I did last month when we issued a report on our human rights observations around the world, the purpose of this document is not to scold and it's not to name and shame. It is to enlighten and to energize, and most importantly, to empower people. And by issuing it, we want to bring to the public's attention the full nature and scope of a \$150 billion illicit trafficking industry. And it is an industry. Pick up today's New York Times, front page story about a young Cambodian boy promised a construction job in Thailand, goes across the border, finds himself held by armed men, and ultimately is pressed into service on the seas—three years at sea, shackled by his neck to the boat so that he can't escape and take off when they're around other boats. If that isn't slavery and imprisonment, I don't know what is.

We want to provide evidence and facts that will help people who are already striving to achieve reforms to alleviate suffering and to hold people accountable.

We want to provide a strong incentive for governments at every level to do all that they can to prosecute trafficking and to shield at-risk populations.

And in conveying these messages, let me acknowledge that even here in the United States, we Americans need to listen and improve. Like every nation, we have a responsibility to do better—a better job of protecting those who live within our own borders, whose passports are taken away from them, who are imprisoned for labor purposes or for sex trafficking.

When criminals in one city are arrested for using children in the commercial sex trade, believe me, the pressure on authorities in nearby cities to make arrests builds.

* * * *

When country A becomes known for its success in putting human traffickers in jail, the leaders in country B are drawn into a virtuous competition.

And when the practice of using forced labor to catch fish, to process meat, to sew clothing, to assemble toys is exposed, then authorities will have a good reason to look at other

industries—and consumers will then have cause to question the origins of the global supply chains of what they have chosen to buy and what is placed before them in stores or online. I don't have to tell this audience that traffickers are both ruthless and relentless. They know how to exploit the hopes of those desperate to escape poverty or to find shelter from disaster or from strife. Traffickers prey upon the most vulnerable. They target the weak, the despairing, the isolated. And they make false promises and transport their victims across borders to labor without passports or phones in places where the language is unknown and where there are no means of escape. If the victims rebel or become ill, the traffickers often use violence to ensure that their profits continue and their crimes are concealed.

That is why this TIP Report needs to be read as a call to action.

Governments need to strengthen and enforce the laws that they have on the books, and prosecutors must take pride in turning today's traffickers into tomorrow's prisoners.

The private sector also needs to be a part of this effort by blowing the whistle on companies that use labor that is under age, under paid, and under coercion.

Investigative journalists can continue to assist by shining the spotlight—as *The New York Times*, Reuters, AP, and *The Guardian*, CNN and others recently have—on abuses in the seafood and other industries.

Advocacy groups, faith groups, faith leaders, educators, and researchers should continue to intensify the pressure for bold action so that together we will win more battles in a fight that will surely last for some time to come.

And throughout, we have to be true to the principle that although money may be used for many things, we must never, ever allow a price tag to be attached to the heart and soul and freedom of a fellow human being.

* * * *

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 October 5, 2015, President Obama issued a memorandum for the Secretary of State, “Presidential Determination With Respect to Foreign Governments’ Efforts Regarding Trafficking in Persons.” 80 Fed. Reg. 62,435 (Oct. 16, 2015). The President’s memorandum conveys determinations concerning the 23 countries that the 2015 Trafficking in Persons Report lists as Tier 3 countries. See Chapter 3.B.3.a. *supra* for discussion of the 2015 report.

The Trafficking Victims Protection Act further requires that the President’s

notification be accompanied by a certification by the Secretary of State regarding certain types of foreign assistance (“covered assistance”) that “no [such covered] assistance is intended to be received or used by any agency or official who has participated in, facilitated, or condoned a severe form of trafficking in persons.” Secretary Kerry signed the required certification as to all 23 countries placed on Tier 3 in the 2015 Report and it was included with the President’s determination. 80 Fed. Reg. 62,435 (Oct. 16, 2015). Prior to obligating or expending covered assistance, relevant bureaus in the State Department are required to take appropriate steps to ensure that all assistance is provided in accordance with the Secretary’s certification.

c. *United Nations*

On November 23, 2015, Ambassador Sarah Mendelson, U.S. Representative for Economic and Social Affairs, U.S. Mission to the United Nations, delivered remarks at the 70th UN General Assembly Third Committee on the topic of improving coordination of efforts against trafficking in persons. Ambassador Mendelson’s remarks are excerpted below and available at <http://usun.state.gov/remarks/7005>.

* * * *

The United States welcomes the coming adoption of this resolution after substantial negotiations. As President Obama has noted, “Our fight against human trafficking is one of the great human rights causes of our time.” Trafficking in persons is modern slavery. It is a criminal act, a threat to development, and a cause and a symptom of instability around the world.

The victims of human trafficking can be found in factories and fields, in brothels, in conflict zones, and even in private homes. Trafficking touches many of us in undetected ways through products tainted by supply chains riddled with forced labor. Every day the lives of men, women, and children are stolen, broken, bought, and sold in every country around the world.

In 2000, for the first time, through the Palermo Protocol, the United Nations adopted an internationally agreed upon definition of trafficking in persons and provided a legal framework to end human trafficking. Our global commitment to end trafficking was built around three pillars: prevention, prosecution, and protection. With the adoption of the Global Plan of Action on combating trafficking in persons in 2010, the General Assembly added a fourth pillar: partnership. The global community realized that ending this form of modern slavery is only possible through collaborative and collective action by member states, the private sector, and civil society.

With the adoption of the 2030 Agenda for Sustainable Development, member states have renewed the call to end trafficking. If we are to achieve the 2030 Agenda overall, and specifically Goal 5 on gender equality, Goal 8 on decent work, and Goal 16 on justice for all, we must continue this global partnership.

Reaffirming our commitment to the fourth pillar, we welcome this call for a high-level meeting on the appraisal of the Global Plan of Action in the 72nd Session of the General

Assembly and look forward to robust participation by all – Member States, the private sector, and civil society.

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On December 16, 2015, the United States released a statement in its capacity as President of the Security Council on trafficking in persons in situations of conflict. The presidential statement follows, and is also available at <http://usun.state.gov/remarks/7052>.

* * * *

The Security Council recalls its primary responsibility for the maintenance of international peace and security, in accordance with the Charter of the United Nations.

The Security Council recalls the United Nations Convention against Transnational Organized Crime, and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which includes the first internationally agreed definition of the crime of trafficking in persons and provides a framework to effectively prevent and combat trafficking in persons.

The Security Council condemns in the strongest terms reported instances of trafficking in persons in areas affected by armed conflict. The Security Council further notes that trafficking in persons undermines the rule of law and contributes to other forms of transnational organized crime, which can exacerbate conflict and foster insecurity.

The Security Council deplores all acts of trafficking in persons undertaken by the “Islamic State of Iraq and the Levant” (ISIL, also known as Da’esh), including of Yazidis, as well as all ISIL’s violations of international humanitarian law and abuses of human rights, and deplores also any such trafficking in persons and violations and other abuses by the Lord’s Resistance Army, and other terrorist or armed groups, including Boko Haram, for the purpose of sexual slavery, sexual exploitation, and forced labor which may contribute to the funding and sustainment of such groups, and underscores that certain acts associated with trafficking in persons in the context of armed conflict may constitute war crimes.

The Security Council reiterates the critical importance of all Member States fully implementing relevant resolutions with respect to ISIL, including resolutions 2161 (2014), 2170 (2014), 2178 (2014), 2199 (2015) and 2249 (2015). The Security Council further reiterates the critical importance of all Member States fully implementing relevant resolutions, including resolution 2195 (2014), which expresses concern that terrorists benefit from transnational organized crime in some regions, including from the trafficking of persons, as well as resolution 2242 (2015) which expresses concern that acts of sexual and gender-based violence are known to be part of the strategic objectives and ideology of certain terrorist groups.

The Security Council calls upon Member States to reinforce their political commitment to and improve their implementation of applicable legal obligations to criminalize, prevent, and otherwise combat trafficking in persons, and to strengthen efforts to detect and disrupt trafficking in persons, including implementing robust victim identification mechanisms and providing

access to protection and assistance for identified victims, particularly in relation to conflict. The Security Council underscores in this regard the importance of international law enforcement cooperation, including with respect to investigation and prosecution of trafficking cases and in this regard calls for the continued support of the United Nations Office on Drugs and Crime (UNODC) in providing technical assistance upon request.

The Security Council calls upon Member States to consider ratifying or acceding to the United Nations Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The Security Council further calls upon States Parties to this Convention and to the Protocol to redouble their efforts to implement them effectively

The Security Council takes note of the recommendations made by the Working Group on Trafficking in Persons, established by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, since its inception, and calls upon States to strengthen their efforts in building the necessary political, economic and social conditions to tackle this crime.

The Security Council notes the particular impact that trafficking in persons in situations of armed conflict has on women and children, including increasing their vulnerability to sexual and gender based violence. The Security Council expresses its intention to continue to address this impact, including, as appropriate, in the context of its Working Group on Children and Armed Conflict, within its mandate, and in the framework of its agenda to prevent and address sexual violence in armed conflict.

The Security Council expresses solidarity with and compassion for victims of trafficking, including victims of trafficking related to armed conflicts worldwide and underscores the need for Member States and the UN System to proactively identify trafficking victims amongst vulnerable populations, including refugees and internally displaced persons (IDPs), and address comprehensively victims' needs, including proactive victim identification and, as appropriate, the provision of or access to medical and psycho-social assistance, in the context of the UN peacekeeping and peacebuilding efforts, as well as ensure that victims of trafficking in persons are treated as victims of crime and in line with domestic legislation not penalized or stigmatized for their involvement in any unlawful activities in which they have been compelled to engage.

The Security Council calls upon Member States to hold accountable those who engage in trafficking in persons in situations of armed conflict, especially their government employees and officials, as well as any contractors and subcontractors, and urges Member States to take all appropriate steps to mitigate the risk that their public procurement and supply chains may contribute to trafficking in persons in situations of armed conflict.

The Security Council welcomes existing efforts to address sexual exploitation and abuse in the context of UN peacekeeping missions, and requests the Secretary-General to identify and take additional steps to prevent and respond robustly to reports of trafficking in persons in UN peacekeeping operations, with the objective of ensuring accountability for exploitation.

The Security Council requests the Secretary-General to take all appropriate steps to reduce to the greatest extent possible the risk that the UN's procurement and supply chains may contribute to the trafficking in persons in situations of armed conflict.

The Security Council urges relevant UN agencies operating in armed conflict and post-conflict situations to build their technical capacity to assess conflict situations for instances of trafficking in persons, proactively screen for potential victims of trafficking, and facilitate access

to needed services for identified victims.

The Security Council expresses its intent to continue to address trafficking in persons with respect to the situations on its seizure list.

The Security Council requests that the Secretary-General report back to the Council on progress made in 12 months to implement better existing mechanisms countering trafficking in persons and to carry out steps requested in this Presidential Statement.

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4. Money Laundering

On July 29, 2015, the Department of the Treasury, Financial Crimes Enforcement Network (“FinCEN”) issued a Final Rule imposing the fifth special measure against FBME Bank Ltd. (“FBME”), formerly known as the Federal Bank of the Middle East, Ltd., with an effective date of August 28, 2015. On August 27, 2015, the United States District Court for the District of Columbia granted FBME’s motion for a preliminary injunction and enjoined the Final Rule from taking effect. On November 6, 2015, the Court granted the Government’s motion for voluntary remand to allow for further rulemaking proceedings. 80 Fed. Reg. 74,064 (Nov. 27, 2015).^{**}

5. Organized Crime

a. Transnational Organized Crime Rewards Program

As discussed in *Digest 2013* at 51, the U.S. government expanded its rewards program in 2013 to extend to information about individuals involved in transnational organized crime. The Transnational Organized Crime (“TOC”) Rewards Program is the result and is managed by the U.S. Department of State’s Bureau of International Narcotics and Law Enforcement Affairs in coordination with U.S. federal law enforcement agencies.

On February 24, 2015, the Department of State announced that the TOC Rewards Program was offering up to \$3 million for information leading to the arrest and/or conviction of Evgeniy Mikhailovich Bogachev, a Russian national allegedly involved in a major cyber racketeering enterprise. See February 24, 2015 media note, available at <http://www.state.gov/r/pa/prs/ps/2015/02/237849.htm>. The media note includes the following additional information about the reward offer relating to Bogachev:

Also known online as “lucky12345” and “slavik,” Bogachev allegedly acted as an administrator in a scheme that installed malicious software on more than one million computers without authorization. The software, known as “Zeus” and

^{**} Editor’s Note: FinCen issued a new Final Rule on March 31, 2016.

“GameOver Zeus,” enabled contributors to the scheme to steal banking information and empty the compromised accounts, resulting in the theft of more than \$100 million from U.S. businesses and consumers.

Bogachev currently appears on the FBI’s [Cyber’s Most Wanted](#) list. He is believed to be at large in Russia. This reward offer reaffirms the commitment of the U.S. government to bring those who participate in organized crime to justice, whether they hide online or overseas.

On March 26, 2015, the State Department announced the TOC Rewards Program offers of multi-million dollar rewards for information leading to the arrest or conviction of two other alleged cybercriminals, Russian nationals Roman Olegovich Zolotarev and Konstantin Lopatin. See State Department media note available at <http://www.state.gov/r/pa/prs/ps/2015/03/239799.htm>. The media note explains:

The two fugitives ... were indicted for their role in Carder.su, a global, Internet-based criminal enterprise whose members trafficked in and manufactured stolen and counterfeit identification documents and access devices, such as debit and credit cards, and engaged in identity theft and financial fraud crimes.

A reward of up to \$2 million is offered for information on Zolotarev, known online as “Admin,” who is believed to have served as the leader of Carder.su. Up to \$1 million is being offered for information on Lopatin, known as “Graf,” who allegedly participated in the organization as a key member. Both are believed to be at large in Russia.

Carder.su is responsible for at least \$50 million in losses. To date, 30 individuals have been convicted, and 25 others are pending trial or—like Zolotarev and Lopatin—are fugitives. The cases were investigated by U.S. Immigration and Customs Enforcement Homeland Security Investigations (HSI). They are being prosecuted by the U.S. Attorney’s Office for the District of Nevada and the U.S. Department of Justice’s Organized Crime and Gang Section.

b. Sanctions Program

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

6. Corruption

In conjunction with the 16th International Anticorruption Conference (“IACC”) in Putrajaya, Malaysia, the United States announced several initiatives aimed at combating corruption. See September 4, 2015 State Department fact sheet, available

at <http://www.state.gov/j/inl/rls/fs/2015/246651.htm>. The fact sheet identifies several multilateral fora through which it works to combat corruption, including the UN Convention Against Corruption, the U.S.-Africa Partnership on Illicit Finance, the Organization for Economic Cooperation and Development's Working Group on Bribery, the Open Government Partnership Initiative, the Asia-Pacific Economic Cooperation (APEC), and the G20. The fact sheet also lists the new anticorruption initiatives by the United States, including:

- Increased support for the IACC
- A wildlife trafficking anticorruption initiative
- FBI asset recovery teams to investigate international corruption
- Enhanced engagement with civil society organizations in Asia and the Pacific

In November 2015, the United States participated in the Conference of the States Parties ("COSP") to the United Nations Convention against Corruption in St. Petersburg, Russia., Principal Deputy Assistant Secretary Arreaga delivered opening remarks at the COSP on November 2, 2015. Mr. Arreaga's remarks are excerpted below and available at <http://www.state.gov/j/inl/rls/rm/2015/249117.htm>.

* * * *

Today, we have heard about the trillions of dollars corruption costs our countries as it reduces competitiveness and diminishes growth. Others have mentioned, and correctly so, the millions who are harmed by corruption, whether it's because they can't pay a bribe to get their child medical care; or when a criminal makes illegal payments to escape justice and goes on to harm others; or when natural resources are destroyed for personal gain.

The persistence of this scourge, even a dozen years after we agreed to binding global rules to combat it, could lead some to believe that we cannot end corruption.

To the skeptics we say, the fact that it is difficult to end corruption does not mean we shouldn't fight it. We certainly don't take that position when it comes to other complex global challenges, such as protecting the environment or eliminating poverty.

We have it within our power to enforce anti-corruption standards.

- We can use the Convention's tools and share best practices with one another;
- We can prevent corruption by increasing transparency, integrity rules, and strong systems, particularly in areas such as procurement and budget management; and
- We can commit to prosecute the corrupt, and to make every effort to recover the proceeds of their crimes.

The United States is proud to be among those at the forefront of this fight:

- We strongly defend the independence of investigators, prosecutors, and judges in our country;

- We promote anti-corruption standards globally through partnerships and practitioner-to-practitioner cooperation; and,
- We invest hundreds of millions of dollars in assistance each year for anticorruption and related good governance programs worldwide.

For example:

- Last month the United States increased our support for the International Commission Against Impunity in Guatemala, or CICIG, by \$5 million. Its fearless work deserves the global community's support so it can continue to root out corruption;
- The United States also developed a Kleptocracy Asset Recovery Initiative, which consists of specialized teams of prosecutors who ensure foreign corruption proceeds benefit those harmed by abuse of office. These teams are currently litigating cases involving more than a billion dollars of assets tied to foreign corruption, and have already returned over \$143 million to victims of corruption.
- We also provide training to governments, in countries like Ukraine, and to civil society organizations, in countries like Nigeria and Sierra Leone, to enhance their capacity to combat corruption.

We are also cognizant that good-faith efforts by the United States or of any single country will never be enough: we all must work together to adopt and enforce international standards of integrity, accountability, and transparency.

This is more important than ever because people, markets, and commerce are increasingly interconnected and this creates more opportunities for bad actors and corruption. Every treaty, transaction, and investment rests on a foundation of laws: the more they are compatible, consistent, and meet a higher standard, the better off we will all be.

All of us share a responsibility to implement the convention's anti-corruption standards, to foster international cooperation; and to promote development assistance that is coordinated, effective, and based on each country's needs.

It is essential that we use the Convention's tools set including those that advance more effective asset recovery.

We must draw on all sectors of our societies to fight corruption, including civil society organizations and the private sector. We have nothing to hide and much to gain from their constructive engagement with us in the Conference of States Parties and its subsidiary bodies.

This week, we have several opportunities to continue the progress we have made:

We must support the UNCAC review mechanism so it can smoothly transition to a second cycle. The United States will continue to support the compromises reached in 2009, including on the basic terms by which the mechanism operates.

However, the issues presented in the Asset Recovery and Prevention Chapters are remarkably broad. A review cycle that covers all provisions of both chapters, with the same checklist approach, potentially could overwhelm reviewers, countries under review, and the Secretariat.

One lesson learned in 2011 that we are facing once again is that we must make plans within the finite human and financial resources of our anti-corruption efforts – including at home and at the United Nations. We should make limited, careful adjustments so our peer reviews in the next cycle are effective and cost efficient.

In looking forward to an asset recovery resolution for the Sixth COSP, my delegation has proposed a draft text this week.

The most important goals of any text we adopt should:

- Maintain a balanced and technical outlook that avoids political statements that will not achieve consensus;
- Reinforce good practices identified over the last two years in the Asset Recovery Working Group;
- Recognize that asset recovery is a highly technical, difficult process that requires a significant amount of work by experts from all countries involved;
- Use the Asset Recovery Working Group to address sensitive issues that require meaningful and ongoing dialogue at the expert level; and
- Avoid language that departs from the purpose and the text of the Convention.

Looking to the next five year cycle, the United States remains committed to an approach that uses the limited resources we have wisely; can handle the enormous tasks that remain undone; and confronts new challenges that are as of yet unknown.

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Mr. Arreaga provided an interview on November 23, 2015, after the conclusion of the COSP, in which he summarized its significant outcomes. The interview is available at <http://www.state.gov/j/inl/rls/rm/2015/249916.htm>. Mr. Arreaga identified as the most important accomplishment:

the unanimous decision by all 177 States Parties to launch the second cycle of the UNCAC Review Mechanism in 2016. This is the only global mechanism that governments use to evaluate each other's compliance with their anti-corruption treaty obligations, and it is essential to keep this momentum going in the years ahead.

Mr. Arreaga also highlighted discussions at the COSP about the role of civil society in the UNCAC; debate on resolutions on asset recovery work; and U.S. support for the UNCAC Review Transparency Pledge proposed by the UNCAC Coalition.

C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS

1. International Criminal Court

a. Overview

Ambassador David Pressman, U.S. Alternate Representative to the UN for Special Political Affairs, delivered remarks at the UN General Assembly on the report of the International Criminal Court on November 5, 2015. His remarks are excerpted below and available at <http://usun.state.gov/remarks/6960>.

* * * *

President Gurmendi, thank you for your presentation of the International Criminal Court's activities between August 1, 2014, and July 31, 2015, and for your service to the Court in this first year of your tenure as President.

Ending impunity for those responsible for war crimes, crimes against humanity, and genocide, is something that the United States views as both a moral imperative and a stabilizing force in international affairs. To this end, the United States continues to work—on a case-by-case basis and consistent with U.S. policy and laws—with the International Criminal Court to identify practical ways to advance accountability for the worst crimes known to humanity. Together, the international community must find ways to intensify our collaboration to bring to justice the perpetrators of atrocity crimes.

This past year has been marked by some progress. In January, the United States welcomed the transfer of Dominic Ongwen by Central African authorities to the ICC, which occurred thanks to close cooperation between the Court, the Central African Republic, Uganda, the African Union Regional Task Force, and the United States. Ongwen is allegedly responsible for committing and directing brutal crimes in Uganda and the region. The fact that he will now stand trial at the ICC is a welcome and it is a long overdue step toward justice for the victims of the Lord's Resistance Army. And the United States was pleased to work with our partners to help make that happen. We look forward to the day when Joseph Kony, too, will be held accountable.

The United States also recently welcomed the announcement by the ICC Prosecutor in September that Ahmad Al Faqi Al Mahdi, an alleged member of the Islamic extremist group Ansar al-Dine, was surrendered to the Court by Nigerien authorities, with the cooperation of Mali. This is an important step toward holding accountable those responsible for serious crimes in Mali and toward holding accountable alleged members of extremist groups for war crimes. The charges against Al Faqi signal progress in bringing to justice those accused of intentionally targeting attacks against religious and historic buildings and monuments. Now such assaults are not just on Mali and its people, but on the common cultural heritage of all humankind. These are attacks against civilization and a tragedy for all civilized people, and, as Secretary of State John Kerry has said, "the civilized world must take a stand." The United States commends Mali and Niger on their cooperation to transfer Al Faqi to the Court.

The United States also welcomes the Court's report of continued cooperation with peacekeeping missions that have been authorized by the Security Council to provide support to appropriate justice and accountability initiatives.

We recognize, with particular appreciation, the contributions of UN-Women toward the work of the Office of the Prosecutor through the secondment of gender experts. At a time when we continue to witness the commission of horrific sexual and gender-based violence crimes against women and girls, boys and men, in atrocity situations around the world, we must remain vigilant in our fight to prevent, end, and hold to account those responsible for these most heinous crimes. The United States remains committed to pursuing justice for victims of sexual and gender-based violence, including through strengthening the ability of national authorities to address these crimes, which we are doing in countries like the Democratic Republic of the Congo.

The ICC was established as a court of last resort, one that would focus on those deemed most responsible for the most serious crimes, and one that would step in to investigate and prosecute such persons only when states are not willing or genuinely able to do so themselves. Our support for domestic accountability efforts must be integral to our approach collectively to ending impunity for atrocity crimes. We welcome the progress made in the Central African Republic to establish a Special Criminal Court, within its domestic system but with international participation. This represents an important step toward providing accountability at the national level for the crimes committed amidst the ongoing brutal violence in the Central African Republic, while simultaneously bolstering national-level capacity. The Special Criminal Court could demonstrate the potential of “positive complementarity,” whereby international scrutiny and activity have stimulated and supported the capacity of the domestic judiciary to bring justice to victims.

In closing, it is important to note that there is still much to be done in our work together to prevent mass atrocities and bring to justice those who commit crimes against humanity, war crimes, and genocide. Facing limited resources and increasing demands, it will be important for the Court to make prudent decisions about the cases it pursues and declines to pursue and ensure that its choices are guided by justice, rigor, fairness, and care. And the international community should strive to ensure that the Court is able to remain focused on its core mandate to address war crimes, crimes against humanity, and genocide, and the Court should remain focused on achieving concrete and just results.

We note in this regard that the United States continues to have serious concerns about the crime of aggression amendments adopted at Kampala, which we believe would risk undermining not only the Court’s work to prevent and punish atrocity crimes, but other legitimate efforts to do so as well. If States do not have clarity on what conduct is covered, it is easy to imagine the complications and the chilling effect that would arise in any number of situations where the imperative for action, including by our partners and allies who are parties to the Rome Statute, is overwhelming, including action aimed at stopping the very atrocities that prompted the Court’s creation. Imagine—in such a situation after the Court’s aggression, jurisdiction has been activated—questions states would face about whether the Court would regard as aggression a decision to join or support a coalition to prevent a humanitarian catastrophe. It is in this context that we stress that we all have an interest in seeking greater clarity on key issues before any decision is taken to activate the Court’s jurisdiction over the crime of aggression, including with regard both to what conduct is covered, but also *which States* are covered. States should not have to decide whether to activate the amendments without clear and common understanding on these points.

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On November 19, 2015, Jane Stromseth, Acting Director of the State Department’s Office of Global Criminal Justice, addressed the Fourteenth Session of the International Criminal Court Assembly of States Parties on behalf of the observer delegation of the United States. Her remarks are excerpted below and available in full at http://www.state.gov/j/gci/us_releases/remarks/2015/249814.htm.

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As always, this group of States gathers with a challenging agenda before it: to seek effective ways to end impunity for the most serious crimes of concern to the international community as a whole. Because success in that pursuit depends in part on seizing opportunities and taking encouragement from progress, I want to begin by noting a few of the year's positive developments on which the international community can build.

This year, for the first time, a top commander of the vicious Lord's Resistance Army was apprehended and transferred to the ICC. This transfer occurred in a model of cooperation among the African Union, the leadership of Uganda and the Central African Republic, and the organs of the Court. The United States is proud to have played a role in this process, and we look forward to the day when Joseph Kony is also brought to justice.

This year, also for the first time, a leader of an extremist group in Mali has come before the ICC to answer for alleged war crimes, in this case, crimes against the cultural heritage of the historic town of Timbuktu. We hope this will send a signal to other such groups within the Court's jurisdiction.

And this year, following the Cote d'Ivoire elections in 2010 that witnessed so many atrocities, Ivoirians were able to choose their president in a peaceful election, setting a more hopeful precedent for that country's future.

In these situations, the prospect of justice is helping deliver stability where it has been absent, and truth and dignity for victims who have been denied them. And in these and several other cases, the ICC is playing a unique and positive role. Although the United States, for reasons that have been much discussed, has not accepted the Court's jurisdiction, we continue to work with the ICC in areas of shared interest, on a case-by-case basis and consistent with U.S. laws and policy. The United States has expressed its support for each of the investigations and prosecutions currently under way before the Court.

But the ICC is only one part of a developing system of global criminal justice, one that depends first and foremost on the strengthening of national institutions and the presence of national political will. In that vein, too, this year, we have seen hopeful signs of willingness in a number of countries to address more fully the painful legacies of conflict. To name a few:

In Kosovo, the national Assembly courageously passed the legislation required to create a hybrid Special Court to hear cases emerging from reports of serious crimes committed in the wake of the 1999 conflict.

In Colombia, the government and the country's largest rebel group have made progress toward reaching an agreement on transitional justice in the context of their peace negotiations. We welcome Colombia's commitment to reaching a transitional justice agreement that is consistent with its national and international legal obligations. If achieved, such an outcome would represent an important step for Colombia toward a just and durable peace.

In the Central African Republic, the transitional government is working with the international community to establish a domestic Special Criminal Court, with international participation, to seek justice for atrocity crimes that have wracked that country.

And in South Sudan, the parties to that nation's conflict have signed a peace agreement in August that includes commitments to pursue a wide range of transitional justice measures, including the creation of a hybrid court by the African Union to try those most responsible for atrocities.

These situations span many continents, and as much distinguishes them as ties them together. But we see in these new developments the reflection of a universal yearning for dignity, and for the kind of lasting peace that is built upon justice. Many of these initiatives are in the very earliest stages, and some of them come while conflict is still a daily reality. But if they are pursued credibly, if witnesses and court personnel are protected, and if legal obligations are respected, these initiatives have the potential to contribute to a more sustainable peace in these countries, particularly as many of them will benefit from international participation. The United States will support these initiatives as best we can, and we urge others to do so as well.

But while we need to work together to support and help seize opportunities such as these, we also need to face the situations in which the possibility of progress seems more remote, and to ensure that we are working together to help lay the groundwork for justice.

No situation is more overdue for an effort to find common ground than the situation in Darfur, which the Security Council referred to the ICC ten years ago and where civilians continue to face the persistent threat of aerial bombardments, widespread rape, and the looting and burning of homes and villages. The United States strongly believes that the arrest warrants in the ICC's Darfur situation should be carried out, and that Sudan must comply with its obligations under the referral. But even while the victims of this brutal conflict are waiting for justice, we must continue to look for ways to support and give hope to them, and to insist with one voice that the ongoing atrocities stop.

This year has also presented us with horrific realities of sexual and gender-based violence, which remain rampant and continue to undermine peacebuilding and cause long-lasting pain in conflict zones and post-conflict societies around the world. That's why the United States is committed to helping bring to justice those responsible for these crimes, including through an Accountability Initiative that includes more than eight million dollars in support for specialized justice sector initiatives in conflict-affected countries. But every day, the egregious forms of sexual slavery and violence perpetrated by ISIL in Iraq and Syria make clear just how grave a challenge we face in ending the scourge of sexual violence, and the crucial work that lies ahead to prevent these atrocities and help survivors heal and secure justice.

We condemn, too, the other atrocities being committed in Syria and Iraq—from the Asad regime's torture in its prisons and other abuses against the Syrian people to ISIL's brutal campaign of targeting ethnic and religious groups, abducting women, and other heinous acts of terror—and, most recently, ISIL's vicious attacks in Paris.

The United States will continue to lead a coalition aimed at degrading and ultimately defeating ISIL and ending these atrocities. And we will continue to work with others to seek a negotiated political transition in Syria that ends that country's civil war and Asad's brutality. Justice and accountability undoubtedly have a role to play in dealing with atrocities of this kind. The veto last year of a proposed referral to the ICC did not take accountability off the table in Syria. Rather, it reinforced the need for all of us to lay the groundwork now for future justice efforts, by documenting such crimes and assembling the evidence that will undoubtedly be needed in the years to come.

Against this backdrop of significant challenges, we note, as others have done, that the Court—although no longer a new institution—must still do more to establish its record of success, its legitimacy, and its deterrent impact. Given the demands the Court faces and the sensitivity of the situations in which it may intervene, we continue to urge the organs of the

Court to ensure that their decisions, including prosecutorial choices, are guided by rigor, fairness, legality, and prudence.

I will also raise again our concerns about the potential activation of the crime of aggression amendments in the face of widespread uncertainty about even such basic issues as whether the Court's jurisdiction would apply with respect to Rome Statute parties that do not ratify the amendments. We think all interested States—ratifiers and non-ratifiers alike—have a strong interest in finding a way to discuss these and other basic issues constructively prior to any decision to “activate.”

On these and other issues, the United States does not purport to have all the answers. But once again, we affirm our commitment to pursuing justice for the worst crimes known to humanity. The fact that atrocities are being perpetrated in so many places around the world fills us with a sense of urgency. But we take encouragement from the successes and the steps forward that show that the current of history, when we work together, does indeed flow toward justice.

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b. *Crime of Aggression*

On April 9, 2015, Under Secretary of State for Civilian Security, Democracy, and Human Rights Sarah Sewall delivered remarks at the annual meeting of the American Society of International Law on the crime of aggression amendments adopted at the ICC's 2010 Review Conference (“Kampala amendments”). Her remarks are excerpted below and available at <http://www.state.gov/j/remarks/240579.htm>.

* * * *

...[G]overnments have spent considerable time hashing through the many legal questions raised by the amendments on the crime of aggression that were ultimately adopted at the ICC's 2010 Review Conference in Kampala. My purpose today is less to further debate those questions, but rather to offer a perspective on the policy implications of these amendments. We in the U.S. Government are concerned about the potential of these amendments to have lasting negative effects, and we see it as vital that the states involved in this process work together to avoid harming our common ability to prevent atrocities, resolve conflicts, and pursue justice for the worst global crimes.

Let me start by underscoring that—notwithstanding the quite serious concerns I will express here today—I am not questioning the motives of our many friends and allies who have been supportive of the Kampala amendments. Like them, we fully agree that aggression is inimical to a rules-based international order, and to the cause of peace and security that we seek to advance through our efforts around the world every day. Russia's attempt to annex Crimea, to choose just one recent example, serves as a reminder that the international community will continue to face an ongoing imperative to oppose aggression as a significant policy challenge.

The question, however, is whether the Rome Statute amendments can be an effective and appropriate addition to the international community's toolbox. And here, as I will explain in greater detail, I think the risks of the current amendments outweigh the benefits. We will continue to work to persuade our partners of this, but we also know that for some, opposing these amendments in total may not be an option. For this reason, we propose that other states think seriously about how can they mitigate some of the greatest risks that we see as inherent in the current amendments.

Taking a step back, we recognize that this is a challenging issue, that many years of preparatory work informed the decisions made in Kampala, and that the Review Conference took steps aimed at addressing at least some of the concerns that were raised there. We welcomed, for example, the decision of the parties to exclude from the Court's jurisdiction over aggression the nationals of countries that are not party to the Rome Statute. And we welcomed the decision to defer until 2017 at the earliest any decision to activate that jurisdiction, which have provided breathing space and time in which important and still outstanding issues presented by the amendments could be addressed. At this point, however, we are well into the fifth year of this seven-year period, and it is becoming ever more pressing that the international community make productive use of this reflection time.

Many of our concerns—and many of the means of mitigating them—are linked to the uncertainty that still surrounds crucial aspects of the amendments and how they may be interpreted and applied. The definition of the crime itself, as adopted in Kampala, was ostensibly based on an earlier UN resolution that gave guidance to the Security Council on identifying acts of aggression. But the definition that the parties adopted stripped away the critical requirement that the assessment of a use of force “must be considered in light of all the circumstances of each particular case,” and it shifted the role of applying this guidance and making these judgments—which inevitably involve political judgments—from the Security Council to a judicial body meant to remain above politics. This makes the need for clarity all the greater.

Some of the formal understandings that were adopted in Kampala helped at the margins to clarify which acts will and will not be covered—but there remains little clarity or consensus about the meaning of core elements of the definitions. Our concerns about uncertainty have been exacerbated by the efforts of some supporters of the amendments to promote an interpretation—which we believe flies clearly in the face of the plain language of the Rome Statute—contending that the Court's aggression jurisdiction would extend even to the nationals of states parties that do not ratify the amendments.

Now, why do these open questions matter so much for those who work on peace and security or to promote international justice? Some degree of uncertainty may be inevitable when a text of this complexity is negotiated. But the questions I have referenced are at the heart of the fundamental policy choices that the states supporting the amendments need to make. They therefore should address these uncertainties squarely now. The alternative—simply trusting or hoping that the Court itself will eventually “figure it out” when live cases involving actual defendants come before it, and only after a period of chilling uncertainty—this alternative seems risky and inappropriate given the magnitude of the associated issues. The activation of the Court's aggression jurisdiction would be a highly consequential, even unprecedented, intervention into the international security architecture, and if the ICC's states parties proceed, they have an obligation to resolve outstanding questions.

Let me detail three specific concerns about the activation of the Court's aggression jurisdiction.

First, we are concerned that activation could chill the willingness of states to cooperate in certain military action where the legal basis for that action might be contested, including action aimed at stopping the very kinds of outrages, including mass atrocities, that prompted the Court's creation. President Obama has emphasized the importance of collective action by a broad range of allies and partners when we deal with these threats to humanity. But many of our allies and partners are parties to the Rome Statute, and it is easy to imagine the complications and the chilling effect that could arise in any number of situations involving ethnic cleansing or other atrocities where the imperative for action is overwhelming. Imagine—in such a situation after the Court's aggression jurisdiction has been activated—the Prime Minister of a Rome Statute party being told by her Legal Advisors that they could not guarantee or reliably advise that the Court would not regard a decision to join or support a coalition as aggression. Given current uncertainties, the legal advisors might advise that the ICC Prosecutor could well undertake an investigation of the matter and even pursue criminal proceedings and an arrest warrant. The international community has grappled for decades with the challenges of mobilizing the will to prevent humanitarian catastrophes. We fear that one of the effects of activating the ICC's aggression jurisdiction will be to create new potential obstacles to military action when it is urgently needed to save innocent lives.

Second, we are concerned that activation of the amendments may reduce the ability of the international community to manage and resolve conflicts. While the international community has strived for consensus around the principle that atrocities cannot legitimately be the subject of an amnesty, it is not obvious that the same approach is appropriate for the crime of aggression, which is of a fundamentally different character. Imagine two states in conflict, each having accused the other of starting the war but both prepared to make peace. The United Nations has said that it will not endorse provisions in peace agreements that include amnesties for mass atrocities. But should the international community similarly insist that parties to a conflict not “take off the table” prosecution of the leaders of one side or another for resorting to force in a “manner inconsistent with the Charter of the United Nations”? Particularly with so little certainty about how the Court will interpret the substance of the amendments, is the international community ready to insist that these are crimes that must be prosecuted in every instance at any cost? That these are crimes that cannot go unpunished?

A third concern is that activation of the aggression jurisdiction will harm the Court's ability to carry out its core mission—deterring and punishing genocide, crimes against humanity, and war crimes. Let me be clear: while the U.S. Government has a complex relationship with the ICC, we have worked to promote the Court's success in a wide range of contexts and have expressed our support for each of the situations in which ICC investigations and prosecutions are underway. But the ICC is still working to establish and sustain a record of effectiveness in the basic functions by which its success will be measured, such as apprehending defendants, protecting its witnesses, and prosecuting cases already underway. How will a Court that is already struggling to fulfill its core mandate respond to the additional burden of the kind of decisions it would have to make under the Kampala amendments? The assessments involved in prosecuting aggression will inevitably be deeply political: which actor bears responsibility for a conflict; who has acted legitimately in self-defense? The Court would find itself in a role better

suiting for political actors, particularly if it seeks to prosecute a crime that lacks both a clear definition and the extensive jurisprudence that has developed around many atrocity crimes.

While the United States is not a party to the Rome Statute and its nationals would be explicitly excluded from the ICC's aggression jurisdiction, we nonetheless have a deep interest in the outcome of the states parties' deliberations on this issue – as do all who share the responsibilities and bear the risks of combating atrocities and underwriting global security. This brings me back to what I proposed at the beginning, which is that, for states that entertain the possibility of supporting these amendments to the Statute, we think it is crucial to focus on whether the risks that have been identified here can be sufficiently managed before taking the very consequential decision of whether to activate this new basis of jurisdiction.

In this connection, let me offer at least some preliminary thoughts on some of the risk mitigation measures that could be considered:

- Governments and parliaments of states parties could formally state their views on the questions raised here. They can clarify the scope of which acts are covered and confirm that the amendments do not apply to states parties that do not ratify the amendments. They could do this, for example, in statements at upcoming sessions of the ICC's Assembly of States Parties, or in written instruments communicating their decision whether or not to ratify.

- Perhaps most critically, if there were eventually a decision by the Assembly of States Parties to activate the amendments, states could insist that that decision contain clear guidance on these issues.

- States parties could clarify how the "opt-out" provisions contained in the amendments might be used to help address the concerns raised here and serve as a guardrail or check on an overly broad application of the amendments.

- States parties could also consider other steps, including the possibility of adopting further understandings to ensure these amendments do not work at cross-purposes to the critical goal of preventing atrocity crimes.

To be sure, the activation of the Court's jurisdiction over aggression is not a step that the United States has sought. Still, I trust we can continue this international dialogue in a spirit of good faith and with the urgency it deserves. We look forward to working with other countries and members of civil society to help ensure full consideration of the risks I have described and mitigation measures such as those that have been sketched out.

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c. *ICC Case on Destruction of Cultural Sites in Mali*

In an October 1, 2015 press statement, the U.S. Department of State welcomed the announcement by the ICC Prosecutor that Ahmad Al Faqi Al Mahdi, an alleged member of the Islamic extremist group Ansar al-Dine ("AAD"), had been surrendered to the ICC for prosecution. The press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/10/247741.htm>, is excerpted below.

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This is an important step toward holding accountable those responsible for serious crimes in Mali. The charges against Mr. Al Faqi are the first charges at the ICC relating to intentionally directing attacks against religious and historic buildings and monuments. They are also the first charges brought in the ICC's ongoing investigation of the situation in Mali.

The United States strongly condemns the destruction of Muslim shrines and other religious and historic sites in Timbuktu by extremist militants, including AAD. We are outraged by the destruction of these World Heritage Sites. These are assaults not just on Mali and its people, but on the common cultural heritage of all humankind, and those responsible for these acts—and all those responsible for atrocity crimes—should face justice.

Historic and religious sites are directly linked to culture and heritage and should be protected. The destruction of irreplaceable relics of ancient life and society represents both an attempt to eradicate culture and an assault on the beliefs of those who hold these sites sacred.

As Secretary Kerry has said about the destruction of cultural heritage sites, "These acts of vandalism are a tragedy for all civilized people, and the civilized world must take a stand."

We commend Mali's commitment to ensuring accountability for serious crimes and its cooperation with the ICC in this matter.

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d. Uganda/LRA

On January 20, 2015, the United States issued a press statement welcoming the transfer to the ICC of Dominic Ongwen, a senior commander for the Lord's Resistance Army ("LRA"). The press statement is available at <http://www.state.gov/r/pa/prs/ps/2015/01/236142.htm>, and includes the following:

...This transfer took place as a result of close cooperation and consultation by the governments of the Central African Republic (C.A.R.) and Uganda, the African Union Regional Task Force (AU-RTF), and the ICC.

Ongwen's transfer to the ICC is a welcome step toward justice for the victims of the Lord's Resistance Army (LRA). After he was abducted by the LRA as a child, Ongwen allegedly went on to commit and direct brutal crimes over many years as one of the group's senior commanders, including attacks on displaced civilians in northern Uganda, for which he faces ICC charges, and the massacre of more than 300 civilians in Makombo, Democratic Republic of the Congo, by elements reportedly under his command.

On the same day, U.S. Permanent Representative to the UN Samantha Power issued a statement on Ongwen's arrival at the ICC. Her statement is excerpted below and available at <http://usun.state.gov/remarks/6344>.

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Dominic Ongwen's arrival at the International Criminal Court in the Hague is a welcome development in the international community's campaign to counter the LRA's dehumanizing violence, and to bring perpetrators to justice after more than two decades of the LRA's brutal campaign of torture, rape and murder.

I commend the governments of the Central African Republic and Uganda, as well as the leadership of the African Union, for their close coordination on this effort and for their commitment to ensuring that perpetrators of human rights violations face justice.

The fact that Ongwen will finally face trial is the latest sign of tangible progress in the African Union-led effort to end the threat posed by the LRA and its leader, Joseph Kony, to which the United States has dedicated considerable resources, including more than 100 U.S. military advisors. Today's outcome is a great example of what can result from regional coordination in combating the LRA, and it is imperative that the African Union Regional Task Force (AU-RTF) continue to coordinate with regional governments, the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), and the United Nations Regional Office for Central Africa (UNOCA) in its fight against the LRA, which still remains a serious threat to regional peace and security.

Those remaining LRA members should follow the lead of Dominic Ongwen and the more than 250 other individuals who have left the LRA since 2012. They should end their lives on the run and turn themselves in.

The United States continues to look forward to the end of the LRA and the day when its victims will finally be free from LRA terror, seeing justice that is long overdue.

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e. Sudan

On June 14, 2015, the United States issued a press statement expressing concern regarding the travel of Sudanese President Omar al-Bashir to South Africa. See <http://www.state.gov/r/pa/prs/ps/2015/06/243793.htm>. The statement notes that:

President Bashir has been indicted by the International Criminal Court (ICC) on charges of crimes against humanity and genocide, and warrants for his arrest remain outstanding. While the United States is not a party to the Rome Statute, which sets out the crimes falling within the jurisdiction of the ICC, we strongly support international efforts to hold accountable those responsible for genocide, crimes against humanity and war crimes.

On June 29, 2015, Ambassador Pressman delivered remarks at a UN Security Council briefing by the ICC Prosecutor on the situation in Darfur. His remarks are excerpted below and available at <http://usun.state.gov/remarks/6749>.

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The public discussion of Darfur in the last weeks and months has centered on three phrases: hibernation, exit strategy, and non-cooperation. But in each case, there is a deeper story to tell. And with respect to all three, the discussion would benefit from a renewed focus on those men, women, and children in Darfur who have suffered greatly from the fighting and the violence. It is especially noteworthy now since the violence and suffering are approaching levels that have not been seen since 2004.

In December, you announced, Madame Prosecutor, that you would hibernate investigative activities in Darfur. We welcome your clarification that this does not mean the end of your work on the situation in Darfur, but we were—and are—alarmed that Sudan’s non-cooperation has pushed you to this point.

And we must highlight, in response to those who see this somehow as a victory over the International Criminal Court, that as you also highlight in your report, arrest warrants remain outstanding, and prosecutors continue to work on the cases to the extent possible. We think it is a serious cause for concern—and an affront to victims of atrocities in Darfur—that the individuals subject to outstanding arrest warrants in the Darfur situation remain at large.

We have also heard considerable discussion of UNAMID’s exit strategy, at a time when we need more focus on conditions inside Darfur, where the situation is deadly and deteriorating. The reported events of the past year in Darfur have been alarming. Aerial bombardments—which you describe as showing a “significant increase” kill children, destroy hospitals and humanitarian facilities. Sexual violence is wielded against women and girls with impunity, including reportedly in Thabit, where an investigation into alleged mass rapes remains incomplete, stymied by Sudan’s systematic denial of independent access to UNAMID personnel. Villages have been burned and communities’ very means of survival are destroyed. Increased fighting between the armed groups and intercommunal violence has driven the displacement of over 573,000 people since the beginning of 2014.

The need for UNAMID, and the need for it to have full and unfettered access to conduct its work, is more acute than ever across all of Darfur, including in light of the Prosecutor’s decision to hibernate her new investigative work. It is important for UNAMID not just to protect civilians and facilitate humanitarian work, but also to continue to document the ongoing violations and abuses. This has been reiterated in the latest African Union Peace and Security Council communique of June 22nd, 2015.

Finally, with regard to the issue of non-cooperation, while members of the international community do not see eye-to-eye on many aspects of the Darfur crisis, we believe that there is abundant common ground among the members of the Council that Member States of the UN have obligations under the UN Charter to accept and carry out the decisions of the Security Council. The Government of Sudan continues to disregard the Council’s decision in Security Council resolution 1593 that it shall cooperate fully with, and provide any necessary assistance to, the Court and the Prosecutor. Surely, we can agree that the Council has an interest in ensuring compliance with its own decisions. We continue to urge the international community to ensure compliance by Sudan with its international obligations under Security Council resolution 1593.

The Council must also continue to focus on the need for accountability in Darfur because it was us—we have sent in UN peacekeepers into harm’s way—and we owe them our support. Attacks on peacekeepers in Darfur have killed citizens of Nigeria, Mali, Senegal, Tanzania, and Rwanda, amongst others. Often lost in the debates over President Bashir is the fact that one of the areas of focus of the International Criminal Court’s investigations has been the attack in 2007 on the brave soldiers who served in the African Union’s peacekeeping mission there. In the absence of any national proceedings in Darfur to investigate and provide accountability for these crimes, we must be able to come together and express support for efforts to prosecute deliberate attacks on peacekeepers, attacks which very much continue to this day, as described in your report. For example, on April 26th of this year, the Government of Sudan denied a flight request for the emergency medical evacuation of an Ethiopian peacekeeper injured while performing his duties in Mujkar in West Darfur. The evacuation flight clearance was denied and the peacekeeper died hours later.

Finally, in light of recent events, I would reiterate that the United States opposes invitations to and facilitation of travel by those subject to outstanding International Criminal Court arrest warrants related to the situation in Darfur.

And we are not alone in stressing the continued need for accountability. Voices from South Africa, Nigeria, and Kenya have been clear and unequivocal. It was a South African organization that approached its own courts to seek the enforcement of the ICC arrest warrant. It was Nigerian activists who discouraged a prolonged stay in that country, and it was a Kenyan court that ruled that the government there must arrest Bashir “should he ever set foot” there. All that said, the discussion of hibernation, exit strategy, and non-cooperation too often loses sight of the men, women, and children who have been suffering from the ongoing conflict and violence in Darfur. It is their plight that makes the need for accountability so acute, and we must not turn our back on them.

The United States will continue to work with this Security Council and other partners in the international community to promote an end to Sudan’s many conflicts and a just and sustainable peace.

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On December 15, 2015, Ambassador Pressman addressed a UN Security Council briefing on Sudan and the International Criminal Court. Ambassador Pressman’s remarks are excerpted below and available at <http://usun.state.gov/remarks/7047>.

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... In 2005 this Council referred the situation in Darfur to the International Criminal Court in the face of brutal attacks on civilians, widespread rape, and the destruction of entire villages.

Ten years later, the people of Darfur continue to suffer. As the Prosecutor has said, it should be—and is—a source of concern that the situation remains dire. But the intractability of the problem is not a reason to accept the situation as it is. We cannot become inured to impunity and to atrocity. And we cannot look away, simply because what has transpired—and is transpiring—is not news. Justice demands more and so too do the victims.

I thank the Prosecutor for her continued efforts on this front, in the face of Sudan's continued non-cooperation, which has systematically frustrated the Court's important work. We continue to call on all states to demand that Sudan fully cooperate with the International Criminal Court. It should not be that President Bashir repeatedly travels across international borders when the Court has issued two warrants for his arrest and the victims of his alleged crimes continue to wait for justice. We should not be complacent, and the United States will continue to urge governments, whether or not they are States Parties to the Rome Statute, not to invite, facilitate, or support travel by those who face arrest warrants for alleged crimes committed in Darfur. The fact that these individuals, including President Bashir, remain at large is an affront to the hundreds of thousands of men, women, and children in Darfur who have suffered immeasurable losses and pain. The United States strongly believes that the Court's arrest warrants in the Darfur situation should be carried out. And we welcome the Prosecutor's affirmation that her office has not abandoned the victims of alleged Rome Statute crimes committed in Darfur.

And it is not just the people of Darfur who deserve justice, but also the men and women who have committed themselves to protect these civilians. Let's remember that one of the cases before the Court involves attacks on African Union peacekeepers in Darfur. And it was this very case that was the one that was the subject of the most recent decision regarding Sudan's non-compliance transmitted to this Security Council. And since 2007, when the United Nations-African Union Mission in Darfur was established, 218 mission personnel have given their lives in fulfillment of its mandate. Too many months bring news of one or more such deaths—or other casualties. Just over the last eight months, UNAMID has seen one person killed in May, one killed and four injured in September, and one killed and one injured in October. This slow pattern is deadly and it is steady and this Council should, at the very least, be united in demanding accountability for violence against peacekeepers who have put themselves in harm's way in service to others.

Today in Darfur the nearly 21,000 person-strong UNAMID mission has, among other tasks, been working tirelessly to restore security conditions for the safe provision of humanitarian assistance, facilitate full humanitarian access throughout Darfur, protect civilians, and promote respect for human rights. The environment in which UNAMID operates is a difficult and a dangerous one. These difficulties are compounded by a lack of full cooperation on the part of the Government of Sudan on issues such as the timely processing of visas for UNAMID personnel, clearance of shipments, including food and specialized military equipment belonging to troop contributing countries destined for the mission, and freedom of movement for UNAMID personnel in fulfillment of UNAMID's mandate. We must demand that the Government of Sudan comply with its obligations under the Status of Forces Agreement with the United Nations and the African Union. And we have a long way to go when food—food for peacekeepers—is used as a tool for leverage.

These are not distinct phenomena. While the Government of Sudan tries to impede UNAMID's work through obstruction and delay it also tries to impede the Court's work by ignoring its obligations under Security Council resolution 1593. And this all in the name of avoiding the international scrutiny that is so needed such as, for instance, with regard to the reports of sexual violence in Thabit, where credible investigative work into alleged mass rapes remains incomplete, stymied by Sudan's systematic denial of access to UNAMID personnel. The stakes are simply too high for the status quo to be acceptable.

Sudan's compliance with this Security Council's resolutions and the work of the Court are not just Sudanese issues. We must not forget that it was this Council that referred the situation in Darfur to the Court more than ten years ago. The need for peace and justice in Darfur is important not just for the region, but well beyond. The Government of Sudan must not be allowed to conclude that it can continue to apply similar tactics to those that prompted this Council to act on Darfur to the Two Areas of Southern Kordofan and the Blue Nile. We must recall that when the Government of Sudan conducts offensives, it has often been civilians who bear the heavy cost.

In closing, to make clear, those who commit heinous acts of violence and brutality in Darfur must be held to account. Those who have flouted the law and this Council must know that justice is patient. We will not be lulled and we will not be distracted, and the United States will continue to work with the Security Council and the international community to seek accountability for the crimes committed in Darfur. We will not forget the victims and the survivors nor will we cease to pursue the justice they so deserve.

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f. Libya

On May 12, 2015, Mark Simonoff, Minister Counselor for Legal Affairs for the U.S. Mission to the UN, delivered remarks at a UN Security Council briefing on Libya. Mr. Simonoff's remarks are excerpted below and available at <http://usun.state.gov/remarks/6458>.

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As we have heard, since the Prosecutor last briefed the Security Council on Libya in November, the conflict has persisted, despite the ongoing UN-facilitated political dialogue, and has contributed to a disintegration of rule of law, paralyzing the current government's efforts to tackle human rights problems. As the United Nations Support Mission in Libya recently stated, "Armed groups across political, tribal, regional and ideological divides have shown disregard for civilian life." The Prosecutor confirmed that this absence of stability and rule of law have significant consequences for the work of the ICC.

Many of the individuals and institutions with the most critical roles to play in exposing and preventing violence against civilians—including journalists, human rights defenders, judges and prosecutors, female activists, and the country's human rights commission—have been singled out for intimidation and brutal violence for simply attempting to provide key services to the Libyan people. Other murders, such as the killing of prominent human rights leader Salwa Bugaighis last June on the day of national elections, have a clear political purpose, even as it has been impossible to identify those responsible.

The ongoing conflict has ravaged Libya's domestic justice institutions, which are essential to protecting civilians and playing a key role in advancing respect for human rights. Escalating violence between Libyan political rivals makes Libya, its citizens and its resources, vulnerable to exploitation by violent extremists. Sexual violence also remains an issue of serious

concern, as survivors struggle to access critical services and those who work to deliver them face intimidation.

All of these abuses highlight the stakes of this conflict, and the urgent need to develop the strong institutions that Libya needs to protect its people. The critical first step towards resolving the current crisis and restoring rule of law and the protection of human rights is the formation of a national unity government through the UN-facilitated political dialogue. There can be no military solution; all parties should cease hostilities and work to create an environment conducive to inclusive dialogue. We fully support the efforts of Special Representative of the Secretary-General Bernardino Leon who will convene the next round of talks shortly, and we urge the parties to seize this opportunity to finalize agreements on the formation of a national unity government and arrangements for a comprehensive ceasefire before the holy month of Ramadan begins.

We call on all Libyan actors to take steps to ensure due process for the detainees. This includes not only releasing any individuals held in unlawful detention, but also planning for the means to transfer detainees to State custody, and rebuilding the judiciary's capacity to bring cases to trial.

We welcome the decision by the UN Human Rights Council in its March session to request that the High Commission dispatch a fact-finding mission to investigate violations and abuses in Libya since the beginning of 2014. We welcome the Prosecutor's continuing calls on the parties to refrain from unlawfully targeting civilians or, more generally, committing atrocity crimes.

With respect to the finding of non-cooperation that the ICC transmitted to this Council, we welcome the continuing cooperation between Libyan authorities and the Prosecutor's office to further implement the Memorandum of Understanding concluded between Libya and the ICC in November 2013 on burden-sharing regarding the investigation and prosecution of former Gaddafi officials. At the same time, we reiterate our support of this Council's recent call for Libyan authorities to fulfill their obligation to cooperate with the ICC, and we encourage the Libyan authorities to engage with the Court and the Council as appropriate to work to overcome implementation obstacles.

We look forward to continuing to work with the other members of the Council, the organs of the ICC, and all others who have a contribution to make in bringing this conflict to an end and restoring the rights of the Libyan people.

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On November 5, 2015, Ambassador Michele J. Sison, U.S. Deputy Representative to the UN, delivered remarks at a Security Council briefing on Libya and the International Criminal Court. Ambassador Sison's remarks are available at <http://usun.state.gov/remarks/6958>. Ambassador Sison said the following about the ongoing proceedings regarding Libya at the ICC:

With respect to the situation before the International Criminal Court, we continue to support the Council's unified call for Libya to fulfill its obligation to cooperate with and provide assistance to the Court and the Prosecutor. In

particular, we note Libya’s obligation to transfer Saif Qadhafi to the ICC, and we urge Libya to refrain from any further proceedings against Qadhafi that would pose an obstacle to his transfer to the Court. We also continue to stress more generally that national proceedings in Libya should be conducted in full compliance with Libya’s international obligations. To achieve national reconciliation, it will be important to ensure the confidence of all Libyan citizens in their government’s commitment to due process and the rule of law, and that those responsible for serious crimes are held accountable.

g. Preliminary Examination into the “Situation in Palestine”

See Chapter 7.B. for a discussion of the U.S. response to the ICC Prosecutor’s announcement of a preliminary examination into the “situation in Palestine.”

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

On October 13, 2015, Ms. Cassandra Q. Butts, Senior Adviser to the U.S. Mission to the UN, delivered remarks at the 70th UN General Assembly on the International Criminal Tribunal for Rwanda (“ICTR”), the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), and the International Residual Mechanism for Criminal Tribunals (“MICT”). The remarks are excerpted below and available at <http://usun.state.gov/remarks/6886>.

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Without the diligence and the hard work of these Tribunals, and their determination to bring justice to the victims of atrocities committed in the former Yugoslavia and Rwanda, many of those responsible for these atrocities would not have been held accountable for their crimes. Because of these Tribunals, the victims of horrific atrocities have received a meaningful measure of justice, and the international community has greatly advanced international peace and security via justice and accountability for atrocities during the past twenty years.

As the ICTR prepares to close in a few short months, the United States would like to extend our deep appreciation to the Tribunal’s many staff, including judges, prosecutors, support staff, investigators, and defense attorneys—who took care over the past decades to be compassionate with victims; uphold the principles of international law; and ensure the legacy of the tribunal. Because of their hard work, the ICTR concluded all trials in 2012 and is close to completing all of its appeals work, with just one appeals judgment in a complex, multi-defendant case to be delivered by the end of the year. Despite facing difficulties in replacing experienced staff, the Tribunal is set for a smooth and efficient transition to the Mechanism as well as to national courts, where proceedings against ICTR indictees who remain at large are set to take place.

We also commend the ICTY for a productive year. Judgments have been issued in two appeals, plus an additional 6 interlocutory appeals, and progress has been made on the four cases remaining at the trial level. We welcome the efforts by the Trial Chambers to expedite judgment in these cases and ensure that they are delivered on time. Our appreciation also goes to the Victim and Witness Section, which has provided services to 206 witnesses that have appeared before the Tribunal and has completed its goal of conducting 300 witness interviews, all while protecting the integrity of the process and human dignity of the witnesses. We also express our deep appreciation and admiration for Judge Theodor Meron, who will shortly complete his term as President of the ICTY, and whose wise leadership has guided the ICTY during the last few years.

International criminal law is one of the greatest vehicles we have for promoting peace and justice throughout the world. As the grim events across the world remind us, from Syria to the Central African Republic, South Sudan to North Korea, the challenge of ending mass atrocities is greater than ever, but bodies such as the ICTY and the ICTR are responsible for providing the necessary justice due to victims who have suffered the greatest harm that can be inflicted on humanity—genocide, war crimes, and crimes against humanity. By building an extraordinary legal edifice of international criminal accountability, the Tribunals have helped lay the groundwork for future generations to prosecute violations of international law more efficiently and with a better understanding of the law.

By this time next year, the ICTR will have successfully completed its mandate and will have transferred its remaining workload to the Mechanism. This marks the end of an era that, combined with the work in the ICTY, thoroughly advanced international law, showed how international ad hoc tribunals could be successful, and revealed what the international community could do on behalf of the victims of atrocities. And so, the United States would like to thank all those who worked with the ICTR to make it such a successful endeavor. May the victims in Rwanda and the former Yugoslavia never be forgotten, and may the lessons learned from the ICTR and the ICTY always be remembered.

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On December 9, 2015, Ambassador Pressman delivered remarks at a UN Security Council debate on the ICTR, the ICTY, and the MICT. Ambassador Pressman's remarks are excerpted below and available at <http://usun.state.gov/remarks/7031>.

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The ICTY, the International Criminal Tribunal for Rwanda, and the Mechanism for International Criminal Tribunals, have played a central role in both advancing justice and developing our understanding of international criminal law and international humanitarian law. They have served as a demonstration that indeed when this Council is united and when we are committed we can ensure that those who perpetrate the worst atrocities can be forced to account for their crimes. Justice is not an afterthought to our work advancing international peace and security, it is the essence of it.

Today, the extraordinary work of colleagues around this table and in capitals near and far has ensured that those accused by the ICTY—all 161 out of 161—were brought to justice. But just as we recognize the success in apprehending the ICTY's fugitives, we must redouble our efforts to ensure that the remaining fugitives of the ICTR, and now the Mechanism, face the same fate.

It is important to name these men—defendants like: Fulgence Kayishema, accused of orchestrating the massacre of thousands; Charles Sikubwabo, accused of instigating massacres at a church; Aloys Ndimbati, a former mayor, accused of being directly involved in the massacres; Augustin Bizimana, the former Defense Minister of the interim Rwandan government, who is alleged to have controlled the nation's armed forces in preparing and planning for the genocide campaign and preparing lists of people to be killed; Charles Ryandikayo, who reportedly participated in the massacre of thousands of men, women and children who congregated in a church, and directed militias and gendarmes to attack the church with guns, grenades, and other weapons; Pheneas Munyarugarama, a former lieutenant colonel in the Rwandan Army, who allegedly helped to direct and take part in the systematic killing of Tutsi refugees fleeing the fighting; Félicien Kabuga, the alleged main financier and backer of the political and militia groups that committed the genocide, he is also accused of transporting the death squads in his company's trucks; and Protais Mpiranya, commander of the Rwandan Presidential Guard, who allegedly directed his soldiers to kill the sitting Rwandan Prime Minister and 10 United Nations peacekeepers guarding her home.

While these men are at large, they should know that they are still at the forefront of our minds—and the Security Council's focus—and there they will remain until each and every one of them stands to answer for their actions. We will not forget them, and must never forget their victims.

It is that commitment that led, just today, to the arrest of Ladislas Ntaganzwa, who has been arrested by the Congolese national authorities, who have indicated they will take the proper steps to transfer him to Rwandan custody. Ntaganzwa, first indicted by the ICTR in 1996, is charged with five counts of genocide and crimes against humanity. He is alleged to have participated in the planning, preparation, and carrying out of the massacre of over 20,000 Tutsis at Cyahinda parish—many of whom had gathered to take refuge from massacres in the surrounding countryside—as well as the massacres of thousands of Tutsis at Gasasa Hill, and killings carried out elsewhere. He is also charged with directly ordering women to be brutally and repeatedly raped. And, today, he is for the first time in two decades, behind bars. And so he should be.

The ICTR has concluded all trials on its docket in 2012, and is expected to issue its last appellate judgment in a few days. As the Tribunal prepares to close at the end of this month, the United States wishes to recognize the monumental legacy of the Tribunal's many staff—including judges, prosecutors, support staff, investigators, and defense attorneys—who took care over the past decades to be compassionate with victims and witnesses; to uphold with integrity the principles of international law; and to ensure that the tribunal advanced justice for victims.

The Tribunal's hard work has also ensured that a smooth and efficient transition to the Mechanism and to national courts, where proceedings against ICTR indictees who remain at large will take place when—and I use that word intentionally—*when* they are captured. The United States is unwavering in its commitment to ensuring that the eight remaining fugitives from the ICTR are apprehended and brought to justice, as Ntaganzwa has been earlier today. To

this end, we continue to offer a reward of up to \$5 million for information leading to the arrest or transfer of these fugitives.

I would also like to commend the ICTY for a productive year. The Tribunal has completed almost all of its cases, with only four cases remaining at the trial level and three cases on appeal. An important appellate decision, as we've discussed, in *Stanišić and Simatović* case is expected to be issued before the end of this month, and progress has continued on all of the remaining cases. We welcome the important efforts by the Trial Chambers to expedite judgments and ensure that they are delivered in a timely manner.

We also again express our deep appreciation and admiration for Judge Meron, who recently completed his term as the President of the ICTY, and whose judicious leadership has guided the ICTY—as well as now the Mechanism—during the last few years. This has included helping to ensure a seamless, in our judgement, transfer of initial functions of both the ICTY and the ICTR to the Mechanism.

Part of justice is, of course, recognizing what has happened, and what has not. Recognizing who bears responsibility for it, and who does not. The work of the ICTR and ICTY has contributed enormously to our ability to grapple with uncomfortable and shocking truths about what humans have done to other humans. And in so doing they have made our world safer. The importance of this work is rendered all the more important when—as we have seen in this Chamber—some continue to resist facts or rewrite history. Twenty years after the genocide in Srebrenica, this Council was painfully unable to adopt one simple resolution recognizing one simple fact—a fact that has been established by the International Criminal Tribunal for the former Yugoslavia and a fact that has been established by the International Court of Justice—that genocide took place in Srebrenica. While that resolution may have been vetoed, the truth—and the judicial findings of the ICTY and ICJ—cannot be. It is a testament to the enduring power and the importance of your work.

In closing, there is perhaps no more fitting day than today—the date newly designated by the General Assembly of the United Nations as the International Day of Commemoration and Dignity of the Victims of the Crime of Genocide and of the Prevention of this Crime—to once again focus on the past, the unfinished work of advancing accountability for the mass atrocities and genocides committed in Rwanda and the former Yugoslavia. But so too must we focus on the future. Even as we recommit ourselves to advancing justice for crimes that have already been committed, so too should we use this moment to reaffirm our commitment to respond to indicators of realized or potential future atrocities on a massive scale, whether in Burundi or Syria or South Sudan or beyond. After all, the ultimate justice for victims is to ensure that they are never victimized, that crimes that we have pledged to allow *never again* do not indeed occur again and again. It is our job to find the tools, the unity, and ultimately the will to act.

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On December 31, 2015, Ambassador Power, acting on behalf of the United States in its capacity as President of the UN Security Council, issued a press statement on the closure of the ICTR. The press statement is excerpted below and available at <http://usun.state.gov/remarks/7084>.

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The members of the Security Council mark the closure on 31 December 2015 of the International Criminal Tribunal for Rwanda (ICTR) established by its resolution 955 (1994) of 8 November 1994.

The members of the Security Council acknowledge the substantial contribution of the ICTR to the process of national reconciliation and the restoration of peace and security, and to the fight against impunity and the development of international criminal justice, especially in relation to the crime of genocide.

The members of the Security Council emphasize that the establishment of the International Residual Mechanism for Criminal Tribunals pursuant to resolution 1966 (2010) was essential to ensure that the closure of the ICTR does not leave the door open to impunity for the remaining fugitives.

The members of the Security Council call upon all States to cooperate with the International Residual Mechanism for Criminal Tribunals and the Government of Rwanda in the arrest and prosecution of the eight remaining ICTR-indicted fugitives, and further call upon States to investigate, arrest, prosecute or extradite, in accordance with applicable international obligations, all other fugitives accused of genocide residing on their territories.

The members of the Security Council reaffirm their strong commitment to justice and the fight against impunity.

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3. Other Tribunals and Bodies

a. Extraordinary African Chambers

The United States expressed support for proceedings against former Chadian president Hissène Habré, brought before the Extraordinary African Chambers of Senegal by the Government of Senegal and the African Union. See July 20, 2015 State Department press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/07/245062.htm>. Habré was charged with torture, war crimes, and crimes against humanity. U.S. Ambassador to Senegal James Zumwalt and Ambassador-at-Large for War Crimes Issues Steven Rapp attended the opening of the trial in Dakar in July. The July 20 press statement said: "This trial is an important step toward justice for the victims of atrocities committed under Habré's rule from 1982 to 1990, and should serve as yet another warning that, no matter their position, perpetrators of atrocities will be held accountable."

b. Special Investigative Task Force ("SITF")

On April 23, 2015, the State Department announced the appointment of David Schwendiman as Lead Prosecutor to the European Union's Special Investigative Task Force ("SITF"). See State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/04/241042.htm>. The SITF was established in

2011 to investigate the allegations of serious crimes contained in a January 2011 Council of Europe report. The State Department announcement includes the following expression of U.S. support for Mr. Schwendiman's appointment and the SITF proceedings:

Mr. Schwendiman is a highly experienced former U.S. federal and state prosecutor, who previously served as an international prosecutor in Bosnia and Herzegovina, 2006-2009. U.S. support for the appointment of Mr. Schwendiman as successor to former SITF Lead Prosecutor Clint Williamson demonstrates the United States' continuing commitment to the SITF proceedings, to the rule of law in Kosovo, cooperation on this matter with our European partners and international justice.

On August 4, 2015, the State Department issued a press statement welcoming the establishment of a Special Court in Kosovo, authorized to issue indictments and try cases based on the evidentiary findings of the SITF. See August 4, 2015 State Department press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/08/245650.htm>. As explained in the press statement, the Government of Kosovo and Kosovo's legislative assembly made the decisions and passed the constitutional amendment and legislation necessary to establish the Special Court.

c. *Hybrid Court for South Sudan*

After the African Union released the report of the commission of inquiry on South Sudan, the U.S. Department of State issued a press statement expressing support for the progress toward establishing the Hybrid Court for South Sudan and eventual peaceful justice and reconciliation. The September 30, 2015 press statement is available at <http://www.state.gov/r/pa/prs/ps/2015/09/247664.htm>. As explained in the press statement, the establishment of the Hybrid Court is provided for in the Agreement on the Resolution of the Conflict in the Republic of South Sudan signed in August 2015. Earlier in 2015, the State Department announced that the United States would provide \$5 million to promote justice and accountability in South Sudan, including the support of such a hybrid court, to hold perpetrators of violence in South Sudan accountable. See May 5, 2015 press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/05/241927.htm>.

d. *Bangladesh International Crimes Tribunal*

On April 11, 2015, the State Department issued a press statement on the death sentence handed down by the Bangladesh International Crimes Tribunal ("ICT") in the

case of Mohammed Kamaruzzaman. The press statement is excerpted below, and available at <http://www.state.gov/r/pa/prs/ps/2015/04/240591.htm>.

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The United States supports bringing to justice those who committed atrocities in the 1971 Bangladesh war of independence. In doing so, the International Crimes Tribunal (ICT) trials must be fair and transparent, and in accordance with international obligations that Bangladesh has agreed to uphold through its ratification of international agreements, including the International Covenant on Civil and Political Rights.

Countries that impose a death penalty must do so with great care.... We greatly respect the decisions of the International Crimes Tribunal and the Appellate Division of the Supreme Court of Bangladesh in Chief Prosecutor vs. Mohammed Kamaruzzaman, and note in particular the judicial rigor applied to this ruling. We believe that broad and enduring support for this process both nationally and internationally can be best achieved by exercising great care and caution before imposing and implementing a sentence of death.

We have seen progress, but still believe that further improvements to the ICT process could ensure these proceedings meet domestic and international obligations. ...

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Cross References

Visa waiver program changes regarding terrorism, **Chapter 1.B.2.**
Agreements on Preventing and Combating Serious Crime, **Chapter 1.B.4.**
Treaty litigation: Abu Khatallah case, **Chapter 4.B.1.**
Child Soldiers in TIP report, **Chapter 6.C.2.b.**
Mandela Rules for treatment of prisoners, **Chapter 6.I.1.**
Protecting human rights while countering terrorism, **Chapter 6.N.1.**
Palestinian efforts to join Rome Statute for ICC, **Chapter 7.B.**
Maritime security and law enforcement, **Chapter 12.A.6.**
Wildlife trafficking, **Chapter 13.C.3.**
Antiquities trafficking, **Chapter 14.B.**
Use of discovery from U.S. in foreign courts, **Chapter 15.C.2.**
Rescission of SST designation of Cuba, **Chapter 16.A.3.b.**
Terrorism sanctions, **Chapter 16.A.6.**
Transnational Crime sanctions, **Chapter 16.A.9.**
Use of force issues related to counterterrorism, **Chapter 18.A.1.**
Nuclear security treaties, **Chapter 19.B.5**
Nuclear terrorism, **Chapter 19.B.5.b.**

CHAPTER 4

Treaty Affairs

A. CONCLUSION, ENTRY INTO FORCE, AND RESERVATIONS

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

On January 6, 2015, the Palestinian Authority tendered instruments of accession by the “State of Palestine” to six multilateral treaties. The United States communicated objections to the purported accessions on the basis that the United States does not believe the “State of Palestine” qualifies as a sovereign state and therefore considers the Palestinian Authority ineligible to become a party to multilateral treaties for which accession is limited to sovereign States. The U.S. objections relating to those treaties to which the United States is a party further indicate that the United States does not consider itself to be in a treaty relationship with the “State of Palestine” under those treaties.

On January 15, 2015, the United States sent objections to the United Nations with respect to: the Convention on the Political Rights of Women, done at New York, March 31, 1953; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958; the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, done at New York, December 14, 1973; 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, done at Geneva, October 10, 1980 and its Protocols I and III thereto; the United Nations Convention Against Transnational Organized Crime, done at New York, November 15, 2000; and the Rome Statute of the International Criminal Court, done at Rome, July 16, 1998. Copies of the objection notes are available at www.state.gov/s/l/cB183.htm.

On December 28, 2015, the U.S. Embassy in The Hague addressed to the Ministry of Foreign Affairs of the Netherlands the U.S. objection to the purported accession of

the “State of Palestine” to the Convention for the Pacific Settlement of International Disputes, done at The Hague, October 18, 1907, for which the Netherlands serves as depositary. Excerpts follow from the December 28 note from the United States to the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The note in its entirety is available at www.state.gov/s/l/cB183.htm.

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The Government of the United States of America does not believe the “State of Palestine” is qualified to accede to the Convention.

Consistent with Article 93 of the Convention, accession to the Convention was initially limited to “powers invited to the Second Peace Conference,” convened in The Hague in 1907. Article 94 of the Convention further provides that, “The conditions on which the powers which have not been invited to the Second Peace Conference may adhere to the present convention shall form the subject of a subsequent agreement between the Contracting Powers.”

At a March 3, 1960 meeting, the Administrative Council of the Permanent Court of Arbitration, having consulted all parties to the two Hague conventions on the pacific settlement of disputes, decided that after March 15, 1960, the Government of the Netherlands would invite members of the United Nations which did not participate in the activities of the Permanent Court of Arbitration to declare (1) whether they considered themselves parties to the 1899 or 1907 Hague conventions on pacific settlement of disputes, or, if this were not the case, (2) whether they were willing to adhere to these conventions or to one of them. On the basis of this subsequent agreement of the parties to the Convention, eligibility to accede to the Convention has been extended to UN member states.

The Government of the United States is not aware of any subsequent decision of the parties to the Convention to extend eligibility to accede to the Convention to entities that are not members of the United Nations. The “State of Palestine” is not a member of the United Nations. Further, the Government of the United States does not believe the “State of Palestine” qualifies as a sovereign State and does not recognize it as such. Because the “State of Palestine” is neither a “power invited to the Second Peace Conference” nor a member of the United Nations, it is not eligible to accede to the Convention.

The Government of the United States believes that the Kingdom of the Netherlands, in its capacity as depositary of the Convention, should not list the “State of Palestine” as a party to the Convention. Accordingly, the Government of the United States affirms that it would not consider the “State of Palestine” to be a party to the Convention and would not consider itself to be in a treaty relationship with the “State of Palestine” under the Convention.

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2. U.S. Reservation to SPAW Protocol

On March 3, 2015, the United States notified Colombia, as depositary for the Protocol Concerning Specially Protected Areas and Wildlife (“SPAW”) to the Convention for the

Protection and Development of the Marine Environment of the Wider Caribbean Region, done at Kingston January 18, 1990, that it was entering a reservation to the listing of ten species in Annex II and Annex III of the Protocol, as decided by the SPAW Conference of Parties on December 9, 2014. The United States entered its reservation pursuant to Article 11.4(d) of the SPAW Protocol. The ten species are identified in the March 3, 2015 letter from Judith G. Garber, Acting Assistant Secretary of State, to Maria Angela Holguín Cuéllar, Minister of Foreign Affairs for the Republic of Colombia, available at www.state.gov/s/l/c8183.htm. The letter explains:

This reservation is based on the concern of the United States that the decision to list these ten species was the outcome of a process that failed to follow the procedures for listing that are set forth in Article 11.4 of the Protocol.

Article 11.4(a)-(c) of the SPAW Protocol details the following procedures for amending the annexes... The Parties elaborated on these procedures in a set of guidelines adopted in 2014.

The ten species in question were added to the annexes without a formal nomination by any Party, without the requisite supporting documentation, and without the [Scientific and Technical Advisory Committee's or] STAC's review. The failure to follow the procedures for listing as set forth in Article 11.4 prevented the United States from conducting a full scientific review and from following the domestic procedures that are a prerequisite for acceptance by the United States of SPAW Protocol listings.

While the SPAW Protocol Parties' decision to list these ten species without following the Protocol's procedures compels the United States to enter this reservation, the United States may consider withdrawing its reservation for the relevant species after it completes its own domestic review process.

3. 2030 Agenda for Sustainable Development

As discussed in Chapter 13, the UN General Assembly achieved consensus on the 2030 Agenda for Sustainable Development in 2015. In delivering the U.S. explanation of position on the 2030 Agenda on September 1, 2015, Tony Pipa, U.S. Special Coordinator for the Post-2015 Development Agenda, clarified the status of the 2030 Agenda under international law. Mr. Pipa's statement is excerpted below and available at <http://usun.state.gov/remarks/6833>. Additional excerpts of Mr. Pipa's September 1 statement and excerpts from others of his statements on the 2030 Agenda appear in Chapter 13.

* * * *

We would like to take the opportunity to make important points of clarification on the text, with the understanding that none of the provisions of this Agenda—including those characterized as having been “agreed”—create or affect rights or obligations under international law, as recognized in paragraph 18. For example, the United States understands that the language regarding the permanent sovereignty of each State over its wealth, natural resources and economic activity must be read consistent with states’ obligations under international human rights treaties to which they are a party, as well as other obligations of States under international law. Similarly, this Agenda does not affect potential constraints under international law or agreements that apply to “policy space,” nor does the Agenda, including and especially paragraph 30, affect the rights of states to take trade measures. Finally, target 6.5 must be read consistent with existing transboundary agreements.

We also highlight our mutual recognition, in paragraph 58, 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 prejudice or serve as precedent for decisions and actions underway in other forums. For example, the United States continues to view the World Trade Organization as the appropriate forum for the negotiation of trade issues, and this Agenda does not represent agreement on WTO Doha Round-related issues, nor does it 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). Similarly, indicators, governance proposals, and language developed through this process have no precedential value for the International Financial Institutions, including the IMF and World Bank Group.

* * * *

4. Joint Comprehensive Plan of Action with Iran

As discussed in more detail in Chapter 19, Iran, the European Union, and the permanent five members of the Security Council plus Germany (“P5+1”) reached the Joint Comprehensive Plan of Action (“JCPOA”) to constrain Iran’s nuclear program in 2015. During the negotiations of the JCPOA, members of the U.S. Congress criticized the Obama administration for pursuing such an arrangement with Iran and proposed legislation that would have mandated a Congressional vote of approval for any deal with Iran. Denis McDonough, Assistant to the President and Chief of Staff, explained in a March 14, 2015 letter to Senator Bob Corker, Chairman of the Senate Committee on Foreign Relations, that non-binding political arrangements such as the JCPOA have been negotiated by the Executive Branch repeatedly and should continue to serve as a useful tool of U.S. foreign policy and diplomacy. Excerpts follow from the letter to Senator Corker, which is available at www.state.gov/s/l/c8183.htm.

* * * *

Thank you for your March 12 letter to the President regarding Iran. I am responding on his behalf. The Administration has welcomed Congress' important role in the United States' policy toward Iran and takes seriously our continued engagement with Congress on this issue. ...

We agree that Congress will have a role to play—and will have to take a vote—as a part of any comprehensive deal that the United States and our international partners reach with Iran. As we have repeatedly said, even if a deal is reached, only Congress can terminate the existing Iran statutory sanctions. We also agree that the existing statutory sanctions should remain in place, even as we suspend some of them using waivers included by Congress in the Iran sanctions statutes that it has enacted, until after Iran has complied with its commitments for an extended period of time, so that we retain the capability to re-impose sanctions if Iran does not comply with a deal, and so that Congress has the benefit of seeing whether Iran lived up to its commitments before taking actions.

However, the legislation you have introduced in the Senate goes well beyond ensuring that Congress has a role to play in any deal with Iran. Instead, the legislation would potentially prevent any deal from succeeding by suggesting that Congress must vote to “approve” any deal, and by removing existing sanctions waiver authorities that have already been granted to the President. We believe that the legislation would likely have a profoundly negative impact on the ongoing negotiations—emboldening Iranian hard-liners, inviting a counter-productive response from the Iranian *majiles*; differentiating the U.S. position from our allies in the negotiations; and once again calling into question our ability to negotiate this deal. This would therefore complicate the possibility of achieving a peaceful resolution to the Iranian nuclear issue if legislative action is taken before a deal is completed. Moreover, if congressional action is perceived as preventing us from reaching a deal, it will create divisions within the international community, putting at risk the very international cooperation that has been essential to our ability to pressure Iran. Put simply, it would potentially make it impossible to secure international cooperation for additional sanctions, while putting at risk the existing multilateral sanctions regime.

In addition to its impact on the negotiations, this legislation would also set a potentially damaging precedent for constraining further Presidents of either party from pursuing the conduct of essential diplomatic negotiations, making it much harder for future Presidents to negotiate similar political commitments. These factors have led the President to determine that he would veto this legislation, were it to pass the Congress.

It is also important to note that, despite the recent commentary that some of your colleagues addressed to the Iranian leadership, non-binding arrangements—like the deal we are negotiating with Iran and the United Kingdom, France, Germany, Russia, and China, and the European Union—are an essential element of international diplomacy and do not require congressional approval. Presidents from both parties have relied on such arrangements to address sensitive national security matters, including nonproliferation. The United States has implemented numerous similar arms-control and nonproliferation arrangements. A few examples include:

- The 2013 U.S.-Russia framework to remove chemical weapons from Syria, which was not legally binding and was not subject to congressional approval, outlined the steps for eliminating Syria's chemical weapons and helped lay the groundwork for a successful multilateral effort to rid the world of these dangerous weapons.
- A variety of multilateral initiatives, including the Proliferation Security Initiative (a multilateral effort involving over 100 countries aimed at stopping the trafficking of

weapons of mass destruction), the Nuclear Suppliers Group Guidelines (a set of principles that govern nuclear trade for peaceful purposes), the Missile Technology Control Regime (a voluntary association of countries that coordinate on export licensing efforts to prevent the proliferation of unmanned delivery systems capable of delivering weapons of mass destruction), the Hague Code of Conduct Against Ballistic Missile Proliferation (a multilateral arrangement involving over 100 countries to curb ballistic missile proliferation worldwide and to further delegitimize such proliferation), the Vienna Declaration on nuclear safety (a 2015 initiative to prevent nuclear accidents and mitigate their radiological consequences), and a series of instruments related to the Organization for Security and Cooperation in Europe (including the Helsinki Final Act and the Vienna Document on Confidence- and Security-Building Measures).

- A variety of bilateral cooperative arrangements—to take a few recent examples, a 2015 exchange of letters with the Government of Vietnam on cooperative threat reduction, a 2014 memorandum of understanding with Canada on nuclear forensics, a memorandum of cooperation between the Nuclear Regulatory Commission and China from 2007, and a 2006 memorandum of understanding between the Department of Energy and China implementing the 123 Agreement.
- Political commitments that were developed at major multilateral nonproliferation conferences also often result in the development of important, non-binding political commitments. For example, the Nuclear Security Summit hosted by the United States in 2010 resulted in the development of a Communique and Work Plan in which participants committed to ensure effective security of all nuclear materials under their control, to consolidate or reduce the use of weapons-usable materials in civilian applications, and to work cooperatively to advance nuclear security.

These types of arrangements are also common in other areas of diplomacy and foreign policy. To cite just a few examples: the Atlantic Charter, negotiated by President Roosevelt in 1941, was a joint declaration with Great Britain addressing objectives for World War II and the post-war international order. The Shanghai Communique, negotiated by President Nixon in 1972, was a joint declaration with China on principles governing bilateral relations and led to the normalization of relations. Other examples, which are too numerous to list in this letter, include bilateral commitments on issues ranging from foreign taxation to intelligence cooperation and defense measures. Additionally, the deal we are negotiating will allow us to retain significant leverage, as Iran would face severe consequences for any violation since we would have the capacity to swiftly re-impose punishing sanctions if Iran does not meet its commitments.

The United Nations Security Council will also have a role to play in any deal with Iran. Just as it is true that only Congress can terminate U.S. statutory sanctions on Iran, only the Security Council can terminate the Security Council's sanctions on Iran. ...

The Administration's request to the Congress is simple: let us complete the negotiations before the Congress acts on legislation. The Administration is committed to sharing the details and technical documents related to a long-term comprehensive deal with Congress. If we successfully negotiate a framework by the end of this month, and a final deal by the end of June, we expect a robust debate in Congress. We will aggressively seek public and congressional support for a deal—if we reach one—because we believe a good deal is far better than the alternatives available to the United States. We understand that Congress will make its own determinations about how to respond, but we do not believe that the country's interests are served by congressional attempts to weigh in prematurely on this sensitive and consequential

ongoing international negotiation aimed at achieving a goal that we all share: using diplomacy to prevent Iran from developing a nuclear weapon.

* * * *

5. U.S.-France Agreement on Compensation for Holocaust-Related Deportation

See discussion in Chapter 8 of the entry into force and the exchange of rectifying notes for the Agreement reached between the United States and France on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are not Covered by French Programs. The Agreement, including the rectifying notes, is available at <http://www.state.gov/documents/organization/251005.pdf>.

6. U.S. Statement on Multilateral Treaties and the Rule of Law

On October 15, 2015, Stephen Townley, Deputy Legal Adviser for the U.S. Mission to the UN, delivered remarks at the 70th UN General Assembly Sixth Committee session on “The Rule of Law at the National and International Levels.” Mr. Townley’s remarks on the role of multilateral treaties in promoting and advancing the rule of law are excerpted below and available at <http://usun.state.gov/remarks/6904>.

* * * *

Multilateral treaties play important roles in promoting and advancing the rule of law across a broad range of subjects. To give just a handful of examples, they promote transparent and predictable rules that advance international trade, investment, communications, and travel; they facilitate cooperation in the investigation and prosecution of serious crimes and help countries work together to prevent and punish conduct that threatens our common interests; and they outline fundamental human rights the protection of which is a critical imperative.

The breadth of the topics addressed by multilateral treaties brings with it, though, a proliferation of *kinds* of multilateral treaties, not only with regard to their substance, but also with regard to the processes by which they are negotiated and concluded.

Yet even before one can speak of such processes, it is also useful to bear in mind that treaties are not the only tools at the international community’s disposal for advancing common interests, including the rule of law. Treaties have the capacity to create binding obligations under international law. But in many areas, non-binding instruments can serve as effective means for promoting international cooperation and shaping state conduct. They may also provide advantages—including greater flexibility and potential for faster implementation—that may make them preferable to treaties in some circumstances. For these reasons, when it comes to addressing the antecedent question of whether, in fact, a treaty is the best solution to a particular problem that international cooperation might be helpful in addressing, we respectfully submit

that it is not enough to suggest that the responsive instrument should be legally binding, as the—in the view of some—‘highest form’ of norm setting. In our view, the question is a much more nuanced one, and, taking into account for instance the difficulty of negotiating and forging support for a treaty, sometimes a different answer may be the appropriate one.

When it comes specifically to treaties, though, we think two particularly important considerations must be born in mind in whatever forum and by whatever means the treaty is to be negotiated: clarity of drafting and a commitment to implementation.

Clarity of drafting is important to ensuring that the broad range of actors who will be responsible for giving effect to treaty obligations understand and are able to apply the treaty’s provisions. These actors may include members of national legislatures who may have to approve a state joining a treaty, national court judges and private parties who may be called upon to interpret and apply the treaty, or may invoke it in litigation, respectively, and members of the media who may have a role in the public’s understanding of the treaty and its requirements.

With these considerations in mind, we strive to pay careful attention during treaty negotiations to the clarity of treaty text. Ensuring that treaty terms are clearly defined and that the nature and scope of treaty obligations is clearly stated can contribute significantly to the treaty’s ultimate effectiveness. In addition, where treaties are concluded in multiple languages, it is important to consider how treaty terms may be translated so that they clearly convey the intended meaning in each language version of the treaty. During treaty negotiations, U.S. negotiators will often make proposals designed to improve the clarity of treaty provisions in these and other respects. Such changes may sometimes appear technical in nature, but they can produce important benefits in helping the treaty to achieve its intended objectives. We would be interested in how others approach issues of clarity in treaty provisions under negotiation.

A second critically important consideration is treaty implementation. Consistent with the principle of “*pacta sunt servanda*” every treaty is binding upon the parties to it and must be performed by them in good faith. States can maximize the effectiveness of treaties, and ensure compliance with their legal obligations, by giving careful consideration to the steps that will be required to implement treaty obligations before becoming party to a treaty. In the United States, we employ a standardized process through which interested agencies across the U.S. government carefully review treaties before the United States joins them. Among the most important issues we consider through this process is how we would expect to implement the treaty’s various obligations. For each treaty we might join, we carefully consider whether any new legislation would be required for us to be able to implement it, and adopt any such legislation before becoming party. We would be interested to hear more about other states’ processes for addressing treaty implementation. It may also be useful to examine further how treaties themselves have addressed the need for effective implementation, and to identify factors and mechanisms that have proven most useful in promoting such implementation.

But it is not just states that can help achieve clarity and ensure implementation. An increasingly salient aspect of the multilateral negotiation process, also identified in this year’s Secretary General’s report, is the involvement of non-governmental actors such as civil society or the private sector in treaty processes. While it must be states that develop international law, we believe non-governmental actors can sometimes play a useful role, both with regard to providing input during the negotiation of an instrument, and after the fact, in helping to hold us collectively to account to our obligations.

And the UN of course, can itself make a critical contribution to both clarity and implementation.

With regard to clarity in treaty drafting, the Secretary General, and the UN Office of Legal Affairs, can serve as a repository of treaty practice. In this role, they may assist negotiators in formulating treaty provisions, drawing on relevant similar provisions in other instruments. This, in turn, may result in a clearer understanding of how an eventually-adopted provision should be understood.

With regard to treaty implementation, this Committee can play an important role in allowing states to exchange information and identify best practices with a view to helping states strengthen their approaches, and their commitment to, treaty implementation.

And, of course, it goes without saying that states need to be able to participate in multilateral treaty regimes once they have been negotiated and once states are in position to implement them. In that regard, we would also like to highlight and commend the Office of Legal Affairs for its work in support of the Secretary General's depositary function, and to encourage an update to the Guide to Depositary Practice, within existing resources. This Guide is an extremely useful resource for states and helps facilitate their effective participation in multilateral treaty regimes.

Finally, in addition to considerations relating to clarity and implementation, we also believe that the effectiveness of treaties can be advanced by greater public understanding and awareness. We recognize and commend OLA's work to expand access to information about treaties, including its excellent UN treaty collection website and its organization of the annual treaty event. From our perspective, we have recently sought to publicize to state and local officials the human rights treaties to which the U.S. is party. And, of course, the Geneva Conventions include an obligation to disseminate them. But it would be useful to understand what the practice in other instruments has been, and how states themselves have gone about making treaties known, not only to other states, but internally. While Article 102 of the Charter concerned the importance of other states understanding the legal regimes in place, today, it is equally key that our citizens understand the obligations their governments are preparing to undertake or have undertaken. We think it would be very useful to discuss further how best to achieve this.

* * * *

7. ILC Work on the Law of Treaties

On November 6, 2015, Assistant Legal Adviser Todd Buchwald delivered remarks on behalf of the United States at the 70th UN General Assembly Sixth Committee on the Report of the International Law Commission ("ILC") on the Work of its 67th Session. He discussed the work of the ILC on multiple subjects, including subsequent agreements and subsequent practice in relation to the interpretation of treaties. Mr. Buchwald's remarks on customary international law and crimes against humanity are excerpted in Chapter 7. Excerpts below relate to subsequent agreements and subsequent practice. His remarks are available in full at <http://usun.state.gov/remarks/6968>.

* * * *

Mr. Chairman, turning to the topic of “Subsequent agreements and subsequent practice in relation to the interpretation of treaties,” we would like to thank the Special Rapporteur, Georg Nolte, and the Commission for their perceptive and insightful work on this topic, including on the important issue of the role of the practice of international organizations in the interpretation of treaties.

We have studied with great interest Draft Conclusion 11 and commentary as provisionally adopted by the Commission this past summer and agree with much of the analysis. In particular, we agree that the rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties apply to the constituent instruments of international organizations, as stated in Draft Conclusion 11, paragraph 1. We also agree that a subsequent agreement or subsequent practice by the parties to a treaty may arise from or be expressed in the practice of an international organization in the application of its constituent instrument, as stated in Draft Conclusion 11, paragraph 2. For example, the parties may instruct the international organization to engage in a certain practice or react to the activities of the international organization in a way that constitutes subsequent practice of the parties.

However, we have doubts about Draft Conclusion 11, paragraph 3, which says the “[p]ractice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.”

The draft commentary explains that the purpose of this provision is to address the role of the practice of an international organization “as such” in the interpretation of the instrument by which it was created. The Commission apparently recognized—correctly in the view of the United States—that the practice of that international organization is not “subsequent practice” for the purposes of the rule reflected in Vienna Convention, Article 31, paragraph 3b, because the international organization itself is not a party to the constituent instrument and its practice as such, therefore, cannot contribute to establishing the agreement of the parties.

However, faced with the inapplicability of paragraph 3b of Article 31, the Commission has proposed instead that consideration of the international organization’s practice is appropriate under paragraph 1 of Article 31 and Article 32 of the Vienna Convention.

Mr. Chairman, paragraph 1 of Article 31 is not relevant in this context. Paragraph 1 reads: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose.” The factors to be considered pursuant to Article 31, paragraph 1—“ordinary meaning,” “context” and “object and purpose”—do not encompass consideration of subsequent practice regardless of whether the actor is a party or the international organization. The Commission provides no evidence from the *travaux préparatoires* of the Vienna Convention, including the Commission’s own work, in support of using Article 31, paragraph 1, in this way. Moreover, none of the very few cases cited by the Commission in support of this proposition appear to rely on Article 31, paragraph 1, of the Vienna Convention.

Article 32 of the Vienna Convention may potentially provide a basis for considering the practice of an international organization with respect to the treaty by which it was created, particularly where the parties to the treaty are aware of and have endorsed the practice. We

believe that circumstances in which the practice of the international organization may fall within Article 32, however, should be explained in the commentary.

Mr. Chairman, before concluding on this topic, we would like to make two final points. First, as the United States has noted previously, we welcome the situating of this topic in the framework of the rules on treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention. For this reason, we have questions about discussions, in the commentary to Draft Conclusion 11, of interpretative rules that may be inconsistent with those reflected in Articles 31 and 32, such as the commentary's reference in paragraph 35 to a "constitutional interpretation".

Finally, we note that the Commission indicated an interest in "examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty." The United States believes it is important that the Commission make clear that the actions or views of treaty bodies consisting of independent experts do not, in and of themselves, constitute a "subsequent agreement" or "subsequent practice" for the purposes of paragraph 3 of Article 31 of the Vienna Convention, as they are neither agreements "between the parties" nor practice that establishes such an agreement. However, the views of treaty bodies composed of independent experts may be relevant indirectly. For example, States parties' reactions to the pronouncements or activities of a treaty body, in some circumstances, may constitute subsequent practice (of those States) for the purposes of Article 31, paragraph 3.

In conclusion, we again thank the Special Rapporteur and the Commission for their valuable work on this important topic and look forward to further refinement of Draft Conclusion 11 and its commentary as this topic progresses.

* * * *

On November 11, 2015, Mark Simonoff, Minister Counselor for the U.S. Mission to the UN, delivered remarks at the 70th UN General Assembly Sixth Committee on the Report of the International Law Commission on the Work of its 67th Session. Excerpts below address the topic of provisional application of treaties. Mr. Simonoff's remarks are also excerpted in Chapter 7 and available in full at <http://usun.state.gov/remarks/6976>.

* * * *

Mr. Chairman, with respect to the topic of "Provisional application of treaties," the United States thanks the Special Rapporteur, Juan Manuel Gómez-Robledo, for his third report, including the extensive work and consideration of States' views that it reflects. We also thank the Drafting Committee for its contributions in the three Draft Guidelines it provisionally adopted in July.

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 agrees to apply a treaty, or certain provisions of it, prior to the treaty's entry into force for that State. Provisional application gives rise to a legally binding obligation to apply to the treaty or treaty provision in question, although this obligation can be more easily terminated than the treaty itself

may be once it has entered into force. We hope to see this clearly stated in the Draft Guidelines as they progress.

We also believe it is important that the Draft Guidelines make clear that a State's legal obligations under provisional application can only arise through the actual agreement of that State and the other States that undertake to apply the treaty provisionally. We are concerned that the Special Rapporteur's Draft Guideline 2 and the language of his report may suggest that such obligations may be incurred through some method other than agreement, contrary to Article 25 of the Vienna Convention on the Law of Treaties.

Mr. Chairman, the United States is impressed by the extensive research reflected in the Special Rapporteur's third report, which contains references to a wide variety of situations. We caution, however, that not every situation in which States apply a treaty prior to its entry into force involves "provisional application" of the treaty within the meaning of the Vienna Convention. We do not believe, for example, that the application by an international organization of its constituent instrument is "provisional application" in the sense of the Vienna Convention, as the international organization is not a prospective party to the treaty. Similarly, a non-legally binding commitment to begin applying a treaty prior to entry into force is not "provisional application" in our view.

With regard to future work of the Special Rapporteur and the ILC on this topic, we support the suggestion that the ILC develop model clauses as a part of this exercise as those clauses may assist practitioners in considering the many options that are available to negotiators and how best to capture those options in their drafts. However, we are not convinced of the merits of studying the legal effects of the termination of provisional application with respect to treaties granting individual rights, as we do not believe that the rules regarding provisional application of treaties differ for such instruments.

* * * *

B. LITIGATION INVOLVING TREATY LAW ISSUES

1. *Abu Khatallah*

On September 9, 2015, the United States filed its brief in opposition to the motion brought by defendant Ahmed Salim Faraj Abu Khatallah asking that the Court divest itself of personal jurisdiction over his prosecution in the United States and send him back to Libya. Abu Khattala is a Libyan national, charged with participating in the September 11-12, 2012, terrorist attack in Benghazi, Libya. As commander of Ubaydah Ibn Al Jarrah ("UBJ"), one of the Libyan-based Islamist extremist groups that carried out the attack, Abu Khatallah allegedly participated by, among other things, coordinating efforts to turn away emergency responders and entering the Mission compound to supervise its plunder during the attack. Abu Khatallah was captured in Benghazi in 2014 after he was charged in a criminal complaint and a warrant was issued for his arrest. Excerpts below are from the section of the U.S. brief responding to Abu Khatallah's contention that his apprehension violated international treaties. The full text of the brief is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The defendant argues that his capture and subsequent detention violated treaties of the United States, specifically the U.N. Charter and the Hague Convention;⁶ thus, the Court should divest itself of personal jurisdiction over the defendant. He is incorrect. The defendant’s argument ... ignores the fact that the treaties he cites are not self-executing and the fact that the treaties do not provide for individual rights.

As a threshold matter, the apprehension of the defendant violated neither the U.N. Charter nor the Hague Convention.⁷ Even if the U.N. Charter or the Hague Convention were construed to prohibit certain apprehensions—and there is nothing in either treaty that specifically prohibits such conduct—they are not self-executing treaties that may be directly enforced in court. Moreover, the defendant fails to identify any provision of these international agreements which creates rights enforceable by a private individual. ...

A. Neither the U.N. Charter nor the Hague Convention may be enforced by this Court to sanction the Executive for the apprehension of the defendant.

In order for the U.N. Charter or the Hague Convention to be directly enforced by this Court, they would have to be “self-executing.” As the Supreme Court explained in *Medellin v. Texas*, 552 U.S. 491, 505 (2008), “a treaty is ‘equivalent to an act of the legislature,’ and hence self-executing, when it ‘operates of itself without the aid of any legislative provision. When, in contrast, ‘[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.’” (Citation omitted.)

The treaty provisions on which the defendant relies are not self-executing. First, numerous courts, including the D.C. Circuit, have examined various provisions of the U.N. Charter and found them not to be self-executing. *See, e.g., Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) ... The provision of the U.N. Charter on which the defendant relies, Article 2, also should be viewed as not self-executing. Section 4 of Article 2 of the U.N. Charter, on which the defendant apparently relies, provides that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” This Section, therefore, relates to one of the most fundamentally political questions that faces a nation—when to use force in its

⁶ There are actually multiple Hague Conventions. The defendant cites (at 11) the Hague Convention on the Law of War: Rights and Duties of Neutral Powers and Persons in Case of War on Land, adopted by the United States on November 27, 1909, which is commonly referred to as the Hague Convention V. For purposes of terminology, all references in this brief to the “Hague Convention” will be to the Hague Convention V, unless otherwise noted.

⁷ Notably, Libya is not even a party or a signatory to the Hague Convention. As provided in Article 20 of that Convention, “[t]he provisions of the present Convention do not apply except between Contracting Powers and then only if all the belligerents are Parties to the Convention.” Therefore, the United States has no treaty obligations to Libya under this Convention and the provisions of this treaty have no bearing on the apprehension of the defendant.

international relations, including when to wage war. It also is phrased extremely broadly, prohibiting the “threat or use of force . . . in any other manner inconsistent with the Purposes of the United Nations.” The defendant has cited nothing, and the government is aware of nothing, to suggest that this rule—or, in fact, any other rule established under Article 2—was intended, standing alone, to be directly enforceable in the courts of the United States. To the contrary, the breadth of the Article’s language suggests that carefully crafted legislation would be required before such a provision, or any part of it, would be directly enforceable in United States courts. As noted in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring): “Articles 1 and 2 of the United Nations Charter are likewise not self-executing.”

...

The same is true of the Hague Convention. While the defendant appears to invoke the Hague Convention V (*see* n.6, *supra*), by analogy, multiple courts have found the Hague Convention IV to be not self-executing. . . . As far as we are aware, no court has ever held that the Hague Convention V is self-executing. This is not surprising in that the Convention provision on which the defendant appears to rely, Article 1, which states only that “the territory of neutral Powers is inviolable,” like Article 2 of the U.N. Charter, reflects only a general principle that could not have reasonably been intended to be enforceable in U.S. courts. *See Al Liby*, 23 F.Supp.3d at 202.

B. Neither the U.N. Charter nor the Hague Convention creates privately enforceable rights.

Treaties do not generally create rights that are privately enforceable in the federal courts:

Even when treaties are self-executing in the sense that they create federal law, the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. Accordingly, a number of the United States courts of appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary.

Medellin, 552 U.S. at 505 n.3; *see, e.g., Gara v. Lappin*, 253 F.3d 918, 924 (7th Cir. 2001) (“[A]s a general rule, international agreements, even those benefitting private parties, do not create private rights enforceable in domestic courts.”). Therefore, the defendant must demonstrate, not only that the U.N. Charter and the Hague Convention are self-executing, but also that the treaties create privately enforceable rights. The defendant has not and cannot do so as the text and negotiating and legislative history of the provisions at issue give no indication that they were intended to create privately enforceable rights.

Defendant appears to rely on the following portion of Article 2 of the U.N. Charter:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Similarly, the defendant's Hague Convention argument appears to rely on Article 1 of the Convention, which also addresses relations among states. These provisions do not speak of individual rights. Moreover, there is no suggestion elsewhere in the treaties that these provisions were intended to be privately enforceable. Indeed, the treaties do not speak of private rights at all:

[Articles 1 and 2 of the United Nations Charter] do not speak in terms of individual rights but impose obligations on nations and on the United Nations itself. They address states, calling on them to fulfill in good faith their obligations as members of the United Nations. Sanctions under article 41, the penultimate bulwark of the Charter, are to be taken by states against other states. Articles 1 and 2, moreover, contain general "purposes and principles," some of which state mere aspirations and none of which can sensibly be thought to have been intended to be judicially enforceable at the behest of individuals. These considerations compel the conclusion that articles 1 and 2 of the U.N. Charter were not intended to give individuals the right to enforce them in municipal courts, particularly since appellants have provided no evidence of a contrary intent.

Tel-Oren, 726 F.2d at 809; *Al Liby*, 23 F.Supp.3d at 202-03 ("Al Liby has not identified any provision of the United Nations Charter . . . that created judicially enforceable private rights.").

Furthermore, the government is aware of nothing, and the defendant points to nothing, in the drafting history of the provisions or in their consideration by the President and Senate to support a conclusion that the provisions were intended to create privately enforceable rights. Thus, the language and negotiating and legislative history of the U.N. Charter and the Hague Convention do not support a construction that confers individual rights that could in turn be judicially enforced by private parties.

The lack of any such individual right, when considered in conjunction with the fact that the treaties in question are not self-executing, further underscores why the Court should deny the defendant's claim for relief pursuant to these agreements. Even if his apprehension constituted a violation of these treaties (and it did not), the defendant has not shown that the Court should even consider that he has an individual right to enforce them.

C. Even if the defendant had a private right to enforce the treaties upon which he relies, divestiture of personal jurisdiction would not be the appropriate remedy.

Even if the treaties upon which the defendant relies were directly enforceable in federal court and he had a private right to enforce them, the remedy he seeks—divestiture of personal jurisdiction—would not be appropriate because these treaties provide for no such remedy. Courts will not, and should not, infer such a drastic remedy as divestiture of personal jurisdiction for violation of an international agreement absent clear language in the text of the treaty providing for such a remedy: "If we were to require suppression for Article 36 violations without some authority in the [Vienna] Convention, we would in effect be supplementing those terms by enlarging the obligations of the United States under the Convention. This is entirely inconsistent with the judicial function." *Sanche-Llamas v. Oregon*, 548 U.S. 331, 346 (2006); *see also United*

States v. Li, 206 F.3d 56, 61 (1st Cir. 2000) (“we will infer neither an entitlement to suppression nor an entitlement to dismissal absent express, or undeniably implied, provision for such remedies in a treaty’s text.”); *Al Liby*, 23 F.Supp.3d at 203 (“even assuming that the international treaties were self-executing and created judicially enforceable private rights, dismissal of the indictment would not be appropriate”). The defendant has cited to no such language, and the government is aware of none.

* * * *

2. *Patookas v. Teck Cominco*

On October 13, 2015, the United States filed a brief as *amicus curiae* in the U.S. Court of Appeals for the Ninth Circuit in a case involving claims of environmental damage brought by the State of Washington and tribal authorities against a Canadian corporation. *Patookas et al. v. Teck Cominco Metals, Ltd.*, No. 15-35228 (9th Cir.). The district court had concluded that hazardous substances from Teck’s smelter stacks were “disposed” under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601 et seq., upon being deposited on the ground at the Upper Columbia River Superfund Site (“UCR Site”). On appeal, the government of Canada intervened as *amicus*, contending that CERCLA should not apply, rather the dispute should be resolved using a “bilateral mechanism” pursuant to the 1935 Convention for the Establishment of a Tribunal to Decide Questions of Indemnity Arising from the Operation of the Smelter at Trail (the “Ottawa Convention”) and related arbitration decisions in 1938 and 1941. The sections of the U.S. *amicus* brief refuting Canada’s argument regarding the Ottawa Convention are excerpted below.

* * * *

B. The Ottawa Convention Does Not Apply to the Cleanup of Trail Smelter Metals at the UCR Site.

If the Court were to address Canada’s argument, the argument lacks merit and misinterprets the Ottawa Convention. Canada identifies *no* applicable international obligation, let alone one that conflicts with CERCLA. At most, Canada has pointed to a binding arbitration that resolved a narrow set of questions, and a wholly discretionary process, based on the mutual consent of the Governments, that the United States potentially could use to raise additional damage claims arising from the Trail Smelter.

1. The United States Is Not Obligated to Bring Any Claims Under the Ottawa Convention, Which Cannot Be Invoked Without U.S. Consent.

The United States often attempts to achieve diplomatic solutions to transborder pollution issues and is committed to fulfilling its international obligations when they apply. Here, Canada cites nothing under the Ottawa Convention mandating that the Governments refer to arbitration

any dispute concerning the Trail Smelter. “The interpretation of a treaty, like the interpretation of a statute, begins with its text.” *Abbott v. Abbott*, 560 U.S. 1, 10 (2010) (internal quotation marks and citation omitted). Furthermore, an Executive Branch interpretation of treaty provisions is entitled to great weight and deference. *See id.* at 15; *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).

The Ottawa Convention referred to the Tribunal four specific questions concerning whether the Trail Smelter caused damage in Washington state after January 1932 and, if so, what indemnity should be paid and what preventative operational measures (or “regime”) should be implemented. Ottawa Conv., Art. III. The convention also prescribed a procedure for litigating those questions and specified that the proceedings would conclude when the Governments “inform the Tribunal they have nothing additional to present.” *Id.*, Arts. IV-XI. It also provided that the Tribunal’s report reflecting its “final decisions” on the questions would be the concluding step. *Id.* Art. XI. The issuance of the 1941 Decision concluded the Tribunal’s work and was the extent of the Governments’ commitment to submit to the outcome of an arbitration process.

Under the Ottawa Convention, the Tribunal would have no competence over further claims relating to the Trail Smelter unless and until the Governments, in their discretion, “may make arrangements” to address “claims for indemnity for damage” arising after the timeframe covered by the 1941 Decision. *Id.* Art. XI (emphasis added); *see also* 1941 Decision at 1980 (same). The United States has not invoked this process, and has no present intention of invoking it here.¹¹

The 1941 Decision reiterates the voluntary and discretionary nature of this process, expressing “the strong *hope* that any investigations which the Governments *may* undertake in the future, in connection with the matters dealt with in this decision, shall be conducted *jointly*.” 1941 Decision at 1981 (emphasis added). Because the 1941 Decision concluded the matters before the Tribunal and the United States has no present intention to consent to refer *any* new matter under Article XI, the Ottawa Convention has no provisions for this Court to apply or enforce.

2. The Ottawa Convention Applies Only to Government Claims, Not the Claims of Individuals.

Canada also errs in asserting that the “Permanent Regime is fully capable of redressing” Plaintiffs’ claims. Canada Br. at 8. The Ottawa Convention is available only to resolve a dispute between the Governments, subject to their agreement to invoke it. “The controversy is between two Governments . . . ; the Tribunal did not sit and is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government.” 1941 Decision at 1038. The Ottawa Convention simply is not available to Plaintiffs to recover response costs in the way that CERCLA is, nor is it a substitute for their CERCLA claims. *See Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) (“The background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’”) (citation omitted).

3. The Regime Mandated by the Tribunal Applied to Claims for Damage from

¹¹ Canada claims that it “aimed” to invoke the Ottawa Convention through two diplomatic notes. Canada Br. at 5, 16. The first, dated March 20, 2015, did not mention the Ottawa Convention, vaguely complained of a “unilateral compulsory measure” against a Canadian company, and urged a non-specific “government to government” process to address Teck’s “air deposition.” The second, dated August 10, 2015, expressly raised the Ottawa Convention, but asserted only that the Ottawa Convention “could effectively address future claims.”

Sulfur Dioxide and Is Not Available Here.

Plaintiffs' CERCLA claims concern natural-resource damages and recovery of their costs to clean up from the UCR Site various metals from the Trail Smelter's stacks. However, the regime of preventative operational measures mandated by the Tribunal (*e.g.*, maximum hourly sulfur dioxide emissions and placement of sulfur dioxide recorders) was devised "to solve the sulphur dioxide problem presented to the Tribunal." 1941 Decision at 1973, 1974 (purpose of the regime is "to prevent the occurrence of sulphur dioxide in the atmosphere in amounts . . . capable of causing damage in the State of Washington"); *see also Pakootas I*, 452 F.3d at 1069 n.5 (noting that Trail Smelter arbitration "concerned sulfur dioxide emissions from the Trail Smelter.").

Canada offers no textual support for the suggestion that the regime applies much more broadly to any "transboundary air emissions passing from the Trail Smelter." Canada Br. at 12. And even Canada acknowledges that the regime would need to undergo "modification," based on consultation between the Governments, to address the effects of Trail Smelter contamination at issue in this case (*i.e.*, metals and other non-sulfur-dioxide pollutants). *See id.* at 23.

Given the weight of evidence of the treaty's meaning outlined above and the deference owed to the Executive Branch's interpretation, there is no basis for the Court to conclude that the Ottawa Convention prevents the consideration of Plaintiffs' CERCLA claims.

* * * *

3. Crawford v. U.S. Department of the Treasury

On August 12, 2015, the United States filed its brief in opposition to plaintiffs' motion for a preliminary injunction in *Crawford et al. v. U.S. Department of the Treasury et al.*, No. 3:15-cv-250-TMR (S.D. Ohio). Plaintiffs sought to enjoin enforcement of the Foreign Account Tax Compliance Act ("FATCA") and related intergovernmental agreements ("IGAs"). *See Digest 2012* at 413 and *Digest 2013* at 358 for background on FATCA. Excerpts below from the U.S. brief (with most footnotes omitted) respond to plaintiffs' arguments regarding the constitutionality of the IGAs. The brief and procedural history of the case are discussed further in Chapter 11.

* * * *

A. The IGAs Are a Valid Exercise of Executive Power (Counts 1 and 2)

1. The IGAs Are Permitted Under the President's Constitutional Authority and By Statute (Count 1)

The Supreme Court has consistently recognized the authority of the President to conclude international agreements without the advice and consent of the Senate where the President's own constitutional authority, authority derived from Congressional action, or some combination of them, provide support for the President's actions. *See Weinberger v. Rossi*, 456 U.S. 25, 30 n.6 (1982) ("[T]he president may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause of the Constitution[.]"); *Dames &*

Moore v. Regan, 453 U.S. 654, 682-83 (1981); *Belmont v. United States*, 301 U.S. 324, 330-31 (1937); *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912).

Presidential authority to make executive agreements is consistent with the president's wide-ranging power over foreign policy-making in general. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414 (2003); *United States v. Curtiss-Wright*, 299 U.S. 304, 320 (1936). These agreements require no further approval by Congress. *Garamendi*, 539 U.S. at 415.

Moreover, "When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress." *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); *Treaties and Other Int'l Agreements: The Role of the U.S. Senate*, 106th Cong., 2d Sess., S. Prt. 106-71 (2001), at 79 ("Congress has enacted statutes providing authority in advance for the President to negotiate with other nations . . . This authority may be explicit, or . . . implied[.]").²¹

Congress's "enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility[.]'" *Dames & Moore*, 453 U.S. at 678 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). That is, some legislation "requires, or fairly implies, the need for an agreement in order to execute the legislation." Restatement (Third) of Foreign Relations Law, § 303, cmt. e. Agreements are allowed "where there is no contrary indication of legislative intent and when there is a history of congressional acquiescence[.]" *Dames & Moore*, 453 U.S. at 678-79; see also *Haig v. Agee*, 453 U.S. 280, 291 (1981) ("[I]n the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval.").

Contrary to Plaintiffs' belief, the executive agreements at issue here in no way "usurp" Congress's power "to lay and collect taxes." Doc. No. 8-1 at 15 (PageID 153). The IGAs do not "impose" any taxes (Complaint ¶ 113); rather, they facilitate the implementation of tax rules previously enacted by Congress. And the IGAs are authorized both expressly and impliedly. Congress passed legislation that "permits the disclosure of a tax return or return information to a competent authority of a foreign government which has an income tax or gift and estate tax convention, or other convention or *bilateral agreement* relating to the exchange of tax information, with the United States[.]" See 26 U.S.C. § 6103(k)(4) (emphasis added). Moreover, § 1471(b)(2) delegates authority to the Secretary to determine that it is not necessary to apply all

²¹ Plaintiffs cite *Sec. Pac. Nat'l Bank v. Gov't & State of Iran*, 513 F. Supp. 864, 872 (C.D. Cal. 1981), arguing that, "executive agreements are only valid insofar as they fall within the President's independent constitutional powers," Doc. No. 8-1 at 11 (PageID 149), but that case allows that the president can also "enter into executive agreements . . . pursuant to valid statutory delegations of authority." They also cite *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953). In that case, the court concluded that an executive agreement conflicted with a statute and invalidated the agreement on that basis. *Id.* at 658. By contrast, the agreements at issue here are authorized by, and in furtherance of the purposes of, applicable statutes. *Capps* has been read by some to imply that an executive agreement can never concern matters that are within Congress's Article I powers. See *id.* at 659; see also Doc. 8-1 at 13 (PageID 151) (citing *Capps* for this proposition). This reading of *Capps*, however, has been criticized for taking "the narrowest view of the President's power" in a way that "does not accord with the practice either before or since If the President cannot make agreements on any matter on which Congress could legislate, there could be no executive agreements with domestic legal consequences." Louis Henkin, *Foreign Affairs and the Constitution* 181 (1972). The Fourth Circuit's implication in this regard was not adopted by the Supreme Court when it affirmed, see 348 U.S. 296 (1955), and more recent Supreme Court authority like *Dames & Moore* is to the contrary.

the § 1471 rules to particular classes of FFIs.

Federal courts have found statutory authorization to enter similar executive agreements. In *Barquero v. United States*, 18 F.3d 1311 (5th Cir. 1994), the Fifth Circuit, reading 26 U.S.C. § 274(h)(6)(C) in conjunction with 26 U.S.C. 927(e)(3), upheld the tax information exchange agreement (TIEA) with Mexico as constitutional because Congress had expressly authorized it. 18 F.3d at 1314-15. The court also found “that these sections of the Code provide ‘implicit approval’ for the President’s actions,” and were “an ‘invitation’ for the President to enter into TIEAs[.]” 18 F.3d at 1315 (citing § 6103(k)(4) and quoting *Dames & Moore*, 453 U.S. at 678); see also *United States v. Walczak*, 783 F.2d 852, 856 (9th Cir. 1986) (“[S]ince Congress contemplated that agreements having to do with civil aviation would be negotiated by the executive branch, the agreement in question is among those which the President may conclude on his own authority.”); *Owner-Operator Indep. Drivers Ass’n*, 724 F.3d. at 237-38 (executive agreement for the reciprocal recognition of commercial drivers’ licenses permitted under the Secretary of Transportation’s statutory authority to prescribe regulations on minimum standards for licenses); *B. Altman & Co.*, 224 U.S. at 601; *Weinberger*, 456 U.S. 25; *Lemnitzer v. Philippine Airlines, Inc.*, 52 F.3d 333 (table), 1995 WL 230404 (9th Cir. 1995); *Harris v. United States*, 768 F.2d 1240 (11th Cir. 1985).

Plaintiffs’ claim that the IGAs are unconstitutional ignores this precedent. Like the executive agreements considered in *Barquero*, *Walczak*, and *Owner-Operator Independent Drivers Association*, the IGAs here are both expressly and impliedly authorized by statute, as explained above with respect to §§ 1471 and 6103(k)(4). Furthermore, “there is a history of congressional acquiescence,” *Dames & Moore*, 453 U.S. at 678, in this area, with successive presidential administrations having entered into at least 30 TIEAs as executive agreements since 1983. Each of these agreements was reported to Congress pursuant to 1 U.S.C. § 112b, and Congress has not acted to contest or express objection to any of them.

2. Bilateral Treaties Authorizing International Sharing of Tax Information Provide Further Support for the IGAs (Count 1)

The four IGAs at issue are also authorized by treaties previously approved by the Senate. The preambles of all four IGAs refer to the Canadian Convention, Czech Convention, Israeli Convention, and Swiss Convention, respectively, as sources of authority. The Canadian, Czech, Israeli, and Swiss IGAs are all with countries with which the United States has preexisting tax treaties that already permit sharing between our governments of information of the kind contemplated under FATCA. These tax treaties provide an independent source of authority for the IGAs.

3. The IGAs Are Consistent with the FATCA Statute (Count 2)

Count 2 of the Complaint is based on the false premise that “the IGAs directly contradict” the FATCA statute and “establish a different regulatory scheme.” Doc. No. 8-1 at 17 (PageID 155); Complaint ¶ 121. Plaintiffs list only two purported inconsistencies between the FATCA statute and IGAs, neither of which is an inconsistency at all. First, they complain that Model 1 IGAs (Canadian, Czech, and Israeli) “exempt covered FFIs from the statutory requirement that FFIs report account information directly to the Treasury Department, 26 U.S.C. § 1471(b)(1)(C), and instead allow such FFIs to report the account information to their national governments[.]” Complaint ¶ 121. This is a reporting requirement that the Secretary has discretionary power to waive, under § 1471(b)(2)(B), when the FFI “is a member of a class of institutions with respect to which the Secretary has determined that the application of this section is not necessary to carry out the purposes of this section.” The Secretary has exercised this

discretion to waive the requirement for all FFIs in Model 1 jurisdictions to report directly to Treasury, because the IGA enables Treasury to obtain the same information from foreign governments, making direct reporting by individual FFIs unnecessary.

Second, plaintiffs express dismay that Model 2 IGAs, like the one with Switzerland, “exempt covered FFIs from the obligation ‘to obtain a valid and effective waiver’ of any foreign law that would prevent the reporting of information required by FATCA, 26 U.S.C. § 1471(b)(1)(F)(i), and instead obligates the foreign government to suspend such laws with respect to FATCA reporting by covered FFIs[.]” Complaint ¶ 121. They bemoan that, “[t]his deprives account holders of their right under the statute to refuse a waiver.” *Id.* However, they are misreading § 1471 and, by extension, what the IGA “exempts” FFIs from having to do. The obligation of the FFI under § 1471(b)(1)(F) is merely “to attempt to obtain a valid and effective waiver” from the account holder of foreign nondisclosure laws or else to close an account if a waiver is not obtained in a reasonable time. § 1471(b)(1)(F)(i), (ii) (emphasis added). That is, refusing a waiver results in the account being closed. This provision is only applicable when foreign law would (but for a waiver) prevent reporting of FATCA-required information. The statute does not create or enshrine foreign legal rights, nor do IGAs. Switzerland suspending laws that permit refusal of a waiver, in keeping with the IGA, is not inconsistent with § 1471. Whatever rights the plaintiffs may have under foreign laws (or may previously have had, pre-IGA), they are not a valid basis for a U.S. court to order relief against the Government.

In any event, as with the first alleged inconsistency, there is also no inconsistency here because § 1471(b)(2) expressly allows the Secretary to deem FFIs to be in compliance with § 1471(b)(1) regardless of whether they ever seek waivers from their clients under § 1471(b)(1)(F). The Secretary has exercised this statutory discretion, and as a result, the “waiver” provision in § 1471(b)(1)(F) does not apply to FFIs in IGA countries.

* * * *

Cross References

Extradition treaty with Dominican Republic, **Chapter 3.A.1.**
Mutual Legal Assistance Treaties (Kazakhstan, Algeria, Jordan), **Chapter 3.A.2.**
Extradition case regarding treaty (Patterson), **Chapter 3.A.3.a.**
State and local governments' role with regard to treaty obligations, **Chapter 6.A.2.**
Palestinian efforts to join ICC Rome Statute, **Chapter 7.B.**
ILC's work on most favored nation clauses, **Chapter 7.D.2.**
Agreement for compensation for holocaust deportation, **Chapter 8.C.**
Transmittal of tax treaties to U.S. Senate, **Chapter 11.E.1.**
FATCA litigation (Crawford), **Chapter 11.2.**
2030 Agenda for Sustainable Development, **Chapter 13.A.2.b.**
Montreal Protocol (ozone depletion), **Chapter 13.A.3.**
Protocol on Heavy Metals, **Chapter 13.A.4.**
Port State Measures Agreement and Antigua Convention, **Chapter 13.B.2.**
Cultural Property MOUs with El Salvador and Nicaragua, **Chapter 14.A.**
Hague Apostille Convention entry into force between U.S. and Liberia, **Chapter 15.A.3.**
Middle East Peace Process, **Chapter 17.A.**
Litigation involving alleged NPT breach, **Chapter 19.B.2.C.**
Entry into force of Convention on Supplemental Compensation, **Chapter 19.B.3.**
Nuclear security treaties, **Chapter 19.B.5.a**

CHAPTER 5

Foreign Relations

A. LITIGATION INVOLVING NATIONAL SECURITY AND FOREIGN POLICY ISSUES

1. *Meshal v. Higgenbotham*

In *Meshal v. Higgenbotham et al.*, the U.S. Court of Appeals for the District of Columbia Circuit decided that the lower court was correct in dismissing a *Bivens* action brought by a U.S. citizen against FBI agents relating to his detention and interrogation in foreign countries in the context of counterterrorism investigations. *Bivens* and its progeny allow the judiciary to imply a cause of action against federal officials for constitutional violations in certain circumstances. For discussion of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), see *Digest 2002* at 233–34. Excerpts below from the opinion of the D.C. Circuit (with footnotes omitted) explain why national security and foreign policy implications led the court to decide not to recognize a *Bivens* action in the *Meshal* case.

* * * *

Meshal downplays the extraterritorial aspect of this case. But the extraterritorial aspect of the case is critical. After all, the presumption against extraterritoriality is a settled principle that the Supreme Court applies even in considering statutory remedies. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010). If Congress had enacted a general tort cause of action applicable to Fourth Amendment violations committed by federal officers (a statutory *Bivens*, so to speak), that cause of action would not apply to torts committed by federal officers abroad absent sufficient indication that Congress meant the statute to apply extraterritorially. *See Morrison*, 130

S. Ct. at 2877. Whether the reason for reticence is concern for our sovereignty or respect for other states, extraterritoriality dictates constraint in the absence of clear congressional action.

D

Once we identify a new context, the decision whether to recognize a *Bivens* remedy requires us to first consider whether an alternative remedial scheme is available and next determine whether special factors counsel hesitation in creating a *Bivens* remedy. *See Wilkie*, 551 U.S. at 550.

Meshal has no alternative remedy; the government does not claim otherwise. *See Meshal*, 47 F. Supp. 3d at 122 (“The parties agree that Mr. Meshal has no alternative remedy for his constitutional claims.”). Meshal, backed by a number of law professors appearing as amici curiae, argues that, when the choice is between damages or nothing, a *Bivens* cause of action must lie. The Supreme Court, however, has repeatedly held that “even in the absence of an alternative” remedy, courts should not afford *Bivens* remedies if “any special factors counsel[] hesitation.” *Wilkie*, 551 U.S. at 550; *see also Schweiker*, 487 U.S. at 421–22. *Cf. Wilson*, 535 F.3d at 708–09. Put differently, even if the choice is between *Bivens* or nothing, if special factors counsel hesitation, the answer may be nothing. *See Andrew Kent, Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1151 (2014) (“Kent”) (noting “the Court’s *Bivens* doctrine has long tolerated denying *Bivens* even when there is no other effective remedy”).

The “special factors” counseling hesitation in recognizing a common law damages action “relate not to the merits of the particular remedy, but to the question of who should decide whether such a remedy should be provided.” *Sanchez- Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.). Where an issue “involves a host of considerations that must be weighed and appraised,” its resolution “is more appropriately for those who write the laws, rather than for those who interpret them.” *Bush*, 462 U.S. at 380.

Two special factors are present in this case. We do not here decide whether either factor alone would preclude a *Bivens* remedy, but both factors together do so. First, special factors counseling hesitation have foreclosed *Bivens* remedies in cases “involving the military, national security, or intelligence.” *Doe*, 683 F.3d at 394. Second, the Supreme Court has never “created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States.” *Vance*, 701 F.3d at 198–99.

Adding to the general reticence of courts in cases involving national security and foreign policy, the government offers a laundry list of sensitive issues they say would be implicated by a *Bivens* remedy. Further litigation, the government claims, would involve judicial inquiry into “national security threats in the Horn of Africa region,” the “substance and sources of intelligence,” and whether procedures relating to counterterrorism investigations abroad “were correctly applied.” Br. for the Appellees at 25–26, *Meshal v. Higgenbotham*, No. 14-5194 (D.C. Cir. Feb. 13, 2015). The government also alleges *Bivens* litigation would require discovery “from both foreign counterterrorism officials, and U.S. intelligence officials up and down the chain of command, as well as evidence concerning the conditions at alleged detention locations in Ethiopia, Somalia, and Kenya.” *Id.* at 26.

Unlike other cases where a plaintiff challenges U.S. policy, the plaintiff here challenges only the individual actions of federal law enforcement officers. At oral argument, the government had few concrete answers concerning what sensitive information might be revealed

if the litigation continued. ...Still, to some extent, the unknown itself is reason for caution in areas involving national security and foreign policy—where courts have traditionally been loath to create a *Bivens* remedy.

At the end of the day, we find the absence of any *Bivens* remedy in similar circumstances highly probative. Matters touching on national security and foreign policy fall within an area of executive action where courts hesitate to intrude absent congressional authorization. See *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988). Thus, if there is to be a judicial inquiry—in the absence of congressional authorization—in a case involving both the national security and foreign policy arenas, “it will raise concerns for the separation of powers in trenching on matters committed to the other branches.” *Christopher v. Harbury*, 536 U.S. 403, 417 (2002). The weight of authority against expanding *Bivens*, combined with our recognition that tort remedies in cases involving matters of national security and foreign policy are generally left to the political branches, counsels serious hesitation before recognizing a common law remedy in these circumstances.

There are also practical factors counseling hesitation. One of the questions raised by Meshal’s suit is the extent to which Defendants orchestrated his detention in foreign countries. The Judiciary is generally not suited to “second-guess” executive officials operating in “foreign justice systems.” *Munaf v. Geren*, 553 U.S. 674, 702 (2008). And judicial intrusion into those decisions could have diplomatic consequences. See Br. for the Appellees at 26 (allowing *Bivens* here would expose “the substance of diplomatic and confidential communications between the United States and foreign governments” regarding joint terrorism investigations). Moreover, allowing *Bivens* suits involving both national security and foreign policy areas will “subject the government to litigation and potential law declaration it will be unable to moot by conceding individual relief, and force courts to make difficult determinations about whether and how constitutional rights should apply abroad and outside the ordinary peacetime contexts for which they were developed.” Kent, at 1173. Even if the expansion of *Bivens* would not impose “the sovereign will of the United States onto conduct by foreign officials in a foreign land,” Dissent at 18, the actual repercussions are impossible to parse. We cannot forecast how the spectre of litigation and the potential discovery of sensitive information might affect the enthusiasm of foreign states to cooperate in joint actions or the government’s ability to keep foreign policy commitments or protect intelligence. Just as the special needs of the military requires courts to leave the creation of damage remedies against military officers to Congress, so the special needs of foreign affairs combined with national security “must stay our hand in the creation of damage remedies.” *Sanchez-Espinoza*, 770 F.2d at 208–09.

* * * *

2. *Sokolow*

On August 10, 2015, the United States submitted a statement of interest in the U.S. District Court for the Southern District of New York in *Sokolow v. Palestine Liberation Organization*, No. 1:04-cv-00397-GBD-RLE. The U.S. statement of interest, which includes a declaration from Deputy Secretary of State Antony J. Blinken, appraises the court of the critical national security and foreign policy interests to be considered by the court in deciding whether to stay execution of a judgment against the Palestinian

Authority without a supersedeas bond. Excerpts follow from the U.S. statement of interest, which is available in full, along with Deputy Secretary Blinken’s declaration, at <http://www.state.gov/s/l/c8183.htm>.

* * * *

...The United States strongly supports the rights of victims of terrorism to vindicate their interests in federal court and to receive just compensation for their injuries. See 18 U.S.C. § 2333 (providing U.S. national victims of international terrorism with a cause of action, with treble damages and attorney fees, against terrorists and those who actively support terrorism that harms Americans abroad); Attached Declaration of Deputy Secretary of State Antony J. Blinken ¶¶ 3-6, 12 (Aug. 10, 2015); see also, e.g., *Brabson v. The Friendship House of West. New York, Inc.*, 2000 WL 1335745, at *2 (W.D.N.Y. Sept. 6, 2000); *Harris v. Butler*, 961 F. Supp. 61, 63 (S.D.N.Y. 1997). At the same time, the declaration notes that the United States has significant concerns about the harms that could arise if the Court were to impose a bond that severely compromised the Palestinian Authority’s (“PA”) ability to operate as a governmental authority. See Attached Declaration of Deputy Secretary of State Antony J. Blinken ¶¶ 7-11; see, e.g., *Morgan Guar.*, 702 F. Supp. at 66; *Teachers Ins. & Annuity Ass’n v. Ormesa Geothermal*, 1991 WL 254573, at *4 (S.D.N.Y. Nov. 21, 1991).

The United States respectfully urges the Court to take into account these factors as it considers the evidence regarding the PA’s financial situation. The Court and the parties made clear at the July 28, 2015 hearing that they are aware of the issues regarding the PA’s financial stability, and the need to have some mechanism for plaintiffs to secure payment if the Court’s judgment is affirmed.

The United States does not herein express a view on the ultimate merits of defendants’ Rule 62 motion (or any other issue in the case). The United States files this Statement of Interest solely to inform the Court of its interests as the Court considers where the public interest lies in ruling on defendants’ Rule 62 motion.

* * * *

B. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Statute (“ATS”), also referred to as the Alien Tort Claims Act (“ATCA”), was enacted as part of the First Judiciary Act in 1789 and is now codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts “shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.” In 2004 the Supreme Court held that the ATS is “in terms only jurisdictional” but that, in enacting the ATS in 1789, Congress intended to “enable[] federal courts to hear claims in a very limited category defined by the law of nations and

recognized at common law.” *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens.

The Torture Victim Protection Act (“TVPA”), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against “[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation” for individuals, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

The following entries discuss 2015 developments in a selection of cases brought under the ATS and the TVPA in which the United States participated.

2. Extraterritorial Reach of ATS post- *Kiobel*

In 2013, the U.S. Supreme Court dismissed ATS claims in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). For further background on the case, see *Digest 2013* at 111-17 and *Digest 2011* at 129-36. The majority of the Court reasoned that the principles underlying the presumption against extraterritoriality apply to claims under the ATS, and that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”

In 2015, the U.S. Court of Appeals for the Second Circuit in *Balintulo et al. v. Ford Motor Co., and IBM Corp.*, 796 F.3d 160, affirmed the district court’s 2014 dismissal of all claims against the remaining corporate defendants for allegedly aiding and abetting the apartheid regime in South Africa. As discussed in *Digest 2014* at 147-49, the district court had been directed to reconsider the case in light of the Supreme Court’s decision in *Kiobel*. The United States had submitted a statement of interest, as well as multiple *amicus* briefs, at earlier stages in the long-running litigation. See *Digest 2009* at 140-44; *Digest 2008* at 236-38; and *Digest 2005* at 400-11. For further background on the case, see *Digest 2007* at 226-27 and *Digest 2004* at 354-61. Excerpts follow (with footnotes omitted) from the 2015 opinion of the Second Circuit Court of Appeals.

* * * *

Turning to the complaints in the instant case, plaintiffs assert that the following conduct by defendant Ford is sufficient to displace the ATS’s presumption against extraterritoriality: (1) Ford provided specialized vehicles to the South African security forces that enabled these forces to violently suppress opposition to apartheid; and (2) Ford was responsible for aiding and abetting the suppression of its own workforce in South Africa.

As for IBM, plaintiffs allege that (1) IBM employees trained employees of the South African government on how to use their hardware and software to create identity documents—“the very means by which black South Africans were deprived of their South African nationality”; (2) IBM bid on contracts in South Africa with unlawful purposes such as

denationalizing black South Africans; and (3) IBM designed specific technologies that were essential for racial separation under apartheid and the denationalization of black South Africans.

In *Balintulo I*, we reasoned that the Companies' alleged domestic conduct lacked a clear nexus to the human rights abuses occurring in South Africa. Here too, plaintiffs' amended pleadings do not establish federal jurisdiction under the ATS because they do not plausibly allege that the Companies themselves engaged in any "relevant conduct" within the United States to overcome the presumption against extraterritorial application of the ATS.

1. Allegations Against Ford

Beginning with the allegations against Ford, plaintiffs only allege "relevant conduct" that occurred in South Africa... It was Ford's subsidiary in South Africa, not Ford, that is alleged to have assembled and sold the specialized vehicles to South Africa's government, with parts shipped principally from Canada and the United Kingdom—not from the United States. Similarly, it was Ford's South African subsidiary, not Ford, that allegedly provided information to the apartheid government about anti-apartheid activists in South Africa. Although plaintiffs repeatedly allege—no less than six times in their proposed amended complaint—that Ford controlled their South African subsidiary, we have previously rejected a vicarious liability theory based on allegations materially identical to those asserted here.

Plaintiffs contend that their amended pleadings demonstrate that the Companies controlled their South African subsidiaries from the United States such that they could be found directly—and not just vicariously—liable for their subsidiaries' conduct under the ATS. But holding Ford to be directly responsible for the actions of its South African subsidiary, as plaintiffs would have us do, would ignore well-settled principles of corporate law, which treat parent corporations and their subsidiaries as legally distinct entities. While courts occasionally "pierce the corporate veil" and ignore a subsidiary's separate legal status, they will do so only in extraordinary circumstances, such as where the corporate parent excessively dominates its "subsidiary in such a way as to make it a 'mere instrumentality' of the parent."

Here, plaintiffs present no plausible allegations—indeed, they present no allegations—that would form any basis for us to "pierce [Ford's] corporate veil." The complaints do not suggest that Ford's control over its subsidiaries differed from that of most companies headquartered in the United States with subsidiaries abroad. Allegations of general corporate supervision are insufficient to rebut the presumption against territoriality and establish aiding and abetting liability under the ATS.

2. Allegations Against IBM

Plaintiffs' first allegation against IBM also fails because the "relevant conduct" all occurred within South Africa... Just as in the case of Ford, it is IBM's South African subsidiary—not IBM—that is alleged to have trained South African government employees to use IBM hardware and software to create identity materials. These allegations cannot rebut the presumption against extraterritoriality as they do not sufficiently "tie[] the relevant human rights violations to actions taken within the United States."

Plaintiffs' second allegation against IBM—that the company bid on contracts meant to further the denationalization of South African blacks—falls short of alleging a violation of the law of nations for a simple reason: IBM did not win the contract for the only bid specifically alleged to have been made by IBM, rather than IBM's South African subsidiary. Indeed, even according to plaintiffs, another company, ICL, won the passbooks contract over IBM. It is simply not a violation of the law of nations to bid on, and lose, a contract that arguably would help a sovereign government perpetrate an asserted violation of the law of nations.

Plaintiffs final allegation against IBM, on the other hand, appears to “touch and concern” the United States with sufficient force to displace the presumption against extraterritoriality. Their proposed amended complaint reads, in relevant part, as follows:

In the United States, IBM developed both the hardware and the software—both a machine and a program—to create the Bophuthatswana ID. Once IBM had developed the system, it was transferred to the Bophuthatswana government for implementation.

Identity documents, like those allegedly created by IBM and transferred to the Bophuthatswana government, were an essential component of the system of racial separation in South Africa. And so, designing particular technologies in the United States that would facilitate South African racial separation would appear to be both “specific and domestic” conduct that would satisfy the first of the two steps of our jurisdictional analysis. Accordingly, if this allegation is able to also satisfy the second prong of our extraterritoriality inquiry—that is, if such conduct aided and abetted a violation of the law of nations—the presumption against extraterritoriality would be displaced and we would be able to establish jurisdiction for this particular claim under the ATS.

Upon an initial review of the “relevant conduct” in the complaint, however, we conclude that plaintiffs’ claim against IBM does not meet the *mens rea* requirement for aiding and abetting liability established by our Court. While the complaint must “support [] an inference that [IBM] acted with the ‘purpose’ to advance [South Africa’s] human rights abuses,” it plausibly alleges, at most, that the company acted with knowledge that its acts might facilitate the South African government’s apartheid policies. But, as we noted earlier, mere knowledge without proof of purpose is insufficient to make out the proper *mens rea* for aiding and abetting liability.

Moreover, where the language in the complaint seems to suggest that IBM acted purposefully, “it does so in conclusory terms and fails to establish even a baseline degree of plausibility of plaintiffs’ claims.” A complaint will not “suffice if it tenders naked assertions devoid of further factual enhancement.” Indeed, plaintiffs do not—and cannot—plausibly allege that by developing hardware and software to collect innocuous population data, IBM’s purpose was to denationalize black South Africans and further the aims of a brutal regime. This absence of a connection between IBM’s “relevant conduct” and the alleged human rights abuses of the South African government means that plaintiffs, even if allowed to amend their complaint, will be unable to state a valid ATS claim against IBM.

Accordingly, because plaintiffs fail plausibly to plead that any U.S.-based conduct on the part of either Ford or IBM aided and abetted South Africa’s asserted violations of the law of nations, their claims cannot form the basis of our jurisdiction under the ATS. We therefore affirm the District Court’s denial of plaintiffs’ motion for leave to file an amended complaint because the proposed amendments are futile as a matter of law.

* * * *

C. ACT OF STATE, POLITICAL QUESTION, AND PREEMPTION DOCTRINES

1. Political Question: Lawsuits Seeking Evacuation From Yemen

As discussed in Chapter 2, U.S. citizens filed two lawsuits in 2015 seeking a formal U.S. government evacuation of private U.S. citizens from Yemen. In the first of these cases to be decided by a court, the claims were dismissed based on the political question doctrine. *Sadi v. Obama*, No. 15-11314 (E.D. Mich. 2015). Excerpts follow from the U.S. brief in support of the motion to dismiss. The second case, *Mommaraz v. Obama*, was pending in the D.C. District Court at the end of 2015.

* * * *

Plaintiffs' claims should be dismissed because adjudicating them would require the Court to rule on nonjusticiable political questions that are outside the unique competencies of the judiciary. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The doctrine arises from two key constitutional principles of our system of government: the separation of powers among the three coordinate branches and the inherent limits of judicial competence. See, e.g., *Baker v. Carr*, 369 U.S. 186, 210-11 (1962); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111-12 (1948). "[N]o justiciable 'controversy' exists when parties seek adjudication of a political question." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007).

The Supreme Court has set forth the factors a court is to consider in determining whether a particular claim raises nonjusticiable political questions:

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 respect due coordinate branches of government; *or* [5] an unusual need for unquestioning adherence to a political decision already made; *or* [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217 (emphasis added). The existence of any one of these factors indicates the existence of a political question. See *id.*; *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) ("To find a political question, we need only conclude that one [of these] factor[s] is present, not all.").

Plaintiffs' claims—which ask the Court to review the Executive Branch's current posture on the evacuation of U.S. citizens in Yemen, and order the President, the Department of State,

and the Department of Defense to evacuate these individuals—provide a quintessential example of a nonjusticiable political question, and implicate several of the *Baker* factors, in particular the first three. As one court noted:

We have consistently held, however, that courts 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 this case, plaintiffs question the wisdom of the Executive Branch’s current stance on the evacuation of private U.S. citizens from Yemen, and in the process ask the Court to assess the wisdom of this foreign policy and national security judgment. This Court is not a proper forum for such claims.

With respect to the first *Baker* factor, under the Constitution, the conduct of American diplomatic and foreign affairs is entrusted to the political branches of the federal government. See, e.g., *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention”); *Chicago & S. Air Lines, Inc.* 333 U.S. 103 at 111; *United States v. Pink*, 315 U.S. 203, 222-23 (1942). As the Supreme Court has observed:

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.

First Nat’l City Bank v. Banco Nacional De Cuba, 406 U.S. 759, 766 (1972), quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). Judicial refusal to review the kind of foreign policy judgments at issue here shows proper deference to the prerogatives committed to the political branches, as well as the practical limitations on the role of the judiciary. *Chicago & S. Airlines, Inc.*, 333 U.S. at 111.

To undertake the review sought by plaintiffs here would entangle the Court in the very type of diplomatic and military judgments uniformly committed to the political branches. Such review would require the Court to make determinations regarding the appropriateness of the Government’s policy judgments in response to the ongoing military activities in Yemen.

In particular, the relief plaintiffs seek would implicate the potential use of U.S. military resources.

It is difficult to think of an area less suited for judicial action than . . . the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.

Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C. Cir. 1967) (affirming dismissal where plaintiff sought to enjoin Secretaries of Defense and Army from sending him to Vietnam) (citing cases); see also *Holtzman v. Schlesinger*, 484 F.2d 1307, 1311-12 (2d Cir. 1973) (refusing to adjudicate the legality of military decisions concerning Cambodia). It is the Executive Branch’s prerogative

to decide what and whether military and other resources should be allocated to evacuate private U.S. citizens remaining in Yemen.

Nor can there be any question that the issue before the Court involves foreign policy and the control of military forces. For example, Executive Order 12656, as amended by Executive Order 13074, assigns responsibilities to various Executive Branch Departments with respect to “national security emergencies.” See Ex. 1. The Executive Order expressly notes that the Secretary of State’s responsibilities with respect to protecting or evacuating U.S. citizens abroad are “includ[ed]” as part of his “responsibilities in the conduct of the foreign relations of the United States during national emergencies.” *Id.*, §1301(2). And section 501(16)’s allocation of lead responsibility to the Secretary of Defense clearly implicates the control of the military forces, delegating lead responsibility to the Secretary of Defense for “the deployment and use of military forces . . . in support of their evacuation from threatened areas overseas.” *Id.* § 501(16) (added by E.O. 13074). In addition, the statute authorizing the Secretary of State to expend appropriated funds for evacuation requires that such expenditure “serve to further the realization of foreign policy objectives.” 22 U.S.C. § 2671(b)(1)(A). There can be little doubt, therefore, that both military and foreign policy judgments are at issue in any decision to evacuate U.S. citizens from Yemen at this time, and these judgments are committed to the Executive Branch.

With respect to the second *Baker* factor, there simply are no judicially manageable standards by which the Court could assess whether the current situation in Yemen requires the evacuation of U.S. citizens there:

The conclusion that the strategic choices directing the nation’s foreign affairs are constitutionally committed to the political branches reflects the institutional limitations of the judiciary and the lack of manageable standards to channel any judicial inquiry into these matters.

El-Shifa, 607 F.3d at 843. Nor are there any standards by which the Court may review whether an evacuation decision—once it has finally been made—is appropriate. The Secretary of State bears responsibility for the development and implementation of programs to provide for the evacuation of U.S. citizens “when their lives are endangered,” as well as the expenditure of funds once a decision to evacuate has been made, see 22 U.S.C. §§ 4802(b), 2671(b)(2)(A), but there are no statutory or regulatory provisions by which a Court may determine when evacuation is appropriate and required. In fact, the MOA between the DOS and DoD notes the discretionary balancing that must occur: “successful evacuation operations must take into account risks for evacuees and U.S. forces.” MOA, App. 1. This is a balance uniquely within the province of the DOS and DoD.

By the same token, the third *Baker* factor—the impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion—also supports the defendants in this case. In order to find in plaintiffs’ favor, the Court must second-guess the current foreign policy determination of the defendants, and order that an evacuation occur. Such a decision should remain solely within the purview of the Executive Branch.

* * * *

On June 8, 2015, the district court issued its opinion, dismissing plaintiffs' claims first and foremost on the basis that they raise nonjusticiable political questions. Excerpts follow from the court's opinion. *Sadi v. Obama*, No. 15-11314 (E.D. Mich. 2015).

* * * *

Justiciability is a jurisdictional issue. “[J]usticiability doctrines determine which matters federal courts can hear and decide and which must be dismissed.” Erwin Chemerinsky, *Federal Jurisdiction* 42 (6th ed. 2012). “Justiciability is an analytical approach that has been developed to identify appropriate occasions for judicial action, both as a matter of defining the limits of the judicial power created by Article III of the Constitution, and as a matter of justifying refusals to exercise the power even in cases within the reach of Article III.” *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1146 (6th Cir. 1975) (internal quotation marks and citation omitted). To denote something as “nonjusticiable” is to say that it is “inappropriate[] . . . subject matter for judicial consideration.” *Baker v. Carr*, 369 U.S. 186, 200 (1962) (alterations in original).

Issues of justiciability include “the prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine.” *Id.* These doctrines support the conservation of judicial resources, maintain the separation of powers among the three branches of our government, “improve judicial decision making by providing the federal courts with concrete controversies best suited for judicial resolution,” and “promote fairness, especially to individuals who are not litigants before the court.” Chemerinsky, *supra* at 43–44.

As mentioned, the political question doctrine falls within the purview of justiciability analysis. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 44 (D.D.C. 2010). “The nonjusticiability of a political question is primarily a function of the separation of powers.” *Baker*, 369 U.S. at 210. “The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” *Japan Whaling Ass’n v. Amer. Cetacean Soc.*, 478 U.S. 221, 230 (1976). “The Judiciary is particularly ill suited to make such decisions, as ‘courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.’” *Id.* (quoting *U.S. ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981)).

“The precise contours of the political question doctrine remain murky and unsettled.” *Al Aulaqi*, 727 F. Supp. 2d at 44 (internal citation and quotation marks omitted). Nevertheless, *Baker v. Carr*, 369 U.S. 186 (1962) is the oft-quoted, authoritative United States Supreme Court case concerning the political question doctrine. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 Duke L.J. 1457, 1458 (2005) (“The political question doctrine . . . has been most ambitiously, and authoritatively, defined by the Supreme Court in *Baker v. Carr* . . .”); see also Wright & Miller, *Fed. Prac. & Proc.* § 3534 (3d ed. 2008) (“By far the closest approach to authoritative delineation of the factors separating judicial from political power is found in the classic legislative apportionment opinion in *Baker v. Carr*.”).

In [*Baker v. Carr*], the Supreme Court identified six factors to distinguish a political question that is nonjusticiable: . . . *Biton v. Palestinian Interim Self-Gov’t Auth.*, 412 F. Supp. 2d 1, 6 (D.D.C. 2005) (quoting *Baker*, 369 U.S. at 217). “The factors are probably listed in descending order of both importance and certainty.” *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (citations

and quotations omitted). “[I]n order for a case to be non-justiciable, the court ‘need only conclude that one factor is present, not all.’” *Al-Aulaqi*, 727 F. Supp. 2d at 44 (quoting *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005)). Application of the political question doctrine “must be made on a ‘case-by-case’ basis.” *Schroder v. Bush*, 263 F.3d 1169, 1174 (10th Cir. 2001) (quoting *Baker*, 369 U.S. at 211). “Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question’s presence.” *Baker*, 369 U.S. at 217.

Regarding the second *Baker* factor—“lack of judicially discoverable and manageable standards for resolving” the issue(s)—Defendants argue that “there simply are no judicially manageable standards by which the Court could assess whether the current situation in Yemen requires the evacuation of U.S. citizens there” (Defes.’ Mo. at 10). Defendants maintain that “there are no statutory or regulatory provisions by which a Court may determine when evacuation is appropriate and required.” (*Id.*).

Defendants’ position is well-taken. This Court finds that Plaintiffs have not cited to any judicially discoverable and manageable standards that this Court can rely on to determine if, when, and under what circumstances the United States is obligated to evacuate its citizens from dangerous areas overseas.

Plaintiffs point out that, by statute, Congress has directed the Secretary of State to “develop and implement policies and programs to provide for the safe and efficient evacuation of . . . private United States citizens when their lives are endangered.” 22 U.S.C. § 4802. Plaintiffs interpret 22 U.S.C. § 4802 as imposing upon the Executive branch a duty to conduct evacuation operations when U.S. citizens’ lives are endangered. But this statute does not unequivocally impose any such duty upon the Executive branch. Rather, § 4802 requires the Secretary of State to “develop and implement” certain evacuation-related “policies and programs,” while leaving the content of those policies and programs to the Secretary of State’s discretion.

More to the point, § 4802 provides absolutely no standards by which this Court could determine whether U.S. citizens’ lives are endangered, whether their evacuation would be “safe and efficient,” or by what means evacuation should be executed. Again, § 4802 appears to afford significant discretion to the Secretary of State to make those value determinations. The Court finds that 22 U.S.C. § 4802 does not set forth judicially manageable standards by which Plaintiffs’ claims may be resolved.

Executive Order 12656 provides no further guidance. It simply describes the responsibilities of the Departments of State and Defense in the event of a national security emergency, which may include “protection or evacuation of United States citizens and nationals abroad” Exec. Order 12656, 53 FR 47491. Even still, Executive Order 12656 makes clear that the Secretary of State must carry out its responsibilities “under the direction of the President” Exec. Order 12656, 53 FR at 47503–04 (emphasis added). Executive Order 12656 does not require the Secretary of State to independently initiate any evacuation measures, and it certainly does not set forth standards for determining whether evacuation is warranted or feasible.

Nor does the MOA improve Plaintiffs’ position. It sets forth the policies of the Departments of State and Defense, and describes their respective responsibilities in the event that an evacuation is ordered. However, the MOA does not provide the standards by which the agencies, or this Court, may determine whether evacuation is “necessary and feasible.” (MOA at ¶ A).

The Court concludes that Plaintiffs have not cited to any “judicially discoverable and manageable standards” by which to adjudicate the issues in this case. See *Baker*, 369 U.S. at 217.

As Defendants aptly pointed out at the hearing, the situation in Yemen is fluid, volatile, and dangerous. Neither Plaintiffs nor this Court have the wherewithal to discover what preparations are necessary before a large-scale evacuation can occur, what the conditions in Yemen are or will be at any given time, or what dangers may be posed to individuals involved in the evacuation effort. Even if all of these factors could be understood to some degree of certainty, the Court still lacks the resources to determine whether evacuation is a prudent measure. These fact based judgments have been committed to the discretion of the Executive branch, to be made on a case-by-case basis.

Accordingly, based on the characteristics “[p]rominent on the surface of” this case, *Baker*, 369 U.S. at 217, the Court concludes that this case presents nonjusticiable political questions.

Therefore, the Court shall GRANT Defendants’ Motion to Dismiss.

* * * *

2. *Marshall Islands v. United States*

See Chapter 19 for discussion of the court opinion dismissing claims on the grounds that the Marshall Islands lacked standing to sue for purported treaty breach and that the case presented a nonjusticiable political question.

3. *Lin v. United States*

The United States filed two briefs in support of dismissal of a complaint brought by residents of Taiwan alleging they were unlawfully denied their Japanese nationality at the conclusion of World War II when the Republic of China issued nationality decrees while allegedly “acting as an agent of the United States.” *Lin v. United States*, No. 1:15-CV-295-CKK (D.D.C.). For a discussion of the previous case brought by the same plaintiffs seeking recognition as U.S. nationals, which was dismissed on the basis that the challenge presented a nonjusticiable political question, see *Digest 2008* at 1, 443-47; *Digest 2009* at 300-03. The U.S. briefs assert several bases for dismissal: failure to identify a cause of action; the statute of limitations; lack of standing; and the political question doctrine. Excerpts follow from the political question discussion in the U.S. opening brief in support of its motion to dismiss, filed July 15, 2015. The full brief is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

This case also should be dismissed because it presents a non-justiciable political question. “The political question doctrine is one aspect of ‘the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the ‘case or controversy’ requirement’

of the Article III of the Constitution.” *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974)). The doctrine is “primarily a function of the separation of powers,” *id.* (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962)) (quotation marks omitted), and “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution” to the legislative and executive branches. *Wilson v. Libby*, 535 F.3d 697, 704 (D.C. Cir. 2008) (internal quotation marks omitted).

In *Baker v. Carr*, the Supreme Court identified six factors that may render a case non-justiciable under the political question doctrine... 369 U.S. at 217; see also *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (“[A] controversy “involves a political question . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’ ”) (citing *Nixon v. United States*, 506 U.S. 224, 228 (1993)). The presence of any one of the six *Baker* factors can be sufficient for dismissal under the political question doctrine. *Bancoult*, 445 F.3d at 432 (citing *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005)).

Here, Plaintiffs ask this Court to address broad questions about the nationality of Taiwan residents under international instruments and to issue declarations regarding their nationality. . . . Under settled D.C. Circuit precedent, however, the nationality of Taiwan residents presents a quintessential non-justiciable political question.

In *Lin v. United States*, 539 F. Supp. 2d 173 (D.D.C. 2008), Plaintiff Roger C.S. Lin and a group of Taiwan residents sought a judicial declaration that they are nationals of the United States with all related rights and privileges, including the right to obtain U.S. passports. *Id.* at 176-77. Judge Collyer granted the government’s motion to dismiss, concluding that plaintiffs’ challenge involved “a quintessential political question” that required “trespass into the extremely delicate relationship between and among the United States, Taiwan and China.” *Id.* at 178. The court noted that plaintiffs were asking it to “catapult over” a decision by the political branches to “obviously and intentionally not recognize[] any power as sovereign over Taiwan.” *Id.* at 179 (emphasis in original). Given the “years and years of diplomatic negotiations and delicate agreements” between the United States and China, the court concluded it “would be foolhardy for a judge to believe that she had the jurisdiction to make a policy choice on the sovereignty of Taiwan.” *Id.* at 181.

The D.C. Circuit affirmed that decision, holding that plaintiffs’ request to be declared nationals of the United States was barred by the political question doctrine. See *Lin v. United States*, 561 F.3d 502, 508 (D.C. Cir. 2009). The court explained that addressing plaintiffs’ attempt to be declared U.S. nationals “would require us to trespass into a controversial area of U.S. foreign policy in order to resolve a question the Executive Branch intentionally left unanswered for over sixty years: who exercises sovereignty over Taiwan. This we cannot do.” *Id.* at 503-04.

Lin demonstrates that Plaintiffs’ lawsuit is precluded by the political question doctrine. As in *Lin*, Plaintiffs ask this Court to address the nationality of Taiwan’s residents. It makes no difference that Plaintiffs contend to be Japanese nationals in this case, instead of United States nationals, as they argued in *Lin*. Here, Plaintiffs seek to judicially resolve the nationality of Taiwan’s residents, as they did in *Lin*, and that is a political question which this Court lacks jurisdiction to resolve.

The nationality of Taiwan's residents implicates numerous *Baker* factors, although the presence of even one factor is sufficient for the political question doctrine to apply. *Lin*, 539 F. Supp. 2d at 179 (citing *Schneider*, 412 F.3d at 194).

First, Plaintiffs' lawsuit raises policy questions that are textually committed to coordinate branches of government. *Baker*, 369 U.S. at 217. As in the first *Lin* case, Plaintiffs seek declarations regarding the nationality of Taiwan's residents, an issue which depends on the "antecedent question" of identifying Taiwan's political status, *Lin*, 561 F.3d at 506, and which if attempted to be resolved would interfere with the foreign policy of the United States. As the D.C. Circuit has observed, "[d]ecision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Lin*, 561 F.3d at 505 (internal quotations and citation omitted). Further, the determination of sovereignty over a territory is non-justiciable. See *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political [] question. . . .") (collecting cases); *Baker*, 369 U.S. at 212 ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing....'"); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948) ("the determination of sovereignty over an area is for the legislative and executive departments").

Second, this case is non-justiciable under the political question doctrine because there is a "lack of judicially discoverable and manageable standards" for resolving the suit. *Baker*, 369 U.S. at 217. Plaintiffs allege that the United States is legally responsible for the nationality decrees issued by the Republic of China in 1946 because the Republic of China was "acting as an agent of the United States" when it promulgated the decrees and thereafter. . . . Plaintiffs' agency theory is primarily based on General Douglas MacArthur's Order No. 1, which ordered the Japanese commanders within China and Taiwan to surrender to Generalissimo Chiang Kai-shek, the leader of the Chinese Nationalist Party . . . and the San Francisco Peace Treaty, in which Japan renounced any claim to Taiwan. . . .

No judicially manageable standards can be used to resolve the meaning of General Order No. 1. As Judge Collyer explained in *Lin*, "General Order No. 1 was entered very shortly after Japan signed the Instrument of Surrender and long before all Japanese soldiers actually laid down their arms." 539 F. Supp. 2d at 180. The court added: "the purpose, language, and intentions behind General Order No. 1 might have been entirely blunted by later events. What is clear is that the judiciary is not equipped to interpret and apply, 50 years later, a wartime military order entered at a time of great confusion and undoubted chaos." *Id.*

The San Francisco Peace Treaty likewise provides no judicially manageable standards for resolving this case. . . . While federal courts have the "authority to construe treaties and executive agreements," see, e.g., *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986), the SFPT cannot be interpreted in any manner that would resolve sovereignty over Taiwan or Plaintiffs' nationality. See *Lin*, 539 F. Supp. 2d at 178.

Finally, application of the remaining four *Baker* factors further demonstrates that this case is barred by the political question doctrine. For the last six decades, Taiwan has been the subject of the most sensitive and complex diplomatic concerns. Over sixty years ago the United States made clear that it considered Taiwan to be part of the Republic of China. . . .

Plaintiffs' lawsuit asks the Court to interject itself into the sensitive and complex issue of Taiwan's political status. To adjudicate Plaintiffs' claims, the Court would have to review and opine on the foregoing policy determination of the United States not to take a position on the political status of Taiwan. In doing so, the Court would be interjecting itself into a matter that

presents an “unusual need for unquestioning adherence to a political decision already made.” *Baker*, 369 U.S. at 217. Further, any judicial pronouncement on the nationality of Taiwan’s residents would require “an initial policy determination of a kind clearly for nonjudicial discretion”; demonstrate “lack of respect due coordinate branches of government”; and create “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.* Thus, because this case implicates numerous *Baker* factors, it should be dismissed as non-justiciable under the political question doctrine.

* * * *

The U.S. filed a reply brief on August 28, 2015. Excerpts below directly address Plaintiffs’ contention that their latest case differs from the claims brought in the earlier litigation that was dismissed based on the political question doctrine. The reply brief is also available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

Plaintiffs argue in their opposition that this case is materially distinguishable from the first *Lin* case. This contention is meritless. Plaintiffs argue that in *Lin*:

This Court did not apply the political question doctrine to any question of nationality, but rather to the reading of international treaties and any question that would require identification of Taiwan’s sovereign. It was the question of sovereignty, not any question of nationality . . . , that the Court in the 2006 *Lin* case cited as a reason for dismissal pursuant to the political question doctrine.

Pls.’ Mem. 42-43 (internal citation omitted). Plaintiffs’ reading of *Lin* is wrong. First, it is simply not correct to say that the nationality of Taiwan residents was not at issue in the first *Lin* case. The very declarations sought in *Lin* asked the Court to declare plaintiffs to be nationals of the United States. *Lin*, 561 F.3d at 503; *Lin*, 539 F. Supp. 2d at 176-78. The Circuit, moreover, specifically held that “[d]etermining [Plaintiffs’] nationality would require us to trespass into a controversial area of U.S. foreign policy” and was therefore barred by the political question doctrine. *Lin*, 561 F.3d at 503-04 (emphasis added). In addition, the Circuit explained that resolving Plaintiffs’ claims regarding their nationality status would first require answering the “antecedent question” of identifying Taiwan’s sovereign, an issue that cannot be answered under the political question doctrine. *Id.* at 506. Similar to *Lin*, adjudicating Plaintiffs’ claims here, which are premised on the theory that the United States and the “Republic of China” share a principal-agent relationship spanning decades, would require the Court to address sensitive issues of foreign policy, including addressing the issue of sovereignty over Taiwan. The political question doctrine does not permit review of such claims. Under a straightforward application of *Lin*, this case should be dismissed as non-justiciable under the political question doctrine.

* * * *

4. *Center for Biological Diversity et al. v. Hagel*

- On February 13, 2015, the U.S. District Court for the Northern District of California granted the U.S. government’s motion to dismiss challenges brought by Japanese individuals and four environmental groups to a decision by the U.S. government and the Government of Japan to build a new military base on Okinawa. *Center for Biological Diversity, et al. v. Hagel, et al.*, 80 F. Supp. 3d 991 (N.D. Cal. 2015). The 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. Plaintiffs’ original lawsuit, filed in 2003, argued that the U.S. government failed to “take into account” adverse effects on the dugong as required by section 402 of the National Historic Preservation Act (“NHPA”). The initial district court order in the case in 2008 directed the U.S. government to comply with the 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 the NHPA in 2014 and took steps to begin construction of the base, prompting plaintiffs to bring a new challenge pursuant to the Administrative Procedure Act (“APA”) seeking: (1) a declaratory judgment that the NHPA findings are arbitrary and capricious, or otherwise violate the APA; (2) an order setting aside the NHPA findings; and (3) an injunction prohibiting the building of the military base until the U.S. government complies with its NHPA obligations.

The United States filed a motion to dismiss the complaint on the basis of the political question doctrine. The court, after reviewing the *Baker* factors, discussed in sections C.2. and C.3., *supra*, proceeded to dismiss the case. The court found that the political question doctrine did not bar the declaratory judgment claim, but dismissed it nonetheless based on plaintiffs’ lack of constitutional standing because of the court’s inability to redress their alleged injury. The court dismissed the claim for injunctive relief on the basis of the political question doctrine. Excerpts follow from the decision of the district court.

* * * *

Before turning to the merits of this case, it is absolutely critical to note one final doctrinal caveat: The political question doctrine must be applied surgically—it is “incumbent upon [this Court] to examine each of the claims with particularity.” *Alperin*, 410 F.3d at 547. This is because the applicability of the political question doctrine “turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action.” *El-Shifa Pharmaceuticals*, 607 F.3d at 842 (citation omitted). Indeed, this point was most recently illustrated in *Zivotofsky I*, where the Supreme Court reversed the lower courts’ determination that the claim at issue presented a political question because those courts “misunderst[ood] the issue presented.” 132 S. Ct. at 1427. In that case, the lower courts had understood the Plaintiff to “ask the courts to decide the political status of Jerusalem.” *Id.*

(citation and internal quotation marks omitted). The Supreme Court noted that this frame was far too broad. “Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right . . . to choose to have Israel recorded on his passport as his place of birth.” *Id.* As *Zivotofsky I* deftly illustrates, when applying the political question doctrine it is crucially important to consider each claim individually and carefully, and not at a high level of abstraction. . . . The Court now analyzes the Government’s contentions with the above principles in mind.

B. Plaintiffs’ Requests for Declaratory Relief and an Order Setting Aside the NHPA Findings do not Present Political Questions

...As the Government correctly points out, national security and foreign relations cases “serve as the quintessential sources of political questions.” *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006). Thus, “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.” *Id.* (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)); *see also Alperin*, 410 F.3d at 558 (noting that courts “should refrain from hearing those claims that require passing judgment on foreign policy decisions”); *Smith v. Reagan*, 844 F. 2d 195, 200 (4th Cir. 1988) (noting that “[t]he judiciary cannot oversee the conduct of foreign relations,” or “order the President to take specific action” in the sphere of foreign relations). Plaintiffs’ first claim seeks a declaration that the DoD’s NHPA Findings (that the FRF will have no adverse effect on the Okinawa dugong) are “arbitrary, capricious, and not in accordance with procedures required by law pursuant to the APA.” First Supplemental Complaint at ¶¶ 47-51, Prayer for Relief at ¶ 1. Plaintiffs contend, among other things, that the DoD violated the APA by: failing to consult “interested parties” or “seek public comment” before issuing its Findings; resting the Findings on faulty or incomplete data... For example, Plaintiffs allege that DoD failed to properly consider “the full range of possible adverse effects on the dugong caused by the FRF project, including population fragmentation, [and] the disruption of travel routes” First Supplemental Complaint at ¶ 43. Plaintiffs’ second claim seeks an order setting aside the Findings on the basis of these alleged APA violation(s). Prayer for Relief at ¶ 2.

* * * *

In sum, the Plaintiffs’ declaratory judgment claims will not be dismissed pursuant to the political question doctrine, for while they arise in the context of a political *case* they do not present a non-justiciable political *question*, as seen by applying each of *Baker*’s six tests to these claims.

C. Plaintiffs’ Injunctive Relief Claim Presents a Non-Justiciable Political Question

- In contrast to the declaratory judgment claims, Plaintiffs’ injunctive relief claim clearly presents a non-justiciable political question: Plaintiffs ask this Court for a “temporary” injunction ordering the DoD to halt all construction of an overseas military base that is being paid for by the Japanese government, built by Japanese workers, and erected on Japanese sovereign territory, until the DoD adequately satisfies its obligations under the NHPA. Prayer for Relief at ¶ 3. Plaintiffs’ injunctive relief claim likely “inextricably” implicates a number of *Baker* factors.

- Most importantly, Plaintiffs’ injunctive relief claim fails the second *Baker* test. This Court has no judicially discoverable and manageable standard(s) to apply in deciding whether to grant or deny the requested injunction. In order to obtain an injunction in this case,

Plaintiffs concede that they would have to prevail on the merits and then show that: (1) they suffered an irreparable injury; (2) their remedies at law are inadequate; (3) the balance of the hardships tips in Plaintiffs' favor; and (4) the public interest would not be disserved by the injunction. See *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)); see also Plaintiffs' Supplemental Brief at 3 n. 1. Even assuming that Plaintiffs could satisfy the first two requirements, there are no judicially administrable standards available to this Court in evaluating the remaining factors.

For instance, in evaluating the balance of the hardships, this Court would be required to weigh the serious harm construction of the FRF will likely cause to the dugong (including possible extinction) against claimed benefits of the FRF: e.g., maintaining the United States' "deterrence capability" in Asia, "sustaining public support on Okinawa" for the United States military presence, addressing the "threat posed by a nuclear-armed North Korea" or defusing "tensions over competing territorial and maritime claims in the East China Sea and South China Sea." See Zumwalt Decl. at 2 ¶¶ 10, 13. Evaluating these types of harm is an exercise "for which the Judiciary has neither aptitude, facilities nor responsibility," and thus they "have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Waterman*, 333 U.S. at 111...

In addition to the near impossibility of assessing the balance of hardships in the instant case which entail examination of fundamental foreign policy concerns, this Court would have to adjudicate the fourth injunctive factor—whether the public interest would be disserved by an injunction. This presents yet another task the Judiciary is ill-suited to adjudicate. Government declarants make what appears to be a compelling case that even temporary injunctive relief would "have a significant negative impact on U.S. foreign policy interests in the region." Zumwalt Decl. at 21 ¶ 4... He also notes that an injunction would diminish "the United States' position as a reliable ally for its [other] partners." *Id.* at ¶ 4... As noted above, these assertions are entitled to weight. See *Alperin*, 410 F.3d at 556; *Zivotofsky II*, 725 F.3d at 219. Beyond that, this Court is ill-equipped to meaningfully evaluate the Government's contentions.

Because Plaintiffs' request for injunctive relief "inextricably" implicates one of *Baker's* most important tests—the lack of judicially discoverable and manageable standards (see *Alperin*, 410 F.3d 13 at 545)—the claim for injunctive relief presents a non-justiciable political question.

Issuance of an injunction would implicate other *Baker* factors as well. An injunction would effectively countermand the Government's decision to "establish a military base on [foreign soil]," a political decision generally not reviewable by the courts. *Bancoult*, 445 F.3d at 436. Such a choice is plainly "an exercise of the *foreign* policy and national security powers entrusted by the Constitution to the political branches of our government." *Id.* (emphasis added); see also *Alperin*, 410 F.3d at 559 ("It is axiomatic that the Constitution vests the power to wage war in the President as Commander in Chief."). See *El-Shifa Pharmaceuticals*, 607 F.3d at 844 ("[C]ourts cannot reconsider the wisdom of discretionary *foreign* policy decisions.") (emphasis added); *Alperin*, 410 F.3d at 559 (explaining that "cases interpreting the broad textual grants of authority to the President and Congress in the areas of *foreign affairs* leave only a narrowly circumscribed role for the Judiciary") (emphasis added).

Similarly, an injunction that ascribes more importance to saving the Okinawa dugong than the Executive has chosen to afford in the context of constructing a foreign military base would "inevitably express a lack of respect for the Executive Branch's handling of" U.S.-Japan relations, *Alperin*, 410 F.3d at 555, and would also likely "cause the potentiality of

embarrassment from multifarious pronouncements by various departments on one question.” *Id.* at 558 (quotation omitted).

Moreover, the Government’s argument that the decision to build the FRF is a “political decision already made” that requires an “unusual need for unquestioning adherence” appears well taken. *See Baker*, 369 U.S. at 217. The United States and Japan signed a final executive agreement to build the FRF in 2006 (the Roadmap). *See Okinawa Dugong*, 543 F. Supp. 2d at 1086 (“The 2006 Roadmap . . . is a bilateral executive agreement between two sovereign nations . . . The agreements reached in the Roadmap have received needed approvals at the national levels of both governments, but the Government of Japan is still working to obtain needed approvals from affected local and prefectural governments.”);¹⁹ *see also id.* at 1092 (“[T]he Roadmap is the final agreement between the United States and the Government of Japan marking the consummation of years of negotiation and planning.”). Construction of the FRF has already begun, and both the American and Japanese governments are committed to completing the FRF project expeditiously. *See Zumwalt Decl.* at ¶ 8 (“I understand the Japanese government wants initial work on the FRF to proceed expeditiously due to the desire to carry out the Realignment Roadmap in a timely manner”); Mot. to Dismiss, Exhibit 1 (April 2014 White House press release “reaffirm[ing] our commitment to reducing the impact of U.S. forces on Okinawa” through the “early relocation of Futenma Marine Corps Air Station to Camp Schwab”); Mot. to Dismiss, Exhibit 5 (December 2013 White House Press release indicating that the “United States is determined to implement our roadmap to relocate the base for Futenma as quickly as possible”). The Executive Branch (in consultation with the Japanese) has determined that there “are no viable alternatives to the FRF at Camp Schwab.” *Zumwalt Decl.* at ¶ 12. The last *Baker* factor further counsels against justiciability.

In conclusion, injunctive relief would inextricably implicate nearly all the tests of non-justiciability under *Baker*. Such a claim for relief must be dismissed.

D. Plaintiffs’ Declaratory Judgment Claims Must be Dismissed Because This Court Cannot Fashion any Effective Relief

The inability of this Court to fashion any injunctive or otherwise coercive relief to protect the dugong is also conclusive of another issue—Plaintiffs’ standing to assert their remaining declaratory judgment claims. If this Court cannot grant the Plaintiffs meaningful relief (*i.e.*, cannot redress their injuries), their claims for declaratory judgment must also be dismissed even if these claims do not in themselves present a political question. *See Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946, 957 (9th Cir. 2005) (holding that plaintiffs alleging procedural injury “must show only that they have a procedural right that, if exercised, *could* protect their concrete interests”) (emphasis in original), *overruled on other grounds by Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

1. Basics of Constitutional Standing

To bring or maintain a lawsuit in federal court, a plaintiff must establish that she has Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Specifically, a litigant must have “suffered an ‘injury in fact’” that is “‘concrete and particularized’” and “‘actual or imminent.’” *Mayfield v. United States (Mayfield II)*, 599 F.3d 964, 969 (9th Cir. 2010) (quoting *Lujan*, 504 U.S. at 560). The plaintiff must also “establish a causal connection between the injury and the defendant’s conduct . . . [and] show a likelihood that the injury will be ‘redressed by a favorable decision.’” *Id.* (quoting *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 43 (1976)).

Critically, a “plaintiff must demonstrate standing separately for each form of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Env'tl. Serv. Inc.*, 528 U.S. 167, 185 (2000). “Thus, a plaintiff who has standing to seek damages for a past injury, or injunctive relief for an ongoing injury, does not necessarily have standing to seek prospective relief such as a declaratory judgment.” *Mayfield II*, 599 F.3d at 969 (citations omitted).

2. Redressability of Plaintiffs’ Declaratory Relief Claims

In order to establish standing for their declaratory relief claims, Plaintiffs must show a favorable decision may redress their injuries. *Lujan*, 504 U.S. at 560. Plaintiffs must show there is a “direct relationship between the alleged injury” they seek to remedy “and the claim sought to be adjudicated.” *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973). Here, the ultimate injury Plaintiffs seek to remedy is the construction of the FRF and its impact upon the Okinawa dugong.

Admittedly, Plaintiffs’ claim for declaratory relief seeks only a judgment that the DoD violated the procedures required under the NHPA and an order setting aside the DoD’s allegedly flawed NHPA Findings. The declaratory judgment claims seek in the first instance to vindicate purely procedural injuries. However, parties do not have standing to insist that procedural rules be followed simply for the sake of enforcing conformity with legal requirements. *See, e.g., Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003). Instead, “a plaintiff asserting a procedural injury must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.” *Id.* Here, as noted above, the concrete interest is the construction of the FRF and its possible impacts on the Okinawa dugong. *See id.*; *see also Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225-26 (9th Cir. 2008) (recognizing that the “concrete interest” at the heart of a lawsuit to enforce specific procedures of the Endangered Species Act is the preservation and protection of the endangered species). In order to maintain this lawsuit for a declaration that DoD violated the procedures of the NHPA, Plaintiffs must show a sufficient likelihood that the declaratory relief will lead to the protection of this specific interest.

To be sure, where the statute allegedly violated prescribes rights and obligations of a procedural nature, plaintiffs do not face a “high bar” to establishing redressability. Plaintiffs are entitled to a presumption of redressability. *Mayfield II*, 599 F.3d at 971. A party alleging procedural injury must show “only that the relief requested—that the agency follow the correct procedures—*may* influence the agency’s ultimate decision of whether to take or refrain from taking a certain action.” *Salmon Spawning*, 545 F.3d at 1226-27 (emphasis added). That said, the Ninth Circuit has emphasized that “the redressability requirement is not toothless in procedural injury cases.” *Id.* at 1227.

* * * *

... This Court has determined that no injunctive relief may be issued to prevent or halt construction of the FRF. Moreover, the NHPA “take into account” process is only hortatory, mandating no particular result. *Okinawa Dugong*, 543 F. Supp. 2d at 1095 (explaining that the NHPA “does not require a particular outcome and it neither forbids destruction of a protected property nor commands its preservation”). Hence, there is no likelihood that the United States government, in response to an adverse declaratory judgment, will voluntarily halt construction of

the FRF. As a result, it cannot be said that declaratory relief “may” provide redress to Plaintiffs. *Salmon Spawning*, 545 F.3d at 1226-27.

...And for the reasons stated above, this Court cannot issue an injunction ordering the Government to pull out of the Roadmap or otherwise alter its plans for the FRF. *See* Section II.C, *supra*. Thus, “if we rule against the [Plaintiffs’] claim of procedural injury, they will continue to suffer injury; and, if we rule in their favor, they will still suffer injury because we cannot undo the [Roadmap].” *Salmon Spawning*, 545 F.3d at 1227. ...

* * * *

D. EXTRATERRITORIAL APPLICATION OF U.S. CONSTITUTION

Hernandez

In 2015, the United States government participated in litigation arising out of cross-border shooting incidents. The United States filed a brief and prevailed in the U.S. Court of Appeals for the Fifth Circuit, en banc, in *Hernandez v. United States*, No. 11-50792 (5th Cir.). *Hernandez* is a damages action against the United States and various federal officials, asserting claims under the Federal Tort Claims Act, the Alien Tort Statute, and the U.S. Constitution. The district court dismissed the claims—initially against the United States and subsequently against the federal officials—and plaintiffs appealed. A panel of the Fifth Circuit reversed only the district court’s dismissal of the claim against the border patrol agent. The en banc court, however, affirmed the district court’s dismissal as to all claims. The Supreme Court will consider whether to grant a petition for certiorari in *Hernandez* in 2016. The U.S. Court of Appeals for the Ninth Circuit is considering a similar case involving a cross-border shooting incident. *Rodriguez v. Swartz*, No. 15-16410 (9th Cir.).

Excerpts follow, first from the U.S. en banc brief in *Hernandez*, and, *infra*, from the Fifth Circuit’s decision en banc. The United States filed its en banc brief on January 5, 2015.

* * * *

The panel majority correctly affirmed the dismissal of most of the claims in this case. The panel majority erred, however, in concluding that the claims against U.S. Border Patrol Agent Mesa individually could go forward. Although Agent Mesa is separately represented, the United States urged that en banc review is appropriate because this ruling departed from Supreme Court precedent, created a conflict in the circuits, and threatens serious practical consequences. We respectfully submit the district court’s judgment should be affirmed in full.

I. The *Bivens* defendants are entitled to qualified immunity because the alleged conduct violated no clearly established constitutional rights.

The Supreme Court has established that aliens abroad with no substantial connections to the United States do not have Fourth or Fifth Amendment constitutional rights. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). Plaintiffs do not contend that the decedent, a Mexican national who was in sovereign Mexican territory at the time of the shooting incident, had such connections. Plaintiffs are wrong to suggest that *Boumediene v. Bush*, 553 U.S. 723 (2008), altered or overruled the “substantial

connections” test applied by the Supreme Court in *Verdugo-Urquidez*. *Boumediene*, and the three-factor test established and applied in that case, concerned “the reach of the Suspension Clause,” 553 U.S. at 766, and the unique setting of Guantanamo Bay, which are not at issue here. Contrary to plaintiffs’ contentions, *Boumediene*’s observation that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism,” *id.* at 764, is fully consistent with *Verdugo-Urquidez*. See 494 U.S. at 277-78 (Kennedy, J., concurring). In any event, there is no basis for concluding that an undefined portion of northern Mexico that is unquestionably sovereign Mexican territory is remotely analogous to the heavily fortified U.S. military base at Guantanamo Bay, Cuba, over which the United States has exercised “complete

The Court need not, in any event, resolve the question of whether the Fourth or Fifth Amendments may be applicable to non-citizens outside the United States. At a minimum, it was not clearly established at the time of the alleged shooting incident that the Fourth and Fifth Amendments applied to an undefined swath of Mexican territory near the U.S. border.

II. The Court should, moreover, be reluctant to infer a *Bivens* cause of action in a case of this kind, which presents special factors that counsel strong hesitation. If this Court were interpreting a statute that expressly created a cause of action, it would presume that the statute did not apply extraterritorially. That presumption should apply with at least equal force when the Court considers whether to create a constitutional cause of action in the first instance. When Congress created a statutory tort remedy against the United States in the Federal Tort Claims Act, it avoided the concerns that would be generated by applying the FTCA abroad by specifically precluding liability for tort claims involving injuries occurring in a foreign country. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004). A court should be hesitant to create a constitutional tort with extraterritorial scope that implicates the problems that Congress avoided

The potential concerns arising from applying United States law to sovereign Mexican territory are evident. Border control policies implicate core issues of national security and foreign affairs. Indeed, plaintiffs themselves claim that their suit involves international treaties, as well as relations with the government of Mexico, which has filed two amicus briefs in these appeals.

III. In its principal brief as appellee before the panel on the *Bivens* claims, the United States urged that the judgment bar of the Federal Tort Claims Act provides an independent and alternative basis for affirming the district court’s judgment dismissing the *Bivens* claims. That judgment bar provides that “[t]he judgment in” a Federal Tort Claims action is “a complete bar to *any action* by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.” 28 U.S.C. § 2676 (emphasis added). Although the panel did not address this argument, that sweeping language precludes plaintiffs’ *Bivens* action. The district court entered final judgment on plaintiffs’ Federal Tort Claims Act claims, which arose from the same alleged conduct of the very same Border Patrol official, and plaintiffs are no longer contesting that the Federal Tort Claims Act claim was properly

IV. The panel correctly rejected plaintiffs’ claim that the Alien Tort Statute, 28 U.S.C. § 1350, imposes liability on the United States here. The Alien Tort Statute is “strictly jurisdictional.” *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Sosa*, 542 U.S. at 713). “It does not directly regulate conduct or afford relief.” *Id.* The Alien Tort Statute is therefore not a waiver of sovereign immunity, as every court of appeals that has

* * * *

The en banc court issued its decision on April 24, 2015, affirming the district court's dismissal of all claims.

* * * *

We rehear this matter en banc, *see Hernandez v. United States*, 771 F.3d 818 (5th Cir. 2014) (per curiam) (on petitions for rehearing en banc), to resolve whether, under facts unique to this or any other circuit, the individual defendants in these consolidated appeals are entitled to qualified immunity. Unanimously concluding that the plaintiffs fail to allege a violation of the Fourth Amendment, and that the Fifth Amendment right asserted by the plaintiffs was not clearly established at the time of the complained-of incident, we affirm the judgment of dismissal.

The facts and course of proceedings are accurately set forth in the panel majority opinion of Judge Prado, *Hernandez v. United States*, 757 F.3d 249, 255-57 (5th Cir. 2014). We conclude that the panel opinion rightly affirms the dismissal of Hernandez's claims against the United States, *id.* at 257-59, and against Agent Mesa's supervisors, *id.* at 280, and we therefore REINSTATE Parts I, II, and VI of that opinion. We additionally hold that pursuant to *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), Hernandez, a Mexican citizen who had no "significant voluntary connection" to the United States, *id.* at 271, and who was on Mexican soil at the time he was shot, cannot assert a claim under the Fourth Amendment.

The remaining issue for the en banc court is properly described as whether "the Fifth Amendment . . . protect[s] a non-citizen with no connections to the United States who suffered an injury in Mexico where the United States has no formal control or de facto sovereignty." *Id.* at 281-82 (DeMoss, J., concurring in part and dissenting in part). To underscore the seriousness of the tragic incident under review, we elaborate on that description only to note that the injury was the death of a teenaged Mexican national from a gunshot fired by a Border Patrol agent standing on U.S. soil.

To decide the assertion of qualified immunity made by defendant Agent Mesa, regarding the plaintiffs' Fifth Amendment claim, the court avails itself of the latitude afforded by *Pearson v. Callahan*: "The judges of the . . . courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. 223, 236 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

The prongs referred to are familiar: "First, a court must decide whether the facts . . . alleged . . . make out a violation of a constitutional right. . . . Second, if [so], the court must decide whether the right at issue was 'clearly established' at the time of [the] alleged misconduct." *Id.* at 232. "Qualified immunity is applicable unless [both prongs are satisfied]." *Id.*

The panel opinion correctly describes the substantive-due-process claim as "that Agent Mesa showed callous disregard for Hernandez's Fifth Amendment rights by using excessive, deadly force when Hernandez was unarmed and presented no threat." *Hernandez*, 757 F.3d at

267. The question is whether, under the unique facts and circumstances presented here, that right was “clearly established.”

The Supreme Court has carefully admonished that we are “not to define clearly established law at a high level of generality.” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). To the contrary, a right is clearly established only where “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 202) (internal quotation marks omitted). The question here is whether the general prohibition of excessive force applies where the person injured by a U.S. official standing on U.S. soil is an alien who had no significant voluntary connection to, and was not in, the United States when the incident occurred. No case law in 2010, when this episode occurred, reasonably warned Agent Mesa that his conduct violated the Fifth Amendment.

Although the en banc court is somewhat divided on the question of whether Agent Mesa’s conduct violated the Fifth Amendment, the court, with the benefit of further consideration and en banc supplemental briefing and oral argument, is unanimous in concluding that any properly asserted right was not clearly established to the extent the law requires. The strongest authority for the plaintiffs may be *Boumediene v. Bush*, which addressed whether the Suspension Clause of the U.S. Constitution applied to aliens detained outside the United States at the U.S. Naval Base in Guantanamo Bay, Cuba. 553 U.S. 723, 732–33 (2008). Although the Court drew on cases from contexts other than habeas corpus, *see id.* at 755–64 (discussing the Court’s precedents on “the Constitution’s extraterritorial application,” including, *inter alia*, the *Insular Cases*, *In re Ross*, 140 U.S. 453 (1891), *Reid v. Covert*, 354 U.S. 1 (1957), and *Verdugo-Urquidez*, 494 U.S. 259), it expressly limited its holding to the facts before it, *see id.* at 795 (“Our decision today holds only that petitioners before us are entitled to seek the writ; that the [Detainee Treatment Act] review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court.”). Accordingly, nothing in that opinion presages, with the directness that the “clearly established” standard requires, whether the Court would extend the territorial reach of a different constitutional provision—the Fifth Amendment—and would do so where the injury occurs not on land long controlled by the United States, but on soil that is indisputably foreign and beyond the United States’ territorial sovereignty. By deciding this case on a ground on which the court is in consensus, we bypass that issue by giving allegiance to “the general rule of constitutional avoidance.” *Callahan*, 555 U.S. at 241.

“There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.” *Id.* at 237. Reasonable minds can differ on whether *Boumediene* may someday be explicitly extended as the plaintiffs urge. That is the chore of the first prong of the qualified-immunity test, which we do not address.

The alleged right at issue was not clearly established, under these facts, in 2010.

The judgment of dismissal is AFFIRMED.

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Cross References

Evacuation of U.S. citizens from Yemen, **Chapter 2.A.2.**

Munoz Santos case involving comity and separation of powers, **Chapter 3.A.3.c.**

Zivotofsky case regarding executive branch authority over state recognition, **Chapter 9.C.**

Villoldo case (act of state doctrine), **Chapter 10.A.4.b(3)**

Propriety of sanctions under FSIA (foreign relations concerns), **Chapter 10.A.4.e.**

Exchange Visitors Program litigation, **Chapter 14.D.**

International comity, **Chapter 15.C.3.**

Litigation involving alleged NPT breach (political question), **Chapter 19.B.2.c.**

CHAPTER 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On June 25, 2015, the Department of State released the 2014 Country Reports on Human Rights Practices. The Department submits the reports to Congress annually in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (“FAA”), as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for U.S. views on various aspects of human rights practices in other countries. The reports are available at <http://www.state.gov/j/drl/rls/hrrpt/2014humanrightsreport/index.htm#wrapper>. Secretary of State John Kerry’s remarks on the release of the reports are available at <http://www.state.gov/secretary/remarks/2015/06/244358.htm>. A media note on the reports is available at <http://www.state.gov/r/pa/prs/ps/2015/06/244352.htm>.

2. Role of U.S. State, Territorial, and Local Governments in Implementing Human Rights Treaties

On February 25, 2015, Acting Legal Adviser Mary McLeod addressed the national conference of the National Association of Attorneys General on the role of state, territorial, and local government in promoting, respecting, and defending human rights. Her remarks are excerpted below and available at <http://www.state.gov/s/l/releases/remarks/239960.htm>.

* * * *

The United States is and has always been a leader in respecting, promoting, and defending human rights, both at home and around the world. To be sure, we are constantly seeking to more

fully realize the high standards we set for ourselves, but we can and should be proud of our record of implementing our international human rights obligations.

To be a leader in human rights means, first and foremost, leading by example. Our nation's founding documents reflect the depth of our commitment to equality and freedom, and the United States was at the forefront of the movement to enshrine these values, first in the Universal Declaration on Human Rights and then in a series of international treaties.

When the United States ratifies a treaty, it becomes the supreme law of the land, like the Constitution and federal statutes. It is only through robust efforts at all levels of government—federal, state, territorial, and local—that we can live up to the obligations we have undertaken for ourselves.

At the federal level, a wide variety of departments and agencies have a role in implementing our human rights obligations.

For example, in addition to helping negotiate international treaties and conventions, one of my office's many responsibilities is to interpret U.S. obligations under international law, including our human rights treaty obligations.

The Justice Department investigates and prosecutes civil rights violations, the Department of Housing and Urban Development combats housing discrimination, and other departments and agencies at the federal level play a similarly important role in promoting and defending human rights.

But our efforts at the federal level are only one small component of our efforts as a nation. Because ours is a Federal system, it is largely through the work of officials like you—acting at the state, territorial, and local level—that the United States ensures compliance with its human rights treaty obligations. And Attorneys General, as the chief legal officers for our states and territories, play a particularly critical role in this regard.

So today I'll provide a brief overview of our obligations and of the reporting we and all other countries must do. I'll then focus in particular on the role of state, territorial, and local actors in implementing our human rights obligations and presenting our record on the global stage.

Overview of Five Human Rights Treaties

The United States is a party to five core human rights treaties: the International Covenant on Civil [and] Political Rights (or ICCPR); the Convention on the Elimination of Racial Discrimination (or CERD); the Convention Against Torture (or CAT); and two optional protocols to the Convention on the Rights of the Child (or CRC).

The ICCPR, which the United States ratified in 1992, is one of the fundamental human rights treaties negotiated after World War II, and it covers a wide range of civil and political rights, many of which find analogues in our Bill of Rights. For example, it protects freedom of speech, freedom of religion, and the right of peaceful assembly; it guarantees equal protection and fair trial rights; and it prohibits cruel treatment and slavery.

The CERD, which we ratified in 1994, requires countries to take various actions to work towards the elimination of racial discrimination, including with respect to housing segregation, voting rights, and access to education and health care.

The CAT, also ratified in 1994, augments the core prohibition on torture and cruel treatment under international law by, for example, creating universal jurisdiction to prosecute acts of torture, and prohibiting the deportation or extradition of individuals to countries where they would likely face torture.

And while the United States has not ratified the CRC itself, we ratified two optional protocols to that treaty in 2002. One requires States Parties to prohibit child trafficking, child pornography, and child prostitution, while the other addresses recruitment and use of children in armed conflict.

U.S. Approach to Implementation

Although these treaties do not give rise directly to judicially enforceable rights in U.S. courts, the United States is bound under international law to implement these obligations, which we do through federal and state law.

Prior to becoming a party to each of these treaties, the State Department, coordinating with other federal agencies, carefully determined whether existing laws in the United States were sufficient to implement the treaty, which has generally been the case.

Moreover, with each treaty the United States has issued a set of what are known as Reservations, Understandings, and Declarations, which clarify or in some cases limit our obligations under the treaty in order to ensure that we can comply.

We have issued one such “understanding” regarding our Federal system when ratifying many human rights treaties. This understanding confirms that we are bound by the treaty and will implement it at the appropriate governmental level—federal, state, territorial, or local.

Reporting Process

One important mechanism for promoting compliance with human rights treaties is the reporting process.

Under each of the five treaties we have ratified, the United States—like other Parties to these treaties—is obliged to prepare a report every few years regarding our implementation of the treaty, which is submitted to a committee of experts created under that treaty.

Usually about a year after filing such a report, we send a delegation to Switzerland to present the report to that committee and answer their questions. We made three such presentations in 2014: the ICCPR in March, the CERD in August, and the CAT in November. Our next set of reports relating to the Children’s Protocols is due next January.

Each of these committees is made up of between 10 and 18 independent experts in that substantive area from around the world. These committees review individual country reports, issue general comments on particular provisions, and in some cases address individual complaints. The views and recommendations of the committees are not legally binding but are often given great weight by the international community.

The preparation of these reports requires input from a wide range of federal agencies, such as the Departments of Justice, Homeland Security, and Education.

Over the last few years, we have also consistently reached out to state and territorial governors and tribal leaders to solicit input for our reports.

To fail to represent the trailblazing work you are doing every day would sell the United States short. We need your help.

The presentation of our reports occurs over a 1 or 2 day session with the treaty committee in Geneva. Although the atmosphere is not quite like an oral argument, there is certainly a buzz in the air, especially when we face difficult questioning.

These presentations are usually attended by a large contingent of U.S. civil society activists, and the “shadow reports” filed by civil society groups often inform the questions we receive from members of the committee. For this reason, the State Department organizes several consultations with civil society groups throughout the reporting and presentation process, which themselves serve as vital opportunities to receive input on our human rights record.

No matter what, our delegations are always prepared to tell the world about the myriad ways in which our nation's commitment to human rights is manifested in our policies and practices.

A few days after each presentation, the committee issues a set of "Concluding Observations [and] Recommendations," which presents the committee's views and recommendations on how the United States can further our implementation of the relevant treaty.

Our delegations generally feature high-level participation by multiple federal agencies. For example, our recent CERD delegation included officials from nine different agencies.

Moreover, to reflect our Federal system of government, we have included one or more state or local representatives on each of our delegations since 2008. ...

Universal Periodic Review

Having completed the three presentations last year, we are currently busy preparing for the Universal Periodic Review process (or UPR), which is another important opportunity to present our human rights record internationally.

The UPR process, which started in 2006 and is conducted through the UN Human Rights Council, involves a review of the human rights records of all 192 UN Member States once every five years.

Each country submits a report addressing the full range of its human rights obligations and commitments. The UPR is a peer review process, so other countries have the opportunity to make recommendations for future action. The country indicates which of these recommendations it supports, and it is then expected to address progress on those recommendations in its next UPR report.

We just submitted our second UPR report in February and will present this report in Geneva in May. We will finish the process in September by announcing which recommendations we accept.

Role of State Attorneys General in Implementation

So what does all this mean for the work of the Attorneys General?

The federal government has limited or overlapping jurisdiction with the States on many of the issues covered by these treaties, which is why it is all-the-more important for federal officials to engage with state, territorial, and local government officials.

You are, truly, at the frontlines. When you formulate policies, open civil rights investigations, and take other steps to protect individuals against discrimination, reduce racial disparities in education or housing, or prosecute those exploiting children, you are helping to fulfill our country's human rights obligations.

While the treaty committee recommendations and the recommendations that come out of the UPR process are not legally binding, it is incumbent on all of us—at all levels of government—to be familiar with them because they reflect what domestic issues are of concern to the international human rights community.

We also strongly encourage you and your colleagues to engage in the reporting processes I mentioned, and there are a number of ways to get involved. Perhaps the easiest is by providing information we can use in our reports to highlight the important work happening within the states and territories to promote and protect human rights.

Our strong and effective engagement in the reporting process helps the United States in our efforts to make sure that other countries, like China, Russia or Venezuela, live up to their own human rights obligations and commitments.

Our next report, which is due in January 2016, relates to the children's protocols I mentioned earlier. We would greatly appreciate hearing about the work you are doing to combat child prostitution, child pornography, and child trafficking.

We have provided a letter today, which will soon go to many state and local officials, that includes more information, as well as an email address where you can send us input for our upcoming report.

Conclusion

My hope is that this very brief overview provides a foundation for sustained collaboration between my office and yours on human rights issues. My colleagues and I look forward to the opportunity to work with many of you in the months and years to come.

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On April 25, 2015, Ms. McLeod wrote to the governors of the U.S. states, as well as the mayor of the District of Columbia and tribal leaders, regarding treaty body recommendations, the Universal Periodic Review, and the Children's Protocol report. Excerpts follow from Ms. McLeod's April 25, 2015 letter to state governors, which is available at <http://www.state.gov/s/l/releases/2015/241814.htm>.

* * * *

I am writing to you as part of the U.S. Department of State's ongoing efforts to keep officials at all levels of government informed about U.S. human rights obligations and commitments. As you know, the United States has a long and proud tradition of advancing the protection of human rights around the globe. Our country also upholds these values by protecting human rights here at home, which we achieve not only through actions taken at the federal level, but also through the dedicated efforts of state, local, insular, and tribal governments in areas such as protecting civil and political rights, combating racial discrimination, and protecting children from harms like trafficking and prostitution. We thus believe it is important to distribute broadly information regarding the U.S. government's human rights obligations and commitments and our efforts to present and defend our country's human rights record to the international community.

2014 Treaty Presentations

The United States is a party to five core human rights treaties: the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and two optional protocols to the Convention on the Rights of the Child (CRC). As part of our obligations under these treaties, the U.S. government must submit reports periodically to a committee of independent experts created by the terms of each of these treaties and then appear before that committee to present the report and answer questions. Over the last 12 months, the U.S. government made three such presentations in Geneva, Switzerland with respect to the following treaties: the ICCPR on March 13 and 14, 2014; the CERD on August 13 and 14, 2014; and the CAT on November 12 and 13, 2014.

These presentations were valuable opportunities to demonstrate to the world our country's commitment to protecting human rights domestically through our comprehensive system of laws, policies, and programs at all levels of government—federal, state, local, insular, and tribal. Reflecting our federal system of government, each of the U.S. delegations to these presentations featured not only senior officials from a range of federal agencies, but also elected or other high-level officials from state and local governments.

Shortly after each presentation, the respective committee issued a set of Concluding Observations [and] Recommendations (CORs), which presented the committee's views and recommendations on how the United States can further our implementation of the relevant treaty. Although these CORs are not legally binding, the United States carefully considers the views expressed by each committee, regardless of whether we agree with the factual or legal assertions on which they are based or whether they bear directly on obligations arising under the relevant treaty. These CORs provide constructive input from respected human rights actors in the international community and, as such, they merit consideration by officials at every level of government within the United States when taking actions or formulating and implementing policies that impact human rights.

In addition, CORs can serve as helpful reference points for consultations with civil society organizations and advocates on issues related to human rights in the United States. The federal government conducts civil society consultations in connection with the human rights treaty reporting process, which are important opportunities to receive input and feedback on ways that we can improve our implementation of human rights obligations and commitments. Similar human rights consultations could be useful at other levels of government.

The three sets of CORs from our 2014 presentations are available on the State Department website at:

ICCPR: www.state.gov/documents/organization/235641.pdf

CERD: www.state.gov/documents/organization/235644.pdf

CAT: www.state.gov/documents/organization/234772.pdf

These documents can also be found, along with a wealth of other materials regarding U.S. human rights treaties and U.S. reports and presentations related to our human rights treaty obligations, at: www.state.gov/j/drl/reports/treaties/index.htm.

Upcoming Universal Periodic Review Presentation

The U.S. government will make its next human rights related presentation as part of the UN Human Rights Council's Universal Periodic Review (UPR) mechanism, on May 11, 2015, after filing our second UPR report on February 2, 2015. Unlike the treaty reporting process, the UPR is a process applicable to every UN Member State and UPR reports are filed approximately every five years. At the May presentation, other UN member states will have the opportunity to pose questions and make recommendations to the U.S. delegation related to implementation of our human rights obligations and commitments across a broad range of issues. The UPR provides the United States with the opportunity to reflect on the progress we have made in the promotion of human rights domestically, and to continue to consider ways to improve protection of human rights in our country. The content of our presentation, and the recommendations that we receive and ultimately support, will be available online at www.humanrights.gov.

Upcoming Reports on Children and Human Rights

We will also soon begin drafting our next human rights treaty reports, which will provide information on U.S. implementation of the two Optional Protocols to the Convention on the Rights of the Child (CRC) that were ratified by the United States in 2003: (1) the Optional

Protocol to the CRC on the Involvement of Children in Armed Conflict and (2) the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography. ...

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3. ICCPR

As discussed in *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 (“ICCPR” or “Covenant”) in 2014. On March 31, 2015, the United States conveyed to the Committee its one-year follow-up response to the Committee’s priority recommendations on the U.S. Periodic Report. The follow-up response is available at <http://www.state.gov/documents/organization/242228.pdf>. The United States also submitted a reply to the Committee Co-Rapporteur’s August 6, 2015 follow-up letter on October 9, 2015. That reply is available on the Committee website at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_FCO_USA_21976_E.pdf.

On July 2, 2015, at the 29th session of the HRC, the United States joined consensus on a resolution entitled “The fiftieth anniversary of the adoption and the fortieth anniversary of the entry into force of the International Covenants on Human Rights.” Wesley J. Reisser delivered a U.S. explanation of position, available at <https://geneva.usmission.gov/2015/07/02/anniversary-of-international-covenants/>, which includes the following:

The United States joins other countries in celebrating the anniversaries of the entrance into force of the international covenants on human rights, which will take place late next year. We firmly believe that all human rights are equally important. We join consensus on this resolution with the understanding that it does not imply that states must implement obligations under human rights instruments to which they are not a party.

4. Human Rights Council

a. Overview

The United States participated in three sessions of the HRC in 2015. The key outcomes of each session for the United States are summarized in fact sheets issued by the State Department. The key outcomes at the 28th session are described in a March 27, 2015 fact sheet, available at <http://www.state.gov/r/pa/prs/ps/2015/03/239846.htm>. They include: resolutions on the human rights situations in Burma, Iran, North Korea and Syria; resolutions on freedom of religion and combatting religious intolerance; and a joint statement on countering violent extremism. The key outcomes at the 29th session

are described in a July 9, 2015 fact sheet, available at <http://www.state.gov/r/pa/prs/ps/2015/07/244761.htm>. They include: resolutions on the human rights situations in Burma, Ukraine, South Sudan, and Syria; a resolution on eliminating violence against women; and a joint statement on human rights violations based on sexual orientation and gender identity. The key outcomes at the 30th session are summarized in the State Department's October 8, 2015 fact sheet, available at <http://www.state.gov/r/pa/prs/ps/2015/10/248047.htm>. They include resolutions on the human rights situations in Burundi, Sri Lanka, Sudan, Syria, and Yemen; resolutions on countering violent extremism and equal participation in public affairs; and joint statements on freedom of expression, reprisals, civil society, and Bahrain.

On March 27, 2015, at the 28th session of the HRC, Ambassador Keith Harper delivered a general statement on international law matters to supplement points raised in several statements on resolutions on a variety of topics, including the right to education, and human rights and climate change. The statement follows and is available at <https://geneva.usmission.gov/2015/07/06/general-statement-on-international-law-matters-relevant-to-the-following-resolutions-of-the-un-human-rights-council-29th-session-right-to-education-child-early-and-forced-marriage-violence-again/>.

The United States understands that these resolutions do not imply that states must join human rights instruments to which they are not a party, or that they must implement those instruments or any obligations under them. These resolutions do not change the current state of conventional or customary international law. The United States understands that any reaffirmation of prior documents in these resolutions applies only to those states that affirmed them initially. We also underscore that human rights are held and exercised by individuals, not groups. And while we recognize that development facilitates the enjoyment of all human rights, we reiterate the primary responsibility of states to protect and promote human rights.

b. *Universal Periodic Review*

The United States submitted its Universal Periodic Review (“UPR”) report on February 2, 2015 to the Office of the UN High Commissioner for Human Rights. See February 6, 2015 media note, available at <http://www.state.gov/r/pa/prs/ps/2015/02/237252.htm>. For background on the previous U.S. UPR report submitted in 2010, see *Digest 2010* at 202-04. As explained in the media note, the 2015 report “is the result of robust collaboration between 14 U.S. federal agencies, civil society across the country, and the White House.” The report and further information about the UPR process are available at <http://www.state.gov/j/drl/upr/index.htm>.

On May 11, 2015, the United States delegation delivered the U.S. Universal Periodic Review presentation in Geneva. The opening statement of Ambassador Harper is excerpted below and available at <https://geneva.usmission.gov/2015/05/11/34432/>.

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In 2010 a number of states made recommendations related to Indigenous peoples. One was that the United States endorsed the UN Declaration on the Rights of Indigenous Peoples. On December 16, 2010, President Obama did indeed announce support for the Declaration, as further explained in the accompanying Statement of Support.

There has been a concerted effort to address challenges while adhering to the principles enunciated in the Declaration. The United States has made significant advances working in partnership with tribal communities in areas including healthcare, community safety and law enforcement, education, economic development, and land rights.

In 2010, for example, the President signed into law the Tribal Law and Order Act to, among other things, empower tribal governments to safely and effectively provide public safety in Indian Country. Then in 2013, to further address disproportionately high levels of violent crimes committed against Indigenous women, he signed into law the Violence Against Women Reauthorization Act of 2013. Under this law, tribal courts can assert jurisdiction over non-Native Americans who commit certain violent crimes against Indigenous women. This initiative is perfectly in accord with the overarching principal in the DRIP to involve Indigenous communities—indeed empower those communities to—address their challenges.

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Acting Legal Adviser Mary McLeod followed Ambassador Harper with her opening statement, excerpted below and available at <https://geneva.usmission.gov/2015/05/11/34437/>. Ms. McLeod was followed by James Cadogan, Senior Counselor to the Assistant Attorney General in the Civil Rights Division of the Department of Justice, whose opening statement is available at <https://geneva.usmission.gov/2015/05/11/james-cadogan-department-of-justice-statement-at-the-upr-of-the-united-states/>.

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Since our last UPR in 2010, we have carefully considered the recommendations we accepted from our fellow States and have taken many steps to implement them.

The desire to “form a more perfect union” is woven into our nation’s founding documents, and this same desire inspires our efforts to confront the challenges of today. Indeed, the strength of our democratic system is that it allows for constant scrutiny, advocacy, and debate, which fuels progress and reform.

The progress that democracy, free expression, and civil society can achieve in the United States is illustrated by the battle against all forms of discrimination.

One form of discrimination we have worked to address, especially since our last UPR, concerns the human rights of LGBT individuals.

These issues have been the subject of wide-ranging discussion in our country, as in many others. Peaceful demonstrations were held, public campaigns were launched, thoughtful articles were written, and the powerful words of civil society advocates echoed throughout our nation. These voices were heard by our legislators and before our free and independent judiciary. We have not shied away from the issue because it was challenging—we have embraced it. At the core of these efforts is our belief that what is most important is to recognize the common humanity, the common human dignity, and the need for equal treatment of all people.

At the federal level, we have prioritized the fight to end violence and discrimination against LGBT persons. We have prosecuted crimes motivated by bias, including those based on sexual orientation or gender identity. We have put an end to the discriminatory “Don’t Ask, Don’t Tell” Policy in the U.S. Armed Forces. We have prohibited discrimination against LGBT persons in federal employment. And just last month, the President announced his support for efforts, including at the state level, to ban the use of conversion therapy for minors, or practices by mental health providers that seek to change an individual’s sexual orientation or gender identity.

At the state and local level, many important changes have also taken place. In response to citizens’ demands, laws have been passed to prohibit employment discrimination based on sexual orientation and gender identity. A combination of advocacy and litigation before an independent judiciary has paved the way for meaningful changes in public opinion and law on the issue of marriage equality, allowing equal access to numerous federal and state benefits.

As you will hear today, we have many successes to report, and we’re proud of the work we’ve done since our last UPR. Still, we know we have faced challenges. For example, in December the declassified summary of the Senate Select Committee on Intelligence report was publicly released, which detailed the former CIA detention and interrogation program. As President Obama has acknowledged, we crossed the line, we did not live up to our own values, and we take responsibility for that. We have since taken steps to clarify that the legal prohibition on torture applies everywhere and in all circumstances and to ensure that the United States never resorts to the use of those harsh interrogation techniques again.

As you will hear from my colleagues representing seven federal agencies and the State of Illinois, we continue to work through this and other human rights issues as a nation, and we look forward to hearing your questions, comments, and recommendations today. There is more work to be done—there always is—but we’re proud of what we’ve achieved in our democracy to advance human rights.

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At its UPR presentation in May, the United States received 343 recommendations from other UN member states. On September 24, 2015, the United States presented to the Human Rights Council its positions on each of those recommendations. Ambassador Harper and Deputy Assistant Secretary of State Scott Busby delivered remarks, available

at <https://geneva.usmission.gov/2015/09/24/ambassador-harper-im-very-proud-to-be-before-you-today-for-the-adoption-of-the-second-upr-of-the-united-states/> and <https://geneva.usmission.gov/2015/09/24/statement-by-das-scott-busby-at-the-upr-adoption-of-the-united-states/>. The United States filed an Addendum to its report, explaining its positions on each recommendation, which is available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/USSession22.aspx>.

In November, the United States voluntarily filed an appendix to the addendum with extended explanations of its positions on recommendations it supported in part. That appendix is available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session22/US/AdditionalInfo_US_22session.pdf.

c. *Actions regarding Syria*

On March 27, 2015, at the Human Rights Council's 28th session, Ambassador Keith Harper delivered a general comment on behalf of the U.S. delegation on the resolution entitled "The continuing grave deterioration in the human rights and humanitarian situation in the Syrian Arab Republic." The resolution was adopted by a vote of 29 to 6, with 12 abstentions, on March 27. Ambassador Harper's statement is excerpted below and available at <https://geneva.usmission.gov/2015/03/27/human-rights-council-resolution-on-continuing-grave-deterioration-of-human-rights-in-syria/>. The proposed amendment mentioned in this statement was rejected by a vote of 10 (for adopting the amendment) to 23, with 14 abstentions.

U.S. statements on similar resolutions regarding Syria at the 29th and 30th sessions of the Human Rights Council are available at <https://geneva.usmission.gov/2015/07/02/us-statement-syria/> and <https://geneva.usmission.gov/2015/10/01/the-grave-and-deteriorating-human-rights-and-humanitarian-situation-in-the-syrian-arab-republic/>.

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The United States is pleased to co-sponsor the resolution on "the continuing grave deterioration of the human rights and humanitarian situation in the Syrian Arab Republic" and urges all members to support it.

With the passage of this resolution, the Human Rights Council continues to fulfill the important role of drawing global attention to the atrocities taking place in Syria and collecting the evidence necessary to ensure future accountability for these acts.

The Commission of Inquiry has described continued atrocities by the Asad regime, including those involving systematic attacks on civilians, restriction of humanitarian assistance, torture, and the detention and disappearance of civilians on the basis of their associations. Extremist groups also continue to commit widespread human rights abuses. The COI has

assessed that in many instances, the Asad regime and non-state actors have committed war crimes and crimes against humanity. The United States condemns atrocities committed by all sides.

Let us not forget the aims of the peaceful protesters in March 2011, who called for the end of torture and demanded respect for human rights. We deplore the growing suffering and torture in detention centers throughout Syria, as the COI's reports have depicted. We reiterate our calls for the immediate release of jailed human rights defenders, including Mazen Darwish, head of the Syrian Center for Media and Freedom of Expression, as well as the release of human rights activists abducted by anti-government armed groups, including Razan Zeitouneh, founder of the Violations Documentation Center.

The COI, despite denials of access, continues to provide critical reporting on the ongoing gross violations and abuses in Syria. The United States strongly supports the renewal of the COI's mandate and urges other states to do so as well.

We also applaud the courageous Syrian human rights defenders who, despite the grave risks, continue to document atrocities committed by all sides and share their findings with the international community. United with the Syrian community and the international community, we reiterate our call, for an immediate end to all violations and abuses of human rights and violations of international humanitarian law, especially those egregious, widespread, and continued violations committed by the Asad regime.

The United States supports the text as presented, and urges all members to reject the proposed amendment to operative paragraph 13. That list of militia groups, whose participation in the conflict in Syria has exacerbated the situation there, has previously appeared in Syria resolutions at this Council and at the UN General Assembly, and those groups have also been named by the COI in its reporting. We urge all member states to vote "NO" on that proposed amendment and "YES" on the resolution as presented.

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d. *Actions regarding Sri Lanka*

On September 24, 2015, the United States and others tabled a resolution on Sri Lanka at the UN Human Rights Council. The resolution was adopted on October 1, 2015. U.N. Doc. A/HRC/RES/30/1. Ambassador Harper delivered an adoption statement on the resolution on October 1, 2015, available at <https://geneva.usmission.gov/2015/10/01/ambassador-harper-sri-lanka-resolution-supports-path-to-lasting-peace/>. Secretary Kerry's press statement on the vote is excerpted below and available at <http://www.state.gov/secretary/remarks/2015/09/247268.htm>. For discussion of previous Sri Lanka resolutions at the HRC, see *Digest 2014* at 188-89, *Digest 2013* at 131, and *Digest 2012* at 140.

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Today the United States, Sri Lanka, and our partners tabled a resolution at the UN Human Rights Council in Geneva that represents a landmark shared recognition of the critical importance of truth, justice, reparations, and guarantees of non-recurrence in promoting reconciliation and ensuring an enduring peace and prosperity for all Sri Lankans.

The Sri Lankan government's decision to join as a co-sponsor paves the way for all of us to work together to deliver the commitments reflected in the resolution.

In the past year, the Sri Lankan people have twice voted to put Sri Lanka on the path to peace and turned their country away from a divisive approach that for too long sapped Sri Lanka's strength. This resolution demonstrates our support for Sri Lanka as it takes courageous steps to strengthen its democracy and restore civil liberties for all Sri Lankans, while also addressing the painful experiences of the past to ensure they never recur.

This resolution marks an important step toward a credible transitional justice process, owned by Sri Lankans and with the support and involvement of the international community. The resolution will help families of the missing find answers about their loved ones. And it lays out a path to provide truth, justice, reparation, and guarantees of non-recurrence that the Sri Lankan people deserve while safeguarding the reputation of those, including within the military, who conducted themselves with honor and professionalism.

As I promised in Colombo earlier this year, the United States will remain steadfast in our commitment to walk with Sri Lanka as it takes these important but challenging steps.

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e. Actions regarding North Korea

At the Human Rights Council's 28th Session, the United States co-sponsored a resolution expressing deep concern about human rights violations in North Korea (the "Democratic People's Republic of Korea" or "DPRK"). The general comment, delivered by the U.S. delegation on March 27, 2015, on the resolution appears below and is available at <https://geneva.usmission.gov/2015/03/27/u-s-co-sponsors-resolution-expressing-deep-concern-about-human-rights-violations-in-north-korea/>.

The United States will again co-sponsor this important resolution on human rights in the Democratic People's Republic of Korea and urge all Member States to support it. The United States government, like many of the other states here today, is deeply concerned about human rights violations in the DPRK. The UN Commission of Inquiry has determined that these violations constitute, in many instances, crimes against humanity, and that they are committed "pursuant to policies established at the highest level of the State."

The United States thanks Japan and the European Union for introducing a resolution that holds the DPRK accountable for its serious and ongoing violations of human rights. We support the extension of the mandate of the Special Rapporteur, and look forward to the establishment of the OHCHR office in Seoul. We note that this resolution calls for a panel on the human rights situation in DPRK. Victims' voices are what made the Commission of Inquiry

report on the DPRK especially powerful, and it is a worthwhile endeavor for the Council to hear them firsthand.

The DPRK is among the world's most pervasive deniers of freedoms and violators of human rights. As such, Member States should vote YES on this resolution, which condemns the systematic, widespread and gross violations of human rights in the DPRK. Thank you, Mr. President.

f. *Actions regarding Ukraine*

On July 3, 2015, Ambassador Harper delivered the U.S. explanation of vote on a resolution on assistance to Ukraine. His remarks are excerpted below and available at <https://geneva.usmission.gov/2015/07/06/u-s-eov-on-hrc-cooperation-and-assistance-to-ukraine/>.

* * * *

The United States applauds the Government of Ukraine for bringing forth this resolution. We also commend Ukraine for its continuous cooperation with the Office of the High Commissioner and Ukraine's willingness to have frank conversations about the challenges it is facing.

...

Members of this Council are fond of stressing the need for cooperative approaches to human rights challenges. It is therefore disheartening that many of the same members who yesterday justified their votes against resolutions under Item 4 by emphasizing the need for collaboration, today have voiced opposition to this Item 10 resolution.

This resolution is a purely procedural one tabled by the concerned state. It highlights cooperation between the Ukrainian Government and an existing OHCHR Mission in the country—facts that are incontrovertible. It seeks to build upon the OHCHR's reporting on current human rights challenges. After speaking with many delegations, I have not heard a single objection to the text. In short, this resolution calls for precisely the kind of cooperation and collaboration with OHCHR and this Council that many states often call for.

There is no explanation then for why some states want to say no to Ukraine when it is reaching out for support through this resolution. There is no explanation other than rank politics. It is this Council's duty to provide support to states that are willing to ask for it. The United States will voice its support by voting YES on this draft text. We urge all other states who value the Council as an institution and who believe in the importance of promoting and protecting the human rights of all to vote YES as well.

* * * *

On September 29, 2015, Ambassador Harper delivered a statement on Russian aggression in Ukraine at the 30th session of the HRC. His remarks are excerpted below and available at <https://geneva.usmission.gov/2015/09/29/ambassador-harper-russian-aggression-in-ukraine-is-blattant-and-contrary-to-international-law/>.

* * * *

The United States strongly supports the ongoing work of the High Commissioner's Office to monitor and report on the situation in Ukraine. We urge other member states to contribute to the mission, whose work remains critical. During the last reporting period, the monitoring mission reported 413 civilian casualties and massive disruption to the human rights of Ukrainians, caused overwhelmingly by combined Russian-separatist forces in eastern Ukraine and the occupation authorities in Crimea.

The United States is deeply disturbed by ongoing abuses by Russian occupation authorities in Crimea and we demand that OHCHR monitors be allowed into Crimea, as they are to other parts of Ukraine. Crimean Tatars are facing growing harassment by occupation authorities, including arbitrary arrests, political prosecutions, and crackdowns on Tatar media outlets and civil society organizations. Russian authorities have shown a pattern of mistreatment of the Tatars including by depriving them of health care and education, and Russia has exiled Tatar leaders who dare speak out for their constituents.

In addition, the United States condemns in the strongest possible terms the ongoing violations and abuses routinely perpetrated by combined Russian-separatist forces and illegitimate separatist authorities in the Donetsk and Luhansk oblasts in Ukraine's east. Separatists use egregious tactics including forced disappearances, mock executions, acts of brutality and other atrocities, to spread fear among the local population. Members of religious minorities such as Jehovah's Witnesses and Baptists face severe persecution. Russia-backed separatists also deny humanitarian access which in turn leads to ever-growing shortages of basic goods, including food and medicine.

Russian aggression in Ukraine is blatant and contrary to international law. Russia's egregious actions extend to measures taken against Ukrainian citizens transferred to Russia. We call for the immediate and unconditional release of Nadiya Savchenko, and Oleg Sentsov, Olexander Kolchenko, and Gennadiy Afanasyev.

The United States commends the government of Ukraine for its ongoing cooperation with OHCHR and its willingness to improve human rights in Ukraine. The government is taking important steps to combat corruption and improve policing. They are also taking steps towards combatting impunity by arresting and trying Ukrainians who have accused of committing abuses during the conflict, including members of the military and militia groups.

More must be done, and we will stand by the Ukrainian people as they continue their struggle for their independence and their country's territorial integrity.

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g. Actions regarding Burundi

On December 17, 2015, Ambassador Harper delivered a statement at the Human Rights Council's special session on the human rights situation in Burundi, in support of the session and the resolution that it adopted. His statement is excerpted below, and is available in full at <https://geneva.usmission.gov/2015/12/17/ambassador-harper-hrc-special-session-on-burundi-now-is-the-time-to-stand-against-violence/>. Ambassador Harper's December 11, 2015 letter requesting that the President of the Council hold

that special session is available

at http://www.ohchr.org/Documents/HRBodies/HRCouncil/SpecialSession/Session24/A.HRC.RES.S-24.1_E.docx. Ambassador Harper's statement at the December 16, 2015

organizational meeting for the special session is available

at <https://geneva.usmission.gov/2015/12/16/us-deeply-alarmed-at-spiraling-violence-in-burundi-u-s-supports-hrc-special-session/>. Ambassador Harper's statement

presenting the resolution to the December 17, 2015 special session is available at

<https://geneva.usmission.gov/2015/12/17/u-s-presents-resolution-on-burundi-at-human-rights-council-special-session/>.

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The United States is pleased to be part of the overwhelming support for calling the Special Session today. We wholeheartedly cosponsor the resolution before us.

The United States is deeply alarmed by the spiraling violence in Burundi perpetrated or directed by government and non-government actors alike. President Nkurunziza's pursuit of a third term in office has led to a humanitarian, economic, and security crisis, which in turn has resulted in more than 200,000 Burundians fleeing for neighboring countries. The United States joins the Council today for this important session because we strongly believe that the international community must use all of the tools available to push for an immediate end to the cycle of violence perpetrated by both the security forces and elements of the armed opposition.

...

Increasing government repression of civil liberties and recent dangerous and divisive rhetoric by government officials have contributed to the climate of fear in Burundi. We continue to see large numbers of arbitrary arrests of individuals solely based on their political views. On December 12, rebel insurgents initiated attacks on military installations, exacerbating an increasingly unstable situation. In response, Burundian security forces reportedly rounded up dozens of men, some of whom later were found dead on the streets of Bujumbura. We condemn the attacks on the military installations. We call for an immediate, independent investigation into the civilian deaths and for the Government of Burundi to publicly reject excessive use of force. We have also heard deeply disturbing statements from Burundi President Nkurunziza and President of the Senate Ndikuriyo in recent weeks that evoke the horrors of previous episodes of mass violence in Burundi. We urge the Government and other parties to refrain from any statements or actions that could heighten tensions in Burundi.

Amid the calamity, we see bravery and hope in Burundi. Mr. Pierre Claver Mbonipa, who joins us for this session today, is a shining example. He and other courageous human rights defenders, such as Marguerite Barankitse who is also here today, are under attack in Burundi. We condemn the killings of Pierre's son, Mr. Welly Nzitonda, and of his son-in-law, Pascal Nishirimana. These attacks must stop immediately. We urge Burundian authorities to conduct a thorough and independent investigation of these and other crimes, and to bring the perpetrators to justice.

The United States is committed to the goal of restoring peace and stability in Burundi. We call upon all parties in Burundi to reject unlawful violence. We believe that there is a clear path for Burundi's leaders to avoid further violence and reach a political solution to the current

crisis. Ordinary Burundians deserve to live in peace, without constant fear for their own lives or those of their children. It is time for all sides in Burundi to look beyond their own gain and demonstrate strength and leadership by engaging in an internationally-mediated dialogue outside Burundi. Now is the time to stand against violence and begin the hard work of uniting.

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h. Actions regarding Boko Haram

On April 1, 2015, Ambassador Harper delivered an explanation of position at the special session of the Human Rights Council to address the terrorist group Boko Haram. His statement is excerpted below, and is available in full at <https://geneva.usmission.gov/2015/04/01/eop-on-boko-haram-special-session-resolution/>.

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The United States joins consensus on the resolution presented at this special session in solidarity with the countless individuals affected by Boko Haram-related violence.

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While supporting this important initiative of the Council today, we do note our concerns on the inclusion of language that falls outside the scope of this Council.

In particular, we note that the Human Rights Council lacks the mandate and expertise to address topics such as efforts to limit the flow of funding to non-state groups as well as discussions related to the provision of assistance in efforts to counter terrorism. Other bodies are more appropriate fora for such discussions.

We strongly condemn the atrocities committed by Boko Haram and, simultaneously, we reaffirm that the principal role for members of this Council is to hold each other, as States, accountable for fulfilling our human rights obligations and commitments.

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5. UN General Assembly's Third Committee

On November 19, 2015, Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, delivered a statement on behalf of the United States at the UN General Assembly's Third Committee on North Korea, Syria, and Iran. Her statement follows and is available at <http://usun.state.gov/remarks/6989>.

* * * *

On North Korea, in an extremely strong vote, the world has condemned the government's egregious human rights violations—including torture, public executions, arbitrary detentions, and the extensive use of forced labor—and affirmed that those most responsible must be held accountable. The resolution encouraged the Security Council to continue to consider the relevant recommendations of the North Korean Commission of Inquiry, including on accountability.

On Syria, 115 member states renewed their condemnation of the Syrian regime's continued indiscriminate use of weapons such as barrel bombs and the starvation of civilians as a method of combat, as well as the atrocities carried out by ISIL. Together, member states condemned the killing and persecution of human rights defenders and journalists, enforced disappearances, and the killing of peaceful protestors. The resolution also demanded the Syrian regime release all arbitrarily detained persons. As the sole body representing the entire membership of the United Nations, we must work together to end the atrocities, lay a foundation for justice, and build a sustainable peace in Syria.

On Iran, the General Assembly expressed deep concern regarding ongoing human rights violations, including the targeting of journalists, persecution of minorities, public executions in violation of Iran's international obligations, and restrictions placed on the fundamental freedoms of assembly, opinion, and expression. The United States remains deeply concerned about the human rights conditions in Iran and will continue to engage internationally and speak out forcefully in support of the fundamental rights of the Iranian people.

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Ambassador Michele J. Sison, U.S. Deputy Permanent Representative to the United Nations, delivered remarks expressing U.S. support for the resolution on the human rights situation in Syria that was adopted by the Third Committee. Ambassador Sison's November 19 remarks follow and are available at <http://usun.state.gov/remarks/6988>.

* * * *

The United States strongly supports the draft resolution before us today regarding the grave human rights situation in Syria. We call on all delegations present to join us in voting in favor of this text.

As documented in the numerous reports by the UN Commission of Inquiry on Syria, the Assad regime, associated militias, and ISIL are committing extensive and ongoing violations and abuses. These include mass killings, rape, torture, public executions, chemical weapons attacks, and enforced disappearances—all horrific acts that we must forcefully condemn and for which we must seek accountability. In its September report, the COI rightly calls attention to the impact of the Syrian regime's continued air assault on Syria's people and cities, often through the use of barrel bombs. The United States echoes Special Envoy Staffan de Mistura's strong condemnation of the severe effects on civilians and infrastructure of the Assad regime's on-going bombing across Syria.

The Assad regime continues to imprison tens of thousands of individuals, many arbitrarily, and subjects many to torture, sexual violence, inhumane conditions, denial of fair trials, and execution. These prisoners include children, women, doctors, humanitarian aid providers, human rights defenders, journalists, and average citizens. Tens of thousands have been detained or forcibly disappeared due to their human rights activism or perceived familial ties to anyone who opposes the regime, including their children. Those who survive Assad's torture chambers suffer devastating and lasting damage, as do their families. The international community must collectively support these victims.

We reiterate our call, united with the Syrian people and members of the international community, for an immediate end to all violations and abuses of human rights and violations of international humanitarian law, especially the egregious, widespread, and continued violations committed by the Assad regime. We urge continued support to UN Special Envoy de Mistura's efforts to promote a political transition based on the Geneva Communiqué toward a genuine, negotiated political transition that leads to a future that fulfills Syrians' aspirations for peace, freedom, and dignity. We must work together to end the atrocities, lay a foundation for justice, and build a sustainable peace in Syria. Part of this effort requires our continued robust response, as the sole body representing the entire membership of the United Nations, in condemning these appalling actions and calling for accountability.

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6. UN Security Council Meeting on Human Rights Situation in the DPRK

In December 2015, the UN Security Council held its second meeting on the human rights situation in the DPRK. The United States advocated for the Security Council to include this issue on its agenda in the face of some opposition. U.S. Permanent Representative to the UN Samantha Power's December 10, 2015 remarks, excerpted below, and available at <http://usun.state.gov/remarks/7035>, describe the grave human rights situation in the DPRK.

* * * *

Almost a year ago, on December 22nd, 2014, the Security Council met for the first time ever to discuss the human rights situation in the DPRK. The Council brought this issue into the chamber because the widespread and systematic human rights violations being committed by the North Korean government were not only deplorable in their own right, but they posed a threat to international peace and security.

I would like to address those who believe that what is happening in the DPRK is not a threat to peace and security. I would like to ask whether those countries think that systematic torture, forced starvation, and crimes against humanity are stabilizing or good for international peace and security? I assume they don't think that. So, could this level of horror be seen as neutral? A level of horror unrivaled elsewhere in the world. ... It stretches credulity and it sounds more like cynicism. These arguments—some of which we've heard here today—will not go down well in history, particularly when North Korea opens up. ...

The Commission of Inquiry Report itself said that the human rights situation in North Korea “does not have any parallel in the contemporary world.” The comprehensive report produced by the UN Human Rights Council’s Commission of Inquiry was based on more than 200 interviews with victims, eyewitnesses, and former DPRK officials, whose testimony was corroborated by other evidence such as satellite imagery. The Commission concluded in February 2014 that “systematic, widespread and gross human rights violations have been and are being committed by the Democratic People’s Republic of North Korea.”

The Commission found evidence that provided reasonable grounds to determine that, in the DPRK, “crimes against humanity have been committed... pursuant to policies established at the highest level of the State.”

The Council is meeting again on this issue today, Human Rights Day—for the first time since it was formally added to the agenda last year—because the North Korean people continue to endure a real-life nightmare, and because that nightmare is a threat to peace and security. The UN’s reporting is explicit. The Secretary-General’s report, released in September, found that from September 2014 to August 2015, “there were no indications of improvements in the exercise of freedom of expression.” This is in a country where, according to the COI’s report, the State “operates an all-encompassing indoctrination machine that takes root from childhood...to manufacture absolute obedience to the Supreme Leader,” and where “citizens are punished for any ‘anti-State’ activities or expression of dissent.”

The Secretary-General’s report similarly found that “there were no indications of changes in the use of political prison camps.” Political prison camps where, by UN estimates, between 80 and 120 thousand people are currently being held; and prison camps where, according to the Commission of Inquiry’s report, tens of thousands of prisoners have for generations been “gradually eliminated through deliberate starvation, forced labor, executions, torture, rape, and the denial of reproductive rights enforced through punishment, forced abortion, and infanticide.”

It is not only the blanket denial of enjoyment of freedom of expression and these infernal conditions in the prisoner camps that persist—but all of the grave human rights violations perpetrated by this regime: the summary executions; the use of torture; the decades of enforced disappearances with no accountability, including of citizens from neighboring countries, whose families continue to suffer from not knowing the fate of their loved ones. The list is long, the abuses vast, and the anguish profound.

Also unchanged is the immeasurable suffering experienced by many millions of North Koreans who continue to go hungry as a result of the regime’s actions ...

The systematic human rights violations persist for a simple reason: the North Korean government wants them to. They continue because the State still seeks to intentionally dehumanize, terrorize, and abuse its own people. The regime depends on this climate of fear and violence to maintain its grip on power.

* * * *

No member of this Council, or of the UN, can afford to ignore this situation. North Korea continues to demonstrate that regimes which flagrantly violate the human rights of their own people almost always show similar disdain for the rules that help ensure our shared security. We see this in the DPRK’s flouting of prohibitions imposed by the Security Council on its nuclear and ballistic missile activities, including by undertaking launches. We see it in the destabilizing rhetoric the DPRK routinely uses to threaten the annihilation of its neighbors. And we see it in

the DPRK's aggressive response, as the High Commissioner has mentioned, to the opening of an office in Seoul by the OHCHR—an office aimed at gathering ongoing information on human rights conditions in the DPRK.

* * * *

If we accept that the human rights situation in the DPRK is as abysmal as ever, as the UN's reporting informs us that it is; and if North Korea continues to flout the rules that ensure our shared security, as we have seen that it does—then it is clear that we must continue to shine a light on the human rights situation in North Korea, as we are doing today. Even more, it is incumbent upon this Council to ask what we can do, individually and collectively, to change the situation.

We must continue to take steps that one day will help us hold accountable the individuals responsible for the horrors like those experienced by our guests today. We cannot let immediate obstacles to accountability undermine our determination to document atrocities and identify those who order and carry them out, so that one day the perpetrators will be brought to justice. That is why the comprehensive report compiled by the Commission of Inquiry is so essential, and it is why it is so crucial that the UN's new office in Seoul provide a place where individuals can continue to recount their experiences and provide key information.

Of course, multilateral and human rights organizations should continue to seek unconditional access to the DPRK And this is access that the regime has too long denied, no doubt because of what it would reveal. But it would be a grave mistake to think that in order to obtain such access any country or anybody should soften its criticism of, what is by every measure, the most repressive regime on the planet. We must do the exact opposite, speaking with objectivity and firmness about the real conditions on the ground.

For the UN Security Council it is critical not just to meet on the DPRK, but to consider the Commission's recommendation that the situation in North Korea be referred to the International Criminal Court, and that we consider other appropriate action on accountability—as 112 Member States urged the Council to do just a few weeks ago.

Our continuing spotlight on this situation sends a clear message that we hope will reach the North Korean people, tight as the regime's control over information may be: We will not turn a blind eye to your suffering. ...

And UN Member States, and particularly members of this Council, must stop sending people who try to flee the DPRK back to the country. ...

* * * *

B. DISCRIMINATION

1. Race

a. Committee on the Elimination of Racial Discrimination

As discussed in *Digest 2014* at 191-94, the United States appeared before the Committee on the Elimination of Racial Discrimination in 2014 to present its periodic report on the implementation of U.S. obligations under the International Convention on

the Elimination of All Forms of Racial Discrimination. On September 21, 2015, the United States provided its one-year follow-up response to the Committee regarding its priority recommendations from its Concluding Observations on the U.S. report. Excerpts follow from this one-year follow-up response, which is available in full at http://www.state.gov/j/drl/rls/cerd_report/247203.htm.

* * * *

Recommendation 17(a) & (b) (Police use of force): The Committee urges the State party to:

(a) Ensure that each allegation of excessive use of force by law enforcement officials is promptly and effectively investigated; that the alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions; that investigations are re-opened when new evidence becomes available; and that victims or their families are provided with adequate compensation.

2. U.S. federal, state, and local authorities take vigilant action to prevent use of excessive force by law enforcement officials and to hold accountable persons responsible for such use of force. ...when there is improper conduct, the U.S. Department of Justice (DOJ) has criminal jurisdiction to investigate and prosecute use of excessive force by federal, state, and local officials that violates the U.S. Constitution or federal law. Successful prosecution of any case, including consideration of re-opening a case for prosecution, is dependent on the availability of evidence to support conviction beyond a reasonable doubt. DOJ also has civil jurisdiction to address state and local law enforcement patterns and practices that violate the Constitution or federal law, including the use of excessive force.

3. Federal Prosecutions: In the last six years, DOJ has brought criminal charges against more than 350 law enforcement officials. The following are recent examples of federal prosecutions involving the alleged use of excessive force by police against members of racial or ethnic minorities:

...

4. State-Level Prosecutions: The following are recent examples of prosecutions at the state or local level involving the alleged use of excessive force by police against members of racial or ethnic minorities:

...

5. Effective Remedies: In addition to bringing criminal prosecutions, the DOJ Civil Rights Division continues to institute civil suits for equitable and declaratory relief pursuant to the pattern or practice of police misconduct provision of 42 U.S.C. § 14141. DOJ has opened more than 20 investigations of discriminatory policing and/or excessive force in the last six years and has reached 19 agreements with state or local law enforcement agencies, working toward long-term solutions in those jurisdictions.

Recent cases include:

...

6. DOJ is also working proactively to prevent such incidents through training of police officers and helping to strengthen police-community relations. ...

7. Effective remedies are also provided at the state level. The following are recent examples of compensation or other remedies for incidents involving members of racial or ethnic minorities:

...

(b) Intensify its efforts to prevent the excessive use of force by law enforcement officials by ensuring compliance with the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and ensure that the new Customs and Border Protection directive on the use of force is applied and enforced in practice.

8. Use of excessive force by law enforcement officials has increasingly become an issue of widespread public focus and concern in the United States in the face of a number of highly publicized recent incidents. Authorities at all levels have intensified their efforts to prevent such conduct through numerous mechanisms, including revised use of force policies; increased capacity for crisis intervention with specially-trained personnel; enhanced early warning systems to identify gaps in policy, training and supervision; increased community oversight; use of new types of equipment; and expedited investigations of misconduct complaints. In March 2015, President Obama's Task Force on 21st Century Policing released a report with approximately 60 recommendations, and in May 2015, a \$20 million Body-Worn Camera Pilot Partnership Program was announced. The efforts being undertaken include a number of methods addressed in the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and U.S. government policies on use of force by law enforcement officials are fully consistent with the Basic Principles and with the UN Code of Conduct for Law Enforcement Officials.

9. In addition, in December 2014, DOJ announced an updated policy on profiling applicable to all law enforcement activity under federal supervision. This policy instructs that law enforcement officers may not consider race, ethnicity, national origin, gender, gender identity, religion, or sexual orientation to any degree when making routine or spontaneous law enforcement decisions, unless the characteristics apply to a suspect's description.

10. There have also been recent legislative and policy efforts at the state and local levels to address and curb use of excessive force and discriminatory policing. The following are examples of such efforts:

...

11. With regard to the Department of Homeland Security (DHS) U.S. Customs and Border Protection (CBP) policy on use of force, DHS and CBP enforce strict standards of conduct applicable to all employees, whether they are on- or off-duty, investigate deaths resulting from use of force, and follow up on civil rights and civil liberties-related complaints. CBP has conducted comprehensive reviews of its use of force policies and practices, and continues actively to monitor and enforce those policies. On May 30, 2014, CBP released its current use of force handbook, along with an earlier Police Executive Research Forum report on use of force. Earlier, in 2010, CBP created a Use of Force Reporting System, which

electronically tracks all lethal and non-lethal uses of force by agents and officers. On December 9, 2014, DHS also established a CBP Integrity Advisory Panel as a subcommittee of the Homeland Security Advisory Council, tasked with benchmarking CBP's progress in response to CBP use of force reviews and a report by the DHS Office of Inspector General, as well as identifying best practices from federal, state, local, and tribal law enforcement on incident prevention and transparency pertaining to incident response and discipline.

Recommendation 18 (Immigration policy):

The Committee calls upon the State party to ensure that the rights of non-citizens are fully guaranteed in law and in practice, including inter alia by:

(a) Abolishing "Operation Streamline" and dealing with any breaches of immigration law through civil, rather than criminal immigration system.

12. Operation Streamline is a law enforcement initiative aimed at deterring the increase in illegal crossings on the U.S. Southwest border by prosecuting certain non-citizens under 8 U.S.C. § 1325 ("improper entry by alien"). Most of those prosecuted had attempted to re-enter the United States without inspection after previously being ordered excluded or removed. The goal of Operation Streamline is to reduce rates of alien re-entry recidivism. The United States is committed to making sure that this type of enforcement activity is conducted in a manner consistent with U.S. human rights obligations.

13. Individuals subject to Operation Streamline are entitled to and afforded due process in all criminal proceedings under the U.S. Constitution and laws, including rights provided to all criminal defendants, and consistent with applicable international obligations. Each Streamline prosecution is conducted openly in federal court, with the benefit of legal representation; a thorough, transcribed plea dialogue and rights discussion; a right to demand a trial to make the government prove each element of each allegation beyond a reasonable doubt; a right to be heard at sentencing; and access to courts for higher-level review.

14. As of December 2014, only the Tucson, Del Rio, and Laredo sectors participate in Operation Streamline; the Yuma, El Paso, and Rio Grande Valley sectors discontinued using Operation Streamline between 2013 and 2014. However, U.S. Attorney's Offices in these sectors continue to prosecute misdemeanor cases under 8 U.S.C. § 1325.

(b) Undertaking thorough and individualized assessments for decisions concerning detention and deportation and guaranteeing access to legal representation in all immigration-related matters.

15. Decisions concerning detention and deportation are made on the basis of individualized assessments in light of the totality of the circumstances, and the United States provides avenues for relief and favorable discretion, consistent with U.S. international obligations. ...

16. On November 20, 2014, President Obama announced executive actions within his authority in order to improve the U.S. immigration system. In part, these actions are designed to prioritize removals of individuals who threaten U.S. national security, public safety, and border security, while allowing for the provision of temporary relief from removal on a discretionary

and individualized basis to certain persons who have been in the United States for an extended period and meet certain guidelines for consideration, including national security and criminal background checks. Specifically, the reforms sought to: (1) expand the population eligible for consideration under Deferred Action for Childhood Arrivals (DACA) to people of any current age who had entered the United States before the age of 16 and had lived in the United States continuously since January 1, 2010; (2) extend the period of deferred action and work authorization under DACA from two years to three years; (3) allow parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years under a new initiative, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), provided they have lived in the United States continuously since January 1, 2010, are not enforcement priorities, and pass required background checks; (4) focus enforcement priorities on the removal of national security, border security, and public safety threats; (5) implement a new Priority Enforcement Program in order to focus enforcement resources on those threats; (6) shift resources to the border; (7) modernize, improve, and streamline the legal immigration system; and (8) promote citizenship education and public awareness for lawful permanent residents.

17. DAPA and the modifications to DACA were challenged in federal court, leading to issuance of a preliminary injunction in February 2015 that temporarily blocked implementation of these two policies (but did not affect the original 2012 DACA policy). Despite the legal setback to two of these initiatives, the Obama Administration has taken tangible steps forward on its other immigration initiatives. ...

18. In November 2014, President Obama also announced his intention to focus immigration enforcement resources on criminals and persons who represent threats to our security and safety. ...

19. Many procedural protections for individuals are provided in proceedings before an immigration judge, including the requirement that immigration judges advise individuals of their right to be represented at no expense to the government, and notify them of and provide them with a list of free legal services providers. ...

20. To promote access to legal representation, DOJ offers the Legal Orientation Program to detained individuals, and the Legal Orientation Program for Custodians of Unaccompanied Alien Children (including a national call center). ...

21. On June 24, 2015, DHS Secretary Johnson announced a substantial change in the Department's detention practices with respect to families with children apprehended at the border. The new approach recognizes that, once a family has established initial eligibility for asylum or other relief under U.S. law, long-term detention of the family is an inefficient use of DHS resources and should be discontinued. ...

(c) Reviewing its laws and regulations in order to protect all migrant workers from exploitative and abusive working conditions, including by raising the minimum age for harvesting and hazardous work in agriculture under the Fair Labor Standards Act in line with international labour standards, and ensuring effective oversight of labour conditions.

22. The protection of migrant workers is vital to the United States, and we are committed to ensuring that all such workers in the United States receive the protections to which they are entitled under our Constitution and laws, consistent with applicable international obligations.

23. As previously reported to the Committee, U.S. laws that apply to migrant workers prohibit discrimination in employment on the bases of race, color, national origin (ethnicity), sex (including pregnancy, sex stereotyping, and gender identity), religion, age, disability, or genetic information (including family medical history). ...

24. U.S. federal labor and employment laws generally apply to all workers located in the United States, regardless of immigration status. ...

25. Temporary foreign workers brought into the United States in accordance with the Immigration and Nationality Act also acquire protection under the visa programs under which they are admitted. ...

26. As reported in our 2013 periodic report, DOL has established formal partnerships with foreign embassies and consulates of countries that are major countries of origin for migrant workers. ...

27. All workers, regardless of immigration status, are protected from forced labor by the U.S. criminal code, the Thirteenth Amendment to the U.S. Constitution, and the Trafficking Victims Protection Act (TVPA). ...

28. As reported to the Committee during the August 2014 presentation, in 2011, DOL sought comments on whether to amend and expand the list of agricultural occupations considered too hazardous for the employment of children under age 16. ...Th[e] decision to withdraw the rule was based on the Obama Administration's commitment to listening and responding to the comments of Americans in the public comment process.

29. In connection with this decision, DOL affirmed its intention to work to promote the safety and health of children employed as farm workers, including by collaborating with farming organizations to develop educational programs that address hazardous agricultural work practices and conditions. ...

30. Concurrent with President Obama's November 2014 executive actions, an Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment, and Immigration Laws was established. ...

(d) Ratifying ILO Convention No.29 concerning Forced or Compulsory Labour and ILO Convention No.138 concerning Minimum Age for Admission to Employment.

31. The 1998 ILO Declaration on Fundamental Principles and Rights at Work confirms that all ILO Members have an obligation, arising from the very fact of membership in the Organization, to respect, promote, and realize in good faith the principles concerning the fundamental rights that are the subject of the ILO's eight core conventions, including the elimination of all forms of forced or compulsory labor and the effective abolition of child labor. Although the United States has not ratified the majority of those conventions, the United States has demonstrated, in its follow-up reports under the Declaration, that U.S. workers do enjoy the fundamental principles and rights at work.

32. Under U.S. practice, prior to the President's transmitting any ILO convention to the U.S. Senate for advice and consent to ratification, a careful review of the convention is undertaken by the Tripartite Advisory Panel on International Labor Standards (TAPILS), a subgroup of the President's Committee on the ILO comprising representatives from the U.S. government and from employer and worker organizations. ...

33. TAPILS began a review of ILO Convention 29 on forced or compulsory labor when it began its review of Convention 105, but decided to concentrate on Convention 105. TAPILS has not completed reviews of either Convention 29 or Convention 138, and neither Convention has been transmitted by the President to the Senate for advice and consent to ratification.

Recommendation 22 (Guantanamo):

The Committee urges the State party to end the system of administrative detention without charge or trial and ensure the closure of the Guantanamo Bay facility without further delay. Recalling its general recommendation No.30 (2004) on non-citizens and general recommendation No.31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, it also calls upon the State party to guarantee the right of detainees to a fair trial in compliance with international human rights standards, and to ensure that any detainee who is not charged and tried is released immediately.

34. We preface this response by noting that the United States is committed, in the interest of promoting dialogue and cooperation, to providing information in response to the Committee's requests to the degree practicable, even where we may not agree that a given request bears directly on obligations under the Convention. The United States continues to have legal authority to detain Guantanamo detainees until the end of hostilities, consistent with U.S. law and applicable international law, but it has elected, as a policy matter, to ensure that it holds individuals no longer than necessary to mitigate the threat they pose.

35. President Obama has repeatedly reaffirmed his commitment to close the Guantanamo Bay detention facility, including during his State of the Union address to Congress on January 20, 2015. He has emphasized that the continued operation of the facility weakens U.S. national security by draining resources, damaging relationships with key allies and partners, and emboldening violent extremists. The United States is taking all feasible steps to reduce the detainee population at Guantanamo and to close the detention facility in a responsible manner that protects our national security.

36. More than 80 percent of those at one time held at the Guantanamo Bay detention facility have been repatriated or resettled, including all detainees subject to court orders directing their release. ...

37. The majority of Guantanamo detainees designated for transfer are Yemeni nationals, and in light of the current security situation in Yemen, the United States recognizes the need to identify appropriate resettlement solutions for that population as part of broader transfer efforts.

38. The United States remains of the view that in our efforts to protect our national security, both military commissions and federal courts can, depending on the circumstances of

the specific case, provide appropriate processes for criminal prosecution that are both grounded in applicable law and effective. U.S. law currently precludes the transfer of detainees from Guantanamo for prosecution in the United States. All current military commission proceedings at Guantanamo incorporate fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 of the 1949 Geneva Conventions and other applicable law, and that are further consistent with those in Additional Protocol II to the 1949 Geneva Conventions. A conviction by a military commission is subject to multiple layers of review, including judicial review by federal civilian courts consisting of life-tenured judges.

39. 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. ...

* * * *

b. Human Rights Council

At each of the 2015 sessions of the HRC, the United States delegation provided statements on racism and racial discrimination at meetings held to discuss follow up on the Durban Declaration. Each of these statements provides examples of efforts in the United States to combat racial discrimination, for example, in policing. See March 24, 2015 statement delivered by Kelly J. Tucker at the 28th session, available at <https://geneva.usmission.gov/2015/03/23/item-9-general-debate-racism-racial-discrimination-xenophobia-and-related-forms-of-intolerance-follow-up-and-implementation-of-the-durban-declaration-and-programme-of-action/>; June 30, 2015 statement delivered by Wesley J. Reisser at the interactive dialogue with the special rapporteur at the 29th session, available at <https://geneva.usmission.gov/2015/06/30/hrc-29th-session-dialogue-with-the-special-rapporteur-on-racism/>; and September 28, 2015 statement delivered by Gerard Hodel at the 30th session, available at <https://geneva.usmission.gov/2015/09/29/u-s-statement-on-racism-racial-discrimination-xenophobia-and-related-forms-of-intolerance-follow-up-and-implementation-of-the-durban-declaration-and-programme-of-action/>.

At the 30th session of the HRC, the United States again voted no on the resolution on “Racism: from Rhetoric to Reality,” an annual follow-on to the Durban Declaration, to which the United States has consistently objected. U.N. Doc. No. A/RES/HRC/30/16. The resolution was adopted by a vote of 32 to 12, with 3 abstentions, on October 2, 2015. The U.S. provided the following explanation of vote, available at <https://geneva.usmission.gov/2015/10/06/u-s-explanation-of-vote-on-racism-from-rhetoric-to-reality/>:

The government of the United States of America is deeply engaged in combating racism and racial discrimination. We have welcomed and will continue to welcome opportunities to work together with other countries in implementing

the Convention on the Elimination of All Forms of Racial Discrimination. But we have significant concerns about this resolution. Our objections to the Durban Declaration and Programme of Action are well known. In addition, we cannot accept the resolution's legally incorrect implication that any and all reservations to articles 18, 19, and 20 of the International Covenant on Civil and Political Rights and 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 those treaties; we note that this resolution has no effect as a matter of international law. As a result, the United States will call for a vote, and vote "no."

2. Gender

a. *General Assembly*

On September 27, 2015, President Obama issued a statement, which appears below, on the 20th anniversary of the Fourth World Conference on Women. Daily Comp. Pres. Docs. 2015 DCPD No. 00656. The White House released a report, "United States Report on the Implementation of the Beijing Declaration and Platform for Action," with this statement. The report is available at https://geneva.usmission.gov/wp-content/uploads/2014/11/United_States_Beijing_20_Review.pdf.

* * * *

I am proud to commemorate the 20th anniversary of the Fourth World Conference on Women. Today we recommit ourselves to the basic principle affirmed there, namely that "[w]omen's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace."

The United States understands that women's rights are human rights and that empowered women and educated girls are critical to achieving lasting peace, security, and prosperity. Over the last 20 years, we have made tremendous strides toward gender equality:

- We have worked with Congress to reauthorize the groundbreaking Violence Against Women Act, enacting new protections and strengthening existing protections, including for LGBT individuals and Native American survivors of domestic violence.

- Through the Affordable Care Act, we have dramatically increased access to quality, affordable health care for women and girls across the United States and put an end to women being charged more for health care than men.

- With our National Action Plan on Women, Peace, and Security and by chairing the Equal Futures Partnership, we are encouraging and supporting women's economic and political empowerment both at home and abroad.

• Within the United States, we are taking steps to support working families, encourage women and girls to pursue careers in the STEM fields, and provide additional opportunities for women entrepreneurs.

But we know that much work remains. Women and girls continue to face violence and discrimination at home, at work, in school, and in their communities. Women continue to be paid less than men for equal work. In too many places around the world, girls do not have the same educational opportunities as boys. Too often, women’s contributions are undervalued, underutilized, and suppressed. And in too many places—from China to Egypt, from Russia to Venezuela—women have been swept up in repressive crackdowns on civil society and deprived of their universal rights and fundamental freedoms.

That’s why my administration continues to work to advance the empowerment and education of women and girls here and abroad. It’s why we are dedicating additional resources to address violence against women and girls. It’s why we are investing in job training and apprenticeships to help women earn better-paying jobs. It is why we launched “Let Girls Learn,” to address the challenges adolescent girls around the world face in enrolling, completing and succeeding in school. And it is why my administration’s “Stand With Civil Society” initiative is supporting the right of women and all people around the world to work peacefully for the betterment of their societies without fear that their rights and freedoms will be unjustly abridged.

Today we renew our resolve to work tirelessly toward a world where every woman and girl can enjoy the rights and freedoms that are her birthright. We pledge to continue this work in partnership with the independent civil society advocates and experts who have led the fight for women’s empowerment, as envisioned when the international community convened 20 years ago. And we remind ourselves of all of the noble promises of that conference and rededicate ourselves to making them a reality.

* * * *

b. U.S. Actions on Women, Peace, and Security

On January 27, 2015, the United States commemorated the third anniversary of the National Action Plan on Women, Peace, and Security. Karen J. Hanrahan Deputy Assistant Secretary of State for the Bureau of Democracy, Human Rights, and Labor, delivered remarks on the occasion, excerpted below and available at <http://www.state.gov/j/drl/rls/rm/2015/236879.htm>.

* * * *

... I want to ... recognize USAID’s leadership in implementing the National Action Plan. The team at USAID should be commended for its continued commitment to building a world where women are recognized as key actors in stabilizing their communities and in building peace between warring factions. ...

We are here to commemorate the third anniversary of the National Action Plan on Women, Peace and Security. As you know, this is the first of its kind. Even better, President Obama released the NAP through an Executive Order in which he laid out concrete steps that

this Administration would take to elevate and support women as critical participants in preventing and resolving conflict.

Together, the National Action Plan and the Executive Order represent a fundamental change in how the USG leverages its diplomatic, military, and development power to support women in conflict—by ensuring that women’s perspectives and gender considerations are woven into the DNA of how the United States approaches peace processes, conflict prevention, the protection of civilians, and humanitarian assistance. We have also used these foreign policy tools to influence other nations.

Over the past three years we have seen these efforts generate concrete steps across the world—from South Sudan to Egypt to Afghanistan to DRC—to bring more women to negotiation tables; to integrate solutions and justice for women into peace agreements; to ensure our humanitarian responses protect women; to recruit and retain more women throughout security sectors and criminal justice systems; and to restructure how soldiers, peacekeepers, and police officers are trained and equip them with tools to respond to the unique needs of men and women alike. We have invested in these efforts because we know from our own history that when women play key roles in decision making and leadership structures, the result is greater stability, stronger communities and more durable peace.

Progress had been hard fought and a result of herculean efforts from civil society groups here in the U[nited] S[tates] and in host countries, many of which are represented here today. Within the USG, the success of our efforts has required sustained collaboration across the State Department, USAID, and the Defense Department. And where our diplomacy, development, and defense reinforce each other, we have seen better outcomes, even as we face increasingly challenging threats to international peace and security.

One of many examples—the State Department’s Bureau of Democracy, Human Rights and Labor has galvanized a coalition within the US government to promote the inclusion of women in decision making for Syria’s future—including in peace negotiations. And while the United States is open-eyed about the prospects for near term stability in Syria and Iraq, the leadership and enthusiasm of these women offer a constant reminder that peace is possible. And we will continue to advocate for their formal inclusion in the peace process. At the same time, we are witnessing the Islamic State continues to kidnap, traffic and brutalize women and girls in Iraq and Syria—with a growing presence in other countries. We are discussing internally how to better protect these women and girls.

We are also looking internally at how to do more to implement the NAP; how to truly weave the spirit of UN Security Council Resolution 1325 into our diplomacy every day. The United States is committed to leading by example on Women, Peace, and Security, from investing in better training for diplomats to requiring gender analysis strategic planning for foreign assistance to integrating gender considerations into our procurement; we are improving how we do business.

But today, fifteen years after the passage of UN Security Council Resolution 1325 and twenty years since the Beijing Platform for Action, we must also be humble about the global track record. 2015 is truly the year for the agenda of women, peace and security—and it must be a year of resounding affirmation that including women in decision making isn’t a nice thing to do; it’s the strategic thing to do.

As many of you know, the United States’ review of our NAP is only one aspect of a global culmination of efforts to advance gender equality. The UN’s high level review of 1325 is converging with parallel efforts to take stock of the UN peacekeeping and peacebuilding

architectures that have significant impact on women. At the same time, we are pushing to place gender equality and the empowerment of women and girls at the heart of the Post-2015 Development Agenda—an unprecedented opportunity for the global community to come together around a new set of global development priorities. Together, we must seize on these efforts and continue to push for more action, to continue to be innovative in how we implement the NAP and move this global Women, Peace, and Security agenda forward.

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On October 14, 2015, the U.S. Department of State issued a fact sheet on U.S. Commitments to Women, Peace, and Security. The fact sheet is excerpted below and available at <http://www.state.gov/r/pa/prs/ps/2015/10/248207.htm>.

* * * *

Fifteen years since United Nations Security Council Resolution 1325 was adopted in 2000, the United States remains a strong advocate for women’s equal and full participation in the prevention and resolution of conflicts, peace building, and peacekeeping. The U.S. National Action Plan on Women, Peace, and Security (NAP) remains the United States’ signature strategy for implementing ongoing commitments to the women, peace, and security (WPS) agenda. During yesterday’s UN Security Council Open Debate on WPS, the United States reaffirmed its continued support of women as equal partners in all aspects of peace and security and, in doing so, made a series of monetary commitments totaling \$31.3 million:

Yesterday’s announcement includes \$8 million toward the Global Women, Peace, and Security Initiative and \$2.1 million toward the Africa Women, Peace, and Security Initiative. These initiatives improve the prospects for inclusive, just and sustainable peace by prioritizing projects that work toward protecting women from violence and promoting women’s participation in the peace processes and decision-making.

From the Secretary of State’s Full Participation Fund, the United States is committing \$6.58 million to incentivize the implementation of the U.S. NAP in Bosnia and Herzegovina, Burundi, Republic of Congo, Georgia, Guinea, Honduras, Lebanon, Liberia, Mali, Mauritius, Mexico, Papua New Guinea, Pakistan, the Philippines, Rwanda, Samoa, Sierra Leone, Sri Lanka, and Timor Leste.

Building on Secretary Kerry’s 2014 announcement of the Accountability Initiative, an effort to develop specialized justice sector solutions to fight impunity for sexual violence in conflict-affected countries, the United States is committing \$8.35 million to implementation in the Central African Republic, the Democratic Republic of Congo, and Liberia.

In addition, the United States is also committing \$1 million for a justice initiative based in Democratic Republic of Congo’s South Kivu province that will work with the justice sector and vulnerable communities with the goal of educating 50,000 women on human rights and basic judicial procedures.

Through USAID’s Women, Peace, and Security Incentive Fund, the United States is devoting \$3.7 million to strengthen the roles of women and youth in political and peace processes in Mali, increase political empowerment and agency for Syrian women, and improve

services for survivors of gender based violence in Bosnia and Herzegovina and in the West Bank and Gaza.

Through USAID's Global Women's Leadership Program, the United States is dedicating \$500,000 to support the participation of women in peace processes, political transitions, and other decision-making processes. This investment builds on the activities under and lessons learned from USAID's \$2.6 million Global Women's Leadership Fund.

USAID is also committing \$1 million to a creative new USAID partnership that brings together the WPS and climate change agendas to tackle the critical intersections of gender, climate, security, and resilience.

Finally, USAID is making a new commitment of \$80,000 to support a mechanism to 'roll up' the experiences and findings of field based researchers into an international practitioner-researcher network. This network will focus on non-traditional researchers and opening the space for interacting with policy makers.

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3. Sexual Orientation and Gender Identity

a. General

On February 23, 2015, Secretary Kerry issued a press statement announcing the appointment of Randy Berry as the first U.S. special envoy for the human rights of LGBT persons. The Secretary's statement is excerpted below and available at <http://www.state.gov/secretary/remarks/2015/02/237772.htm>.

* * * *

I could not be more proud to announce Randy Berry as the first-ever Special Envoy for the Human Rights of LGBT Persons.

We looked far and wide to find the right American official for this important assignment. Randy's a leader. He's a motivator. But most importantly for this effort, he's got vision. Wherever he's served—from Nepal to New Zealand, from Uganda to Bangladesh, from Egypt to South Africa, and most recently as Consul General in Amsterdam—Randy has excelled. He's a voice of clarity and conviction on human rights. And I'm confident that Randy's leadership as our new Special Envoy will significantly advance efforts underway to move towards a world free from violence and discrimination against LGBT persons.

Defending and promoting the human rights of LGBT persons is at the core of our commitment to advancing human rights globally—the heart and conscience of our diplomacy. That's why we're working to overturn laws that criminalize consensual same-sex conduct in countries around the world. It's why we're building our capacity to respond rapidly to violence against LGBT persons, and it's why we're working with governments, civil society, and the private sector through the Global Equality Fund to support programs advancing the human rights of LGBT persons worldwide.

Too often, in too many countries, LGBT persons are threatened, jailed, and prosecuted because of who they are or who they love. Too many governments have proposed or enacted laws that aim to curb freedom of expression, association, religion, and peaceful protest. More than 75 countries still criminalize consensual same-sex activity.

At the same time, and often with our help, governments and other institutions, including those representing all religions, are taking steps to reaffirm the universal human rights of all persons, regardless of sexual orientation or gender identity. So while this fight is not yet won, this is no time to get discouraged. It's time to stay active. It's time to assert the equality and dignity of all persons, no matter their sexual orientation or gender identity. And with Randy helping to lead our efforts, I am confident that's exactly what we can and will do.

* * * *

b. Human Rights Council

On June 29, 2015, at the 29th session of the UN Human Rights Council, U.S. Special Envoy Berry delivered the statement on behalf of the U.S. delegation responding to the High Commissioner's new report on discrimination and violence against individuals based on their sexual orientation and gender identity. Mr. Berry's statement is excerpted below and available at

<https://geneva.usmission.gov/2015/06/29/hrc-29th-session-item-8-general-debate/>

* * * *

The United States welcomes the High Commissioner's new report on discrimination and violence against individuals based on their sexual orientation and gender identity. We share OHCHR's concerns regarding the continuing, serious, and widespread violations and abuses perpetrated against individuals based on their sexual orientation or gender identity. The United States also strongly supports the High Commissioner's call for continued robust engagement at the Human Rights Council to address violence and discrimination based on sexual orientation and gender identity.

While member states are taking a more proactive position toward addressing violence against Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons, homophobic and transphobic killings, and discriminatory practices continue to occur at alarmingly high rates in all regions of the world, including in the United States. Recognizing the hard work yet to be done, we continue to make progress at home by adopting measures to combat violence and discrimination. For example, we are implementing the Matthew Shepherd-James Byrd Jr. Hate Crimes Prevention Act and integrating openly gay servicemen and women into our armed forces.

Following former Secretary of State Clinton's declaration in 2011 that "gay rights are human rights and human rights are gay rights," the United States has continued to advance equality at home and around the world. My appointment as the first-ever Special Envoy for the Human Rights of LGBTI Persons signifies the United States' commitment to safeguarding the rights of members of LGBTI communities everywhere. Our commitment is also evidenced by President Obama's recent Presidential Proclamation declaring June as Pride month, which

outlines several strategies for eliminating discriminatory practices and strengthening protections for transgender persons.

We are not alone in exercising a commitment to make the world a safer place for people of various sexual orientations and gender identities. In this regard, the United States commends the leadership at the UN of many countries, including Colombia, Chile, Brazil, Uruguay, Argentina, and Mexico. We are pleased to join Brazil in co-sponsoring a side event on human rights, sexual orientation, and gender identity at this session.

When we work together to protect and promote the human rights of all persons regardless of sexual orientation or gender identity, we come closer to the creation of a more equitable world for everyone. As President Obama said welcoming the Supreme Court ruling, “if we are truly created equal, then surely the love we commit to one another must be equal as well.”

* * * *

c. Security Council

On August 24, 2015, the UN Security Council held its first “Arria-formula” meeting on LGBT issues, addressing in particular ISIL’s crimes against LGBT individuals in Iraq and Syria. A State Department press statement on the meeting, available at <http://www.state.gov/r/pa/prs/ps/2015/08/246296.htm>, explains:

Around the world, the UN has documented thousands of cases of individuals killed or injured in brutal attacks simply because they are LGBT or perceived to be LGBT. This abhorrent practice is particularly widespread in ISIL-seized territory in Iraq and Syria, where these violent extremists proudly target and kill LGBT individuals or those accused of being so. No one should be harmed or have their basic human rights denied because of who they are and who they love.

Ambassador Power delivered remarks on behalf of the United States at the inaugural meeting. Her remarks are excerpted below and available in full at <http://usun.state.gov/remarks/6799>.

* * * *

Today we are making UN history. The UN Security Council has never before had a meeting on LGBT issues.

It is an honor to co-host this meeting with Chile, which continues to be a strong advocate for LGBT rights and more generally for empowering civil society around the world.

* * * *

ISIL does not try to hide its crimes against LGBT persons—it broadcasts them for all the world to see. Many of us have seen the videos. ISIL parading a man through the streets and

beating him—for being gay. ISIL marching men to the tops of buildings and throwing them to their deaths—for being gay. In one of these videos, allegedly from Syria, we are told that the victim was found to be having a gay affair. He is blindfolded, walked up stairs of a building, and then heaved off its roof. His suffering did not end there. The victim miraculously survived the fall, only to be stoned to death by a mob that waited for him below. Kids in the crowd were reportedly encouraged to grab stones and take part.

The mob in this instance carries an important lesson: while the targeting of LGBT individuals in the region appears to have worsened as ISIL's power has grown, such violence and hatred existed well before the group's dramatic rise, and that violence and hatred extends far beyond ISIL's membership. The victim in that grotesque video may have been thrown to his death by ISIL, but he was ultimately killed by stone-throwing individuals who did not belong to the group. Similarly, before Subhi Nahas was forced to flee his country because of death threats from Jabhat al Nusra, he was targeted for being gay by Syrian government soldiers. And before ISIL came to power, Adnan was repeatedly attacked by gangs of thugs for being gay, once being beaten so severely that he could hardly walk.

Today, we are coming together as a Security Council to condemn these acts, to demand they stop, and to commit to one day bringing the perpetrators to justice. That unified condemnation matters. This is the first time in history that the Council has held a meeting on the victimization of LGBT persons. It is the first time we are saying, in a single voice, that it is wrong to target people because of their sexual orientation and gender identity. It is a historic step. And it is, as we all know, long overdue.

But crucial and unprecedented as this step is, condemning ISIL's violent and systematic targeting of LGBT individuals is the easiest step we can take today. Because while today's session is focused on the crimes against LGBT persons committed by ISIL, we know the scope of this problem is much broader. Consider the report released in June by the UN Office of the High Commissioner for Human Rights—a report that found that thousands of people have been killed or brutally injured worldwide because of their sexual orientation or gender identity. According to the report, “the overall picture remains one of continuing, pervasive, violent abuse, harassment and discrimination affecting LGBT and intersex persons in all regions...often perpetrated with impunity.”

We are all horrified by ISIL's videos of men being thrown to their death. But what is it about these crimes that so shocks our collective conscience? At its essence—it is the denial of a person's most basic right because of who they are. It is ISIL deciding that, because of a person's sexual orientation or gender identity, they do not deserve to live.

Yet if these crimes feel utterly unjust and wrong to us, we must also ask: Why is it acceptable to deny LGBT persons other human rights? Why should LGBT persons be imprisoned for who they are? Why should police be allowed to refuse to investigate attacks or threats against LGBT persons? Why should we accept LGBT persons being turned away from schools or jobs or social services because of who they love? The answer to all of these questions is the same: We should not accept it. But too often we do.

No religious beliefs justify throwing individuals off of buildings or stoning them to death because of who they love. No cultural values excuse refusing to investigate a killing, assault or death threat because the victim is gay. These are not Western-imposed rights, or the North trying to force its values on the South.

Yet in too many parts of the world, denying LGBT rights is still seen as moral and just. Laws are used to criminalize LGBT persons, rather than to prosecute the people who violate their rights. That must change.

That change begins by working to stop attacks against individuals based on their sexual orientation and gender identity. And by taking steps to ensure that those who commit these heinous and brutal crimes are held accountable, whether the perpetrators belong to ISIL or police forces or are members of our own communities.

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Let me conclude and hand the floor over to my esteemed co-host, Ambassador Barros-Melet. This year we mark seventy years since the creation of the United Nations. It is fair to say that in writing the charter, the drafters did not consider LGBT rights part of their conception of equal rights. But if we read the Charter today—and in particular its call to “reaffirm faith... in the dignity and worth of the human person”—it is impossible not to see a call for all of us to affirm LGBT rights. ... And it is impossible not to take up the struggle for their rights as our own, as we have other great human rights struggles over the last seven decades. Today, we take a small but important step in assuming that work. It must not be our last step.

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4. Age

a. *Human Rights Council*

At the 29th session of the Human Rights Council, the United States co-sponsored a side event on abuse and violence against older women, marking World Elder Abuse Awareness Day on June 15, 2015. Leslie Marks delivered remarks on behalf of the U.S. Mission in Geneva. Her remarks are excerpted below and available at <https://geneva.usmission.gov/2015/06/15/u-s-statement-at-hrc-side-event-on-elder-abuse-and-violence-against-older-women/>.

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The more we study elder abuse, the more we understand that elder abuse is a form of violence that predominantly impacts women. Global prevalence data is lacking, but we know that across the world, women comprise the majority of elder abuse victims. (In the United States, 2 out of 3 elder abuse victims are women). Some reasons behind the disproportionate impact of elder abuse on older women include higher rates of poverty, social isolation, and dependence on a caregiver (often a spouse).

In every country, older women who are abused are more likely to suffer illness and die sooner than those who are spared abuse. The negative health effects of abuse are particularly acute for older women and include higher incidences of many serious conditions, from

depression and anxiety to arthritis, breast cancer, and heart disease. In addition to the incalculable cost of human suffering, increased incidence of elder abuse will create significant costs to health systems across the globe.

The U.S. has focused on developing practical measures to address elder abuse both at home and globally. The “U.S. Strategy to Prevent and Respond to Gender-Based Violence” acknowledges violence against women and girls across the life cycle, including elder abuse. President Obama signed into law the Elder Justice Act in 2010 which is dedicated to the prevention, detection, treatment, intervention and prosecution of elder abuse, neglect and exploitation...

Every ten years, the White House hosts a Conference on Ageing, and this is one of those years. On the agenda for the first time is Elder Justice: preventing and responding to elder abuse, financial exploitation, and neglect.

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b. *Inter-American Convention on the Human Rights of Older Persons*

At the 45th regular session of its General Assembly in June 2015, the Organization of American States (“OAS”) passed a resolution adopting the “Inter-American Convention on the Human Rights of Older Persons.” OAS Doc. AG/RES. 2875 (XLV-O/15). The United States did not participate in negotiating the draft convention because, in its view, other means and actions would better address the challenges facing older persons. The United States added a footnote to the resolution adopting the convention, explaining its opposition. Canada likewise added a footnote registering its opposition and several other countries lodged reservations to the convention in footnotes to the resolution. The resolution with footnotes is included in the documents of the 45th regular session, available at <http://www.oas.org/consejo/GENERAL%20ASSEMBLY/Resoluciones-Declaraciones.asp>. The U.S. footnote reads as follows:

The United States has consistently objected to the negotiation of new legally binding instruments on the rights of older persons. We reiterate our longstanding reservations and concerns with that exercise and the resulting convention. The United States remains convinced of the importance of working in the OAS and in the United Nations to address the many challenges faced by older persons in this Hemisphere and throughout the world, including with respect to their enjoyment of human rights. However, we do not believe a convention is necessary to ensure that the human rights of older persons are protected. The United States believes that, rather than promoting this new instrument, the resources of the OAS and of its member states should be used to identify practical steps that governments in the Americas might adopt to combat discrimination against older persons, including best practices in the form of national legislation and enhanced implementation of the international human

rights treaties. Such efforts should be aimed at addressing immediately and practically the challenges faced by older persons.

C. CHILDREN

1. Rights of the Child

a. Human Rights Council

At the Human Rights Council's 28th Session, the United States provided an explanation of position on the resolution entitled "Rights of the Child: Towards better investment in the rights of the child." The U.S. explanation of position, delivered on March 27, 2015, is excerpted below and available at

<https://geneva.usmission.gov/2015/03/27/eop-on-item-3-resolution-entitled-rights-of-the-child-towards-better-investment-in-the-rights-of-the-child/>.

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The United States is pleased to join consensus on the Rights of the Child resolution. We thank the sponsors of this resolution and other member states for their collaboration during the negotiations. Streamlining this resolution was an important way to ensure the text was targeted to the issue at hand: improving investments in the rights of the child.

Investing in children is critical. The United States is consistently among the largest donors to UNICEF, and provided over \$500 million last year to help that organization improve the lives of children around the world. As we noted at the full day meeting on children's rights, the Obama Administration announced earlier this month that it is expanding its efforts to help adolescent girls through the *Let Girls Learn* initiative. This initiative will help ensure girls throughout the world get the education they deserve. A key part of Let Girls Learn is to encourage and support community-led solutions to reduce barriers that prevent adolescent girls from completing their education. We are excited about this initiative and look forward to building more partnerships in support of expanding access to education. In the United States, educational matters primarily are determined at state and local levels. We recognize the importance of quality education and of striving to strengthen and expand it.

The United States joins consensus on this resolution with the understanding that the resolution does not imply that states must join human rights instruments to which they are not a party, or otherwise implement obligations under those instruments. Moreover, the United States does not recognize any change in the current state of international law. Further we understand this resolution's reaffirmation of prior documents to apply to those who affirmed them initially.

The United States remains deeply committed to protecting the rights of children, and look forward to continuing our partnerships with other countries and international partners in pursuit of these goals.

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b. UN General Assembly

On November 24, 2015, the United States delivered an explanation of vote at the UN General Assembly on the resolution on the rights of the child. The resolution was subsequently adopted by the UN General Assembly in December. U.N. Doc. A/RES/64/146. The resolution calls upon States to give full effect to the right of all children to education. The U.S. explanation of vote follows.

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The United States is disappointed that this year's resolution on the Rights of the Child will not be adopted by consensus for the first time in many years. We will be voting yes, and encourage others to do as well.

Numerous headlines of tragedies faced by children in or fleeing war-torn areas such as Syria, Yemen, Sudan, and South Sudan remind us of the importance of protecting the rights of children, including those most vulnerable. Efforts to protect and promote the well-being of children in our country and abroad remain a priority for the United States, and this resolution encourages all countries to take action in such regard.

As Secretary of State Kerry noted, "Unless we invest in our children, unless we open the doors of knowledge to everybody, unless we rise above discrimination and intolerance and work together, then we will steadily grow poorer together. That is why education is so critical." To this end, the United States, for instance, has invested billions of dollars domestically in early education in recent years, including through the Preschool Development Grants program that is expanding access to high-quality preschool for children from low-income families in communities with the greatest need. As education is primarily a state and local responsibility within the U.S. federal structure, the United States will address the goals of this resolution concerning education consistent with current U.S. law and the federal government's authority.

Regrettably, we continue to see acts of violence perpetrated against children, even in our own communities and schools. The United States places great importance on the protection of children, and will continue to abide by its applicable international legal obligations.

The U.S. works to eliminate exploitative child labor and forced labor around the world, including through our support of the International Labor Organization's International Program on the Elimination of Child Labor. Not all work is harmful to children, however. For example, many children help their families around the home, on the family farm or in a family business, or take on jobs to learn career and technical skills. In this way, children acquire skills, learn to take responsibility, and gain pride in their own accomplishments. We understand the resolution's call to end child labor by 2025 as not referring to this type of child work.

We join consensus on this resolution, as well as the Girl Child resolution and the Programmes and Policies Involving Youth resolution, with the understanding that they do not imply that States must become parties to instruments to which they are not a party or implement obligations under such instruments. Further, we understand any reaffirmation of prior documents to apply to those States that affirmed them initially. We also underscore that these resolutions do not change or necessarily reflect the United States' or other States' obligations

under treaty or customary international law, including international humanitarian law and with respect to the right to education, nor does this resolution add content to that right. Further, we note that reservations are an accepted part of treaty practice except when prohibited by a treaty or incompatible with the treaty's object and purpose.

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2. Children and Armed Conflict

a. *United Nations*

The UN Security Council adopted resolution 2225 on children and armed conflict on June 18, 2015. U.N. Doc. S/RES/2225. At the Security Council session on children and armed conflict on June 18, David Pressman, Alternate U.S. Representative to the UN for Special Political Affairs, delivered remarks on the issue of children and armed conflict as well as resolution 2225. He emphasized U.S. support for Resolution 2225's addition of child abduction to the bases for listing in the annexes to the Secretary General's annual reports on children and armed conflict. His remarks are excerpted below and available at <http://usun.state.gov/remarks/6570>.

* * * *

The Secretary General's Annual Report on Children and Armed Conflict should be a valuable and trusted resource for advancing accountability against the world's most serious abusers of children. This year alone, we have seen the Islamic State of Iraq and the Levant, ISIL, publicly execute and stone children; kids manipulated to literally explode themselves in service of Boko Haram terrorists; and the continued unlawful recruitment and use of children in South Sudan, the Democratic Republic of the Congo, and Sudan.

The Secretary-General's Annual Report should contribute to our common cause to protect children by using standards that are applied uniformly, when documenting the actions of all parties in conflict—so that it is perceived as credible, objective, and non-political. But if this report is politicized—if it becomes more of a political tool to advance political agendas, rather than a clear application of facts to objective standards—it will be seriously compromised. Let's be clear: the idea that the Government of Israel, as some have suggested in this debate, would be listed on the same page as ISIL, Boko Haram, or Syria is factually and fundamentally wrong. The comparisons we have heard from some today of casualty numbers are totally misleading. Multiple UN agencies and this year's Annual Report on Children and Armed Conflict itself have explicitly stated that the casualty numbers in Syria are unable to be verified and almost certainly underreported. Comparing these underreported numbers to documented deaths meets no standard of credibility and seems like a blatant attempt to vilify rather than illuminate.

Madame President, we welcome the adoption of Resolution 2225, and the addition of abductions as a "trigger" for being listed in the Secretary-General's annex. Mass abductions, especially of young women and children, are becoming part of the extremists' playbook for

terrorizing communities; and the United States supports fully the attention that this violation will now receive.

Today, I want to highlight what we can do better to help children victimized by armed conflict. First and foremost, obviously it is the responsibility of states and armed groups to stop taking children from their homes to engage in hostilities. We have made some progress—in places like the Central African Republic, where armed groups recently agreed to stop recruiting child soldiers and committed to releasing the 6,000 to 10,000 child soldiers currently in their ranks. But promising to release children is just the beginning and, in fact, releasing these children from armed forces and armed groups is itself also just the beginning. The work of reintegrating these children—meaningfully, compassionately, respectfully—is critical and all too often overlooked. It is a long path to recovery, and our collective attention span to the challenge needs to be expanded.

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Of course, the best way to give children the bright future that we want them to have is to protect them from harm in the first place. And that is why tools like The Child Soldier Prevention Act of 2008 in the United States are critical—and we urge other governments to adopt similar legislation to help end the practice of the unlawful recruitment and use of child soldiers by holding governments who violate these basic principles accountable. Under this U.S. law, foreign governments that unlawfully recruit or use child soldiers, or who support armed groups that do, are subject to restrictions on certain U.S. security assistance and commercial licensing of military equipment. As they should be.

We also lead by example when engaged in military operations. U.S. forces receive training throughout their careers in civilian protection; it is woven throughout military doctrine; and the imperative to avoid harming civilians, including children, has become even more explicit in recent tactical directives from our commanders to their forces—directives that go beyond what is required under international law, and often result in forces having to assume additional operational and other risks in order to minimize the possibility of harming children. It is the right thing to do, and other militaries should follow that example.

And when those engaged in, or supporting peacekeeping efforts are accused of abusing the very children they are sent to protect, there must be zero tolerance. There is no room in United Nations peacekeeping or in any regional or national missions for those who prey on the vulnerable.

Madame President, as the Secretary-General's report shows, too many states and armed groups are not living up to their minimum obligations under international law. That is why we have convened here today, and that is why we call on all of our colleagues to commit ourselves once again to documenting violations and abuses against children, to take seriously the need for rigorous standards and methodology in monitoring and reporting across all triggers—now including abductions—and to do all we can to help children who have been through such horrendous experiences in armed conflict to recover.

b. *Child Soldiers Prevention Act*

Consistent with the Child Soldiers Prevention Act of 2008 (“CSPA”), Title IV of Public Law 110-457, the State Department’s 2015 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 2015 report are the governments of Burma, Democratic Republic of the Congo, Nigeria, Somalia, South Sudan, Sudan, Syria, and Yemen. The full text of the TIP report is available at <http://www.state.gov/j/tip/rls/tiprpt/2015/index.htm>. For additional discussion of the TIP report and related issues, see Chapter 3.B.3.

Absent further action by the President, the foreign governments designated in accordance with the CSPA are subject to restrictions applicable to certain security assistance and licenses for direct commercial sales of military equipment. In a memorandum for the Secretary of State dated September 29, 2015, President Obama determined, “that it is in the national interest of the United States to waive the application of the prohibition in section 404(a) of the CSPA with respect to the Democratic Republic of the Congo, Nigeria, and Somalia,” and that, with respect to South Sudan, it is in the national interest that the prohibition should be waived in part. 80 Fed. Reg. 62,431 (Oct. 16, 2015).

D. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

1. ESC Rights Generally and Cultural Rights

a. General

On March 26, 2015, the U.S. delegation provided an explanation of position on a resolution entitled “Realization of Economic, Social [and] Cultural Rights.” The United States joined consensus on that resolution which was adopted without a vote. U.N. Doc. A/HRC/RES/28/12. The U.S. explanation of position is excerpted below and available at <https://geneva.usmission.gov/2015/03/26/resolution-entitled-realization-of-economic-social-cultural-rights/>.

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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 this important area.

As a matter of public policy, the United States continues to take steps to provide for the economic, social, and cultural needs of its people.

While we share the broad aims of this resolution, the United States is concerned about a few key points in it. As the International Covenant on Economic, Social, and Cultural Rights provides, each State Party undertakes to take the steps set out in Article 2.1 “with a view to

achieving progressively the full realization of the rights.” We interpret this resolution’s references to the obligations of States as applicable only to the extent they have assumed such obligations, and with respect to States Parties to the Covenant, in light of its Article 2(1). The United States is not a party to that Covenant, and the rights contained therein are not justiciable as such in U.S. courts.

The principle of non-discrimination that underpins the very concept of human rights is critical, and one the United States strives continually to fulfill. We read the references to non-discrimination in this resolution consistent with Article 2.2 of the 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.

Finally, we interpret this resolution’s reaffirmation of previous documents, resolutions, and related human rights mechanisms as applicable to the extent States affirmed them in the first place. In joining consensus on this resolution the United States does not recognize any change in the current state of conventional or customary international law.

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b. Cultural Rights

On March 26, 2015, at the 28th session of the HRC, the United States delegation provided an explanation of position on the resolution entitled “Mandate of the Special Rapporteur in the field of cultural rights.” The United States joined consensus on the resolution, which was adopted without a vote. U.N. Doc. A/HRC/RES/28/9. The U.S. explanation of position is excerpted below and available at <https://geneva.usmission.gov/2015/03/26/resolution-on-the-mandate-of-the-special-rapporteur-in-the-field-of-cultural-rights/>.

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Mr. President, the United States continues to support the promotion of cultural diversity, pluralism, tolerance, cooperation, and dialogue among people from all cultures. In this spirit, we are pleased to join consensus. Cultural diversity has played a critical role in our own country’s history. Respect for our differences has contributed to the development of significant legal protections for members of minority groups, showing that cultural diversity can strengthen human rights.

Human rights are universal, and all governments are responsible for abiding by their obligations under international human rights law. Under the UN Charter, we have committed ourselves not just to respecting human rights law domestically, but to promoting and encouraging respect for human rights and for fundamental freedoms abroad, without distinction as to race, gender, language, or religion. We believe that respect for human rights also substantially enhances respect for diversity.

We do have concerns, however, that the concept of cultural diversity, particularly when espoused in a human rights context, could be misused. Cultural diversity should neither be used to undermine or limit the scope of human rights, nor to justify or legitimize human rights abuses. We would like to reinforce that efforts to promote cultural diversity should not infringe on the enjoyment by individuals of their human rights. Instead, cultural diversity and international human rights can be mutually reinforcing concepts that help us all achieve a better world. Certain cultural rights are set forth in Article 27 of the Universal Declaration of Human Rights, as well as in other human rights instruments. Notably, in addition to the right of individuals to share in scientific advancement and its benefits referenced in the current resolution, there is a right to the protection of the moral and material interests resulting from any scientific, literary or artistic production. Intellectual property rights reflect that latter right, and must be respected. We appreciate the work of the Special Rapporteur on cultural rights over the past few years, but also note that the United States does not agree with many of her most recent report's recommendations and characterizations. These include ones related to copyright norm-setting activities at experts' discussions in other international fora and others suggesting that individual creators and corporations or businesses should merit different protections.

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On March 11, 2015, at the 28th session of the Human Rights Council, Ambassador Harper delivered an intervention in an interactive dialogue including the Special Rapporteur on Cultural Rights, in response to her report on copyright policy and the right to science and culture. That intervention is excerpted below and available at <https://geneva.usmission.gov/2015/03/11/human-rights-council-dialogue-with-special-rapporteurs-item-3/>.

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We appreciate the report's recognition of the importance of copyright in encouraging creativity. Copyright laws in the United States and other countries foster and promote culture, science, and the arts, for the benefit not only of their creators, but also the general public. A wide range of academic studies has found that when effective copyright protection exists, creators produce more work. If society does not provide authors, artists, and performers with sufficient incentives to create – by ensuring meaningful protections for what they create – we diminish not only their economic and other wellbeing, but also that of millions of individuals and businesses that rely on their creativity. In the end, we diminish the cultural life of our global community.

In the view of the United States, the report does not adequately acknowledge that copyright can serve as a means to promote human rights, including those expressed in Article 27(2) of the Universal Declaration of Human Rights. We also believe that the report should have fully addressed the pressing challenges posed to creators by lack of respect for intellectual property rights and for all individuals' human rights to freedom of expression.

The United States also does not agree with many of the report's recommendations and characterizations. These include ones related to copyright norm-setting activities at experts'

discussions in other international fora and others suggesting that individual creators and corporations or businesses should merit different protections.

Copyright, science, and culture are critically interconnected, and copyright plays a key role in incentivizing creative and scientific works for the benefit of all. We look forward to encouraging further in discussions on these important issues.

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2. Food

On March 26, 2015, at the 28th session of the HRC, the U.S. delegation provided an explanation of position on the resolution entitled “The Right to Food.” The United States joined consensus on the resolution, which was adopted without a vote on March 26, 2015. U.N. Doc. A/HRC/RES/28/10. The U.S. explanation of position reiterates the previously stated U.S. views on the right to food (see *Digest 2014* at 224-25) and is available at <https://geneva.usmission.gov/2015/03/26/u-s-explanation-of-position-on-resolution-on-the-right-to-food/>.

The UN General Assembly adopted a resolution on the right to food on December 17, 2015. U.N. Doc. A/RES/70/154. The United States joined consensus on the resolution, which was adopted without a vote. When the draft resolution was discussed in the UN General Assembly’s Third Committee in November, the United States delivered the following explanation of its position.

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Hunger and malnutrition have devastating consequences, and maintaining a focus on global food security is critical to realizing our vision of a world free from hunger. For more than a decade the United States has been the world’s largest food aid donor. In joining consensus on this annual resolution on the right to food, the United States reiterates our commitment to reducing hunger and addressing poverty sustainably through a variety of approaches. We are also pleased that this resolution emphasizes the important link between the empowerment of women and the progressive realization of the right to adequate food in the context of national food security and expresses concern about child mortality and morbidity and stunting. Our Feed the Future Initiative and programs to support women entrepreneurs and women farmers exemplify the United States’ commitment to incorporating a gender equality perspective in our efforts to address hunger and poverty.

Nevertheless, we have several concerns about this resolution, which continues to use outdated, inapplicable, or otherwise inappropriate language. For instance, trade and trade negotiations are the purview of the World Trade Organization and its membership, which is different from the UN’s, beyond the subject-matter and the expertise of this Committee, and should not have been included in this resolution. We do not accept any reading of this resolution that might suggest that protection of intellectual property rights has a negative impact on food security. Likewise, this resolution today will in no way undermine or modify the commitments of the United

States or any other government to existing trade agreements, nor does it represent agreement on any Doha Round issues or the future of the Doha Round or the mandates of ongoing trade negotiations. We are also concerned that the resolution's language concerning donor nations and investors is imbalanced. The text also should reflect the need for transparency, accountability, good governance, and other elements critical to providing an environment conducive to investment in agriculture.

We also underscore our disagreement with other inaccurate language in this text. For example, this resolution refers to a "global food crisis," when we are not currently in a global food crisis. Using this term detracts attention from important and relevant challenges that contribute significantly to the recurring state of regional food security, including long-term conflicts, lack of strong governing institutions, and systems that deter investment. Unfortunately, the resolution mentions none of these significant factors. We also reiterate our concern about unattributed statements of a technical or scientific nature in this resolution; the United States does not necessarily agree with such statements. Similarly, while the United States cares deeply about climate change, is taking ambitious steps domestically and internationally to address this serious issue, and is working hard toward an effective and ambitious agreement in Paris, we disagree with many of the observations and recommendations in the Special Rapporteur's interim report.

The United States supports the right of everyone to an adequate standard of living, including food, as recognized in the Universal Declaration of Human Rights. In joining consensus on this resolution, the United States does not recognize any change in the current state of conventional or customary international law regarding rights related to food. The United States is not a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR). Accordingly, we interpret this resolution's references to the right to food, with respect to States Parties to the ICESCR, in light of its Article 2(1). We also interpret this resolution's references to member States' obligations regarding the right to food as applicable to the extent they have assumed such obligations. The United States is working to achieve a world in which everyone has adequate access to food but does not treat the right to food as an enforceable obligation. We also do not concur with any reading of this resolution or related documents that would suggest that States have particular extraterritorial obligations arising from a right to food.

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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3. Water and Sanitation

On December 17, 2015, the UN General Assembly adopted resolution 169 entitled, "The human rights to safe drinking water and sanitation." U.N. Doc. A/RES/70/169. The United States joined consensus on the resolution, which was adopted without a vote, but dissociated from consensus on one of its operative paragraphs. The U.S. statement on the resolution, which follows, explains the rationale both for consensus on the resolution overall and for dissociation on operative paragraph 2.

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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 joining consensus on this resolution today we reaffirm the understandings in our July 27, 2011 statement in the New York at the UNGA plenary meeting on this topic, as well as in our explanations of position on the Human Rights Council's September 2012, 2013, and 2014 resolutions on the human right to safe drinking water and sanitation. These statements are available, respectively, on the websites of the U.S. missions in New York and Geneva.

The United States joins consensus with the express understanding that this resolution, including its references to human rights to safe drinking water and sanitation, does not alter the current state of conventional or customary international law, which does not contain standalone rights to safe drinking water or sanitation. While we respect the importance of promoting access to sanitation and water both and that efforts to do so can involve distinctive approaches, we understand this resolution's references to human rights to water and sanitation to refer to the human right to safe drinking water and sanitation derived from economic, social, and cultural rights contained in the ICESCR. 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 18 of this resolution should not be understood as creating any international legal obligations.

The United States also 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 ICESCR, and the rights contained therein are not justiciable in U.S. courts. In addition, we read preambular paragraph 19 of this resolution to be consistent with the Human Rights Council's 2010, 2011, and 2012 resolutions on this topic, which noted that transboundary water issues fall outside the scope of the human right to safe drinking water and sanitation derived from the economic, social, and cultural rights contained in the ICESCR.

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.

Finally, we regret that the United States must dissociate from consensus on 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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On October 14, 2015, the United States delivered an explanation of its position on the Committee on World Food Security's adoption of the Committee's first-ever "Decision Box" (a non-binding resolution) on "Water for Food Security and Nutrition." The Decision Box was adopted by consensus. The U.S. explanation of position follows.

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The United States joins consensus on this Decision Box. Domestically, the United States pursues policies that promote access to food, and supports universal and non-discriminatory access to safe drinking water and sanitation, which are vitally important to human health and well-being. Globally, it is the objective of the United States to achieve a world where everyone has adequate access to food and safe drinking water and sanitation, and where water resources are managed in an integrated and sustainable manner for human health, economic growth and environmental well-being. However, while the Committee has addressed the nexus between water and food security and nutrition, which is well within its purview, we note that water has many other applications and roles within the context of sustainable development. When considering water for food security and nutrition, we believe these other roles for water must be taken into account as well.

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. The United States has also joined consensus on a number of resolutions of the UN Human Rights Council affirming that the human right to safe drinking water and sanitation is derived from the economic, social and cultural rights contained in the International Covenant on Economic, Social and Cultural Rights. The United States is not a party to this Covenant: accordingly, we interpret this Decision Box's references to rights related to food or safe drinking water and sanitation as with respect to States Parties to that Covenant, in light of its Article 2(1). In joining consensus on this Decision Box, the United States does not recognize any change in the current state of conventional or customary international law or obligations, including but not limited to trade obligations regarding human rights, agricultural incentives, or intellectual property rights. In particular, we underscore that human rights are held and exercised by individuals, not groups. The United States also understands that this Decision Box does not imply that states must join or implement obligations under human rights instruments to which they are not a party.

References to traditional knowledge do not relate to intellectual property rights and the United States underscores the importance of regulatory and legal environments that do not negatively affect innovation and development. The language in the document on technology transfer and traditional knowledge does not serve as a precedent for future negotiated documents, including other negotiations in or outside of the UN system, including bilateral and multilateral agreements.

The United States does not concur with any reading of the Decision Box that suggests states have particular extraterritorial obligations arising from rights related to food or safe drinking water and sanitation. Nor does the United States support policies that suggest that water resources should be managed for the sole purpose of food production or that food production should come at the expense of sound, sustainable, and integrated management of water resources. The United States recognizes that an open trading systems allows for food security through increased food availability without increasing food production.

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4. Education

In May 2015, the World Education Forum convened in Incheon, Korea. The outcome of the Forum was the adoption of the Incheon Declaration and Framework for Action on Education 2030. The U.S. statement upon adoption of the Incheon Declaration is excerpted below.

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The United States joins consensus with the express understanding that we attach high priority to early learning, closing achievement gaps and reducing barriers to learning in conflict and crisis affected countries. We emphasize agreement on a meaningful and ambitious post 2015 Development Agenda, as well as a strong Financing for Development Framework. Thus, we would like to underscore that the World Education Forum 2015 Declaration and the Framework for Action Education 2030 should not prejudge those continuing negotiations, specifically regarding the setting of global targets for Overseas Development Assistance (ODA) and sector specific spending. We look forward to discussing the path forward for finalizing the Framework for Action to reflect the outcomes of these on-going dialogues. In joining consensus the United States also does not recognize any change in the current state of conventional or customary international law, and joining consensus does not imply that States must implement obligations under human rights instruments to which they are not a party. While acknowledging the progress that has been made and respecting our various educational governing structures, the World Education Forum and the political support of the member states demonstrate our collective commitment to partnership to achieve inclusive and quality education for all and the eradication of extreme poverty by 2030.

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On July 3, 2016, at the 29th session of the HRC, Eric Richardson delivered a U.S. explanation of position regarding the Council's resolution on the right to education, on which the United States joined consensus. That explanation is excerpted below and available at <https://geneva.usmission.gov/2015/07/06/u-s-eop-on-hrc-right-to-education-resolution/>.

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The United States is firmly committed to providing equal access to education. We note that our judicial framework provides robust opportunities for redress, but it is appropriately limited to parties who have suffered harm. We interpret this resolution's references to obligations as applicable only to the extent that States have assumed such obligations, and with respect to

States Parties to the International Covenant on Economic, Social, and Cultural Rights, in light of its Article 2(1). The United States is neither a party to that Covenant nor to its Optional Protocol, and the rights contained therein are not justiciable as such in U.S. courts. We read this resolution to urge States to comply with their applicable international obligations.

As educational matters in the United States are primarily determined at the state and local levels, we understand the resolution's call on States to strengthen access to quality education in terms consistent with our respective federal, state, and local authorities.

With respect to this resolution's references to private providers, we underscore the importance of education as a public good, but note also that private providers can offer students a viable educational option. We support encouraging all providers to deliver education consistent with its importance as a public good, and take very seriously the responsibility of States to intervene in litigation as appropriate.

The United States does not regard the language in this resolution as assigning primacy to any one issue in the priorities or structure of the Post-2015 Development Agenda or in any other way pre-judging the outcome of these ongoing negotiations.

Despite these and other concerns with the resolution, we join consensus on this resolution because we support its focus on the right to education.

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On June 18, 2015, at the 29th session of the HRC, in an interactive dialogue with the Special Rapporteur on the Right to Education, in response to a report on "protecting the right to education against commercialization," the U.S. delegation delivered an intervention that is available at <https://geneva.usmission.gov/2015/06/18/hrc-dialogue-with-special-rapporteur-on-the-right-to-education/> and includes the following:

With respect to the comments concerning private education in the Special Rapporteur's recent report, we underscore that the role of public education in the United States has deep and strong historical roots. Today, public education is highly-valued as a mechanism for the advancement of all persons. At the same time, we appreciate that private schools play an important role and can provide a critical and viable option for students from all backgrounds. Education is stronger when students and their families have the opportunity to be informed honestly about the education programs offered and the results achieved. We support appropriate measures to address fraudulent practices in public or private schools, which harm all students. Finally, with respect to the reference to the use of public money in the United States in the Special Rapporteur's recent report, we note that the U.S. Supreme Court has upheld the use of public funds to support private school vouchers within certain limited circumstances.

E. HUMAN RIGHTS AND THE ENVIRONMENT

On March 26, 2015, at the 28th session of the HRC, the United States provided an explanation of its position on the resolution entitled “Human Rights and the Environment.” The U.S. explanation of position is available at <https://geneva.usmission.gov/2015/03/26/eop-on-item-3-resolution-entitled-human-rights-and-the-environment/> and includes the following:

The United States continues to agree with other members of the Council that protection of the environment and its contribution to sustainable development, human well-being, and the enjoyment of human rights are vitally important. In this spirit, we join consensus on this resolution.

At the same time, we remain concerned about the general approach of placing environmental concerns in a human rights context and about addressing them in fora that do not have the necessary expertise. For related reasons, while we recognize the efforts of the Independent Expert, soon to be renamed Special Rapporteur, and UN bodies in this area, we do not agree with a number of aspects of their work.

We also note our long-standing interpretation of Principle 7 of the Rio Declaration, to the effect that the principle does not imply any diminution in the environmental responsibilities of developing countries. We interpret this resolution’s references to the obligations of states as applicable only to the extent the State has assumed such obligations by becoming party to various human rights instruments. In joining consensus on this resolution the United States does not recognize any change in the current state of conventional or customary international law. Furthermore, we reiterate that states are responsible for implementing their human rights obligations. This is true of all obligations that a state has assumed, regardless of external factors, including the availability of technical and other assistance.

On March 6, 2015, at the 28th session of the HRC, the U.S. delegation made a statement in the Council’s full-day discussion on human rights and climate change. That statement is excerpted below and available at <https://geneva.usmission.gov/2015/03/09/us-intervention-for-the-unhrc-full-day-discussion-on-human-rights-climate-change/>

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Climate change is an urgent and complex global challenge, requiring cooperation among all nations. Any effective solution to climate change depends upon all nations taking responsibility for their own actions and cooperating for the benefit of our planet. The United States is firmly committed to addressing this challenge at home, with our partners around the world, and through

the appropriate fora, including in the ongoing negotiations by Parties to the UN Framework Convention for Climate Change.

We agree that the effects of climate change may have a range of implications for the effective enjoyment of human rights.

We remain firm in our conviction that any discussion of climate change in the Human Rights Council must be focused on these human rights implications in order to add meaningful value. When it comes to climate change efforts, we see this Council's role as helping ensure that countries respect the human rights obligations that they have assumed.

We remain concerned by attempts to insert the Human Rights Council into the complex and sensitive climate negotiations that experts are pursuing in other UN fora. Any such engagement by the Council could risk sabotaging or prejudicing initiatives that have the potential to address climate change in an effective and meaningful manner. While climate change is a global problem requiring a global solution, the search for a global solution is foremost an issue for the relevant environmental bodies.

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On July 2, 2015, at the 29th session of the HRC, the U.S. delegation provided a statement on resolution 29/15 on human rights and climate change, adopted on July 2 without a vote. U.N. Doc. A/HRC/RES/29/15. David Sullivan delivered the U.S. statement, excerpted below and available at <https://geneva.usmission.gov/2015/07/02/u-s-statement-at-the-hrc-29-on-human-rights-and-climate-change/>.

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... We recognize that climate change is an urgent, complex, and far-reaching global challenge. Addressing climate change requires cooperation among all nations—for any effective solution to climate change depends upon all nations taking responsibility for their own actions and for our planet. Furthermore, as we said about the Human Rights Council's last resolution on this topic, we agree that the effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights. On that basis, we 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 discuss climate change issues through a true human rights lens. That means ensuring that States respect their human rights obligations to persons in their territories when they react to climate change.

Regarding the resolution's reference to the right to development, the United States position on this issue is well known, and applies here. Further, we understand the phrases used in this text to refer to many human rights as shorthand for the more accurate and widely accepted terms used in the applicable international covenants, and we maintain our longstanding positions on those rights.

Certain language in the resolution intrudes on expert climate negotiations taking place elsewhere. This is beyond the competence and expertise of the Council, and is particularly inappropriate in light of the ongoing negotiations in the UN Framework Convention on Climate

Change (UNFCCC). For example, the resolution's unnecessary and selective quotations from the UNFCCC, to which the United States is a party, and its Conference of Parties (COP) decisions, as well as its singling out of one bloc in the negotiations, raise concerns. We understand the quotations from the UNFCCC and COP decisions as simply acknowledging that they contain the stated provisions. The applicability of these quotations and concepts they describe are limited to the context of that carefully negotiated Convention. Furthermore, to the extent that some might attempt to misuse the language in this resolution in the context of the UNFCCC or elsewhere, including to misinterpret carefully negotiated climate change decisions, we underscore that this resolution will in no way affect what has been decided in the context of the UNFCCC, nor prejudge ongoing negotiations in any way.

While we appreciate the tremendous work by the participants in the negotiation of this resolution, this text does not reflect the diverse views expressed in the negotiations. We strongly urge that the Council's future work on this topic be led by a cross-regional core group that includes representation of diverse perspectives.

The United States stands ready to continue working with others on this important issue.

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F. RESPONSIBLE BUSINESS CONDUCT

In 2015, the United States continued to promote implementation of the UN Guiding Principles on Business and Human Rights. As discussed in *Digest 2014* at 234, President Obama announced that the U.S. government, in consultation with interested stakeholders, would develop a National Action Plan ("NAP") to promote responsible business conduct overseas. Additional consultations were held in 2015, including an open dialogue in Berkeley, California on February 6, 2015. See Deputy Assistant Secretary of State Scott Busby's remarks, available at <http://www.state.gov/j/drl/rls/rm/2015/237502.htm>. Consultations were also held in April 2015 in Norman, Oklahoma and Washington, D.C. See <http://www.humanrights.gov/dyn/issues/business-and-human-rights/national-action-plan.html>.

On August 31, 2015, the United States submitted its response to a 2015 questionnaire from the UN Working Group on Business and Human Rights on implementation of the Guiding Principles. The U.S. submission, excerpted below, is available at <http://www.ohchr.org/Documents/Issues/Business/2015Survey/USA.pdf>.

* * * *

In addition to the U.S. NAP, in June President Obama met with the leaders of other G7 nations in Schloss Elmau, Germany, where the leaders' final Summit Declaration announced our shared commitment to addressing issues of "responsible supply chains," including by noting strong support for the Guiding Principles; welcoming efforts to establish substantive National Action Plans; encouraging human rights due diligence; supporting a "Vision Zero Fund" in coordination

with the International Labor Organization (ILO) to prevent and reduce workplace deaths and serious injuries; and extending a commitment to strengthening the National Contact Point for the OECD Guidelines to ensure effectiveness and leadership by example. This declaration by the 07 represents significant progress for the global business and human rights agenda, and the United States is dedicated to addressing these commitments, including, in part, through our National Action Plan.

Business Enterprises and the State

The United States government does not own or control any corporate enterprises. That said, the government engages with the private sector through our facilitation of development finance, managed primarily by the Overseas Private Investment Corporation (OPIC). OPIC has worked hard to ensure that it has robust safeguards and due diligence systems in place. OPIC conducts project-level human rights reviews and for each project seeking OPIC support, OPIC works in close consultation with the U.S. Department of State prior to making any final commitment (see footnote 1 [“Worker and Human Rights”, <http://www.opic.gov/doing-business-us/OPIC-policies/worker-human-rights>]). Furthermore, OPIC’s Office of Investment Policy (OIP) works to ensure that OPIC-supported projects respect human rights and workers’ rights (see footnote 2 [“Our Investment Policies” <http://www.opic.gov/who-we-are/our-investment-policies>]).

Pursuant to Section 239 (i) of the Foreign Assistance Act, OPIC must take into account in the conduct of its programs in a country, in consultation with the U.S. Department of State, all available information pertinent to the observance of and respect for human rights and fundamental freedoms and any effect of its programs on human rights and fundamental freedoms in the country in question.

Additionally, OPIC’s Office of Accountability addresses environmental and social complaints, including human rights-related complaints, that result from OPIC-supported projects. This helps to ensure that OPIC’s policies on human rights and other issues match the practice on the ground, and when issues arise, that there are mechanisms in place for redress.

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In addition to promoting respect for human rights through bilateral U.S. development finance, the United States has also urged the World Bank to incorporate respect for human rights into its Safeguards policies and social impact assessments. The United States has issued several public statements on the World Bank’s Safeguards review process highlighting the need to address the potential human rights impacts of World Bank projects.

With respect to trade, the United States includes labor provisions in its trade agreements that help ensure trade partners are protecting internationally-recognized labor rights. Trade preference programs, which encourage economic growth in developing countries through expanded trade and investment, all condition preferential market access on meeting certain “eligibility criteria,” which include criteria relating to labor rights. While the specific labor criteria in each program are unique, the Obama Administration has made use of all of them to address a range of serious problems: from lack of worker voice, to building and fire safety concerns, to acts of violence and intimidation towards union organizers, to employment-related sexual harassment. Addressing these issues is not only critical to protecting workers’ rights, it is

necessary for strengthening developing countries' growth strategies.

The United States is also seeking the most robust ever labor commitments with the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (T-TIP) countries, which collectively represent nearly two-thirds of the global economy. For example, in the TPP, the United States is seeking to include provisions that require parties to provide workers their fundamental rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work, and has insisted that labor provisions be at the core of the agreement, subject to full dispute settlement and the full range of trade sanctions.

Further, the United States has announced a joint "Initiative to Promote Fundamental Labor Rights and Practices in Myanmar," which aims to establish a partnership to advance labor rights and protections for workers in Burma. With recent changes in its posture towards the outside world, Burma is at an early and pivotal stage in its economic growth. The Initiative helps Burma lay the right foundation for ensuring that economic growth and development proceed on a basis that is inclusive and sustainable.

As a large purchaser of goods and services globally, the U.S. government recognizes its role in promoting and incentivizing responsible business conduct through its procurement practices. As such, the Obama Administration has consistently taken steps to refine and update procurement procedures to address social issues.

In July 2014, the President issued Executive Order 13673: Fair Pay and Safe Workplaces, which requires prospective federal contractors to disclose domestic labor law violations and gives agencies guidance on considering labor violations when awarding federal contracts. The Executive Order also ensures that contractors' employees are given the necessary information each pay period to verify the accuracy of their paycheck, and that workers who may have been sexually assaulted or had their civil rights violated get their day in court by ending pre-dispute arbitration agreements covering these claims at corporations with large federal contracts, except where valid contracts already exist.

Also in July 2014, the President issued EO 13672, which prohibits contractors from discriminating in hiring on the basis of sexual orientation and gender identity.

And in January 2015, a final Federal Acquisition Regulation (FAR) rule was published on strengthening prevention of trafficking in persons in federal contracts, released during a major White House forum on preventing human trafficking in supply chains (see footnote 4 [<https://www.whitehouse.gov/blog/2015/01/29/combating-human-trafficking-supply-chains> and <https://www.federalregister.gov/articles/2015/01/29/2015-01524/federal-acquisition-regulation-ending-trafficking-in-persons>]). The regulations implement Executive Order 13627, "Strengthening Protections Against Trafficking in Persons in Federal Contracts" and Title XVII of the National Defense Authorization Act for Fiscal Year 2013. These regulations prohibit trafficking or trafficking-related practices, such as charging recruitment fees to get work, confiscating workers' identity documents, and using fraudulent or misleading recruitment practices. In addition, the new Executive Order mandates additional protections for large overseas contracts, namely compliance plans that include awareness programs, whistleblower protections, and recruitment, wage, and housing plans, etc. In order to further these regulations, Department of State funded a leading labor rights to develop a framework for evaluating trafficking risks in global supply chains; research key sectors and commodities at heightened risk for human trafficking; and develop a set of tools including a sample compliance plan, sample set of criteria for screening and evaluating labor recruiters, and a labor recruiter performance assessment.

In addition to the Executive Orders listed above, this year the Department of State modified its Worldwide Protective Services contract to require that all private security firms bidding on these contracts be members of the International Code of Conduct for Private Security Service Providers (ICoC) Association. The ICoC provides guidance for private security service providers to promote adherence to international human rights and humanitarian law, and the ICoC Association oversees dissemination and implementation of the International Code of Conduct in practice. The U.S. government worked with other governments, industry, and civil society organizations to establish the ICoC Association, and continues to engage with the Association as a member of the Board. The U.S. government, through the Department of Defense, has also facilitated the development of management standards for the private security industry based on the International Code of Conduct. Currently, among other related activities, the Departments of Defense and State are incentivizing and promoting these standards by referencing them as contract requirements.

Besides utilizing its major procurement role to promote respect for human rights, several U.S. federal agencies are examining their “branding” through licensing agreements. Starting in 2014, the U.S. Marine Corps (USMC) Trademark Licensing Office (TMLO) launched a revised and more robust licensing policy for licensees who produce goods with USMC logos. This policy requires license holders to have a firm understanding and oversight of their supply chain. As a child and forced labor risk mitigation measure, the policy further prohibits licensees from sourcing products or components listed on the U.S. Department of Labor's *List of Goods Produced by Child Labor or Forced Labor* (see footnote 5 [<http://www.dol.gov/ilab/reports/child-labor/list-of-goods/>]). For example, USMC licensees are prohibited from sourcing footwear from Bangladesh, Brazil, China, India and Indonesia since these industries show high risk for child or forced labor according to the Labor Department’s listing.

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G. INDIGENOUS ISSUES

1. HRC

See Ambassador Harper’s remarks at the UPR in section 6.A.4.b, *supra*, discussing U.S. actions relating to the human rights of indigenous peoples. At the 30th session of the HRC, the United States joined consensus on a resolution on human rights and indigenous peoples. U.N. Doc. A/HRC/RES/30/4. The U.S. explanation of position on the resolution is excerpted below and available at <https://geneva.usmission.gov/2015/10/01/u-s-explanation-of-position-human-rights-and-indigenous-peoples-resolution/>.

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...The United States strongly supports efforts at the Human Rights Council and throughout the UN system to promote and protect the rights of indigenous peoples. In particular, we support this resolution's call for a panel discussion on eliminating violence against indigenous women and girls at this Council's session next September. Addressing this serious problem is a priority for the United States and U.S tribal leaders, and one we believe this Council and other parts of the UN system should remain focused on.

We are joining consensus on this resolution despite its inclusion of the phrase "the right to health and indigenous peoples." We interpret the reference to that language in OP 5 of this resolution as referring to the equal right of indigenous individuals to the enjoyment of the highest attainable standard of physical and mental health, enshrined in the Declaration on the Rights of Indigenous Peoples. It relates to the Expert Mechanism's informal reference to this right and we do not agree that this language can serve as a precedent for future negotiated documents, and we will maintain this position in other fora. We look forward to the Expert Mechanism's report on the subject.

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Also at the 30th session of the HRC, the United States joined consensus on a resolution on the mandate of the Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP"). U.N. Doc. A/HRC/RES/30/11. The U.S. general statement on the resolution follows and is also available at <https://geneva.usmission.gov/2015/10/01/resolution-on-the-expert-mechanism-on-the-rights-of-indigenous-peoples/>.

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... Governments and indigenous peoples want progress on reviewing EMRIP's mandate, which is called for in the outcome document of the World Conference on Indigenous Peoples. This resolution defines the critical first steps for those discussions, including setting up a timeline for specific actions aimed at gathering and analyzing substantive ideas for reform.

The United States would further thank Guatemala and Mexico for the leadership demonstrated through this process. The United States firmly believes that full and free participation of indigenous peoples is critical and a precondition to a successful process. Initially, some other states voiced less enthusiasm for full engagement of indigenous peoples and their representatives. Guatemala and Mexico were constructive in ensuring a consensus approach that ultimately harmonized those positions.

The United States is pleased that the resolution we will adopt today includes language on the importance of indigenous peoples' full and effective participation throughout the process and a call for states to hold consultations with indigenous peoples.

The United States has held numerous consultations with U.S. indigenous representatives throughout this process, and we intend to heed the resolution's call by holding additional consultations with U.S. indigenous representatives prior to the convening of the expert workshop, so that we may learn their views on how EMRIP may be reformed. We urge other countries to do the same.

Mr. President, we look forward to the workshop, to OHCHR's subsequent report, and to meeting with states at the July 2016 EMRIP meeting and in this forum a year from now to discuss how to move resolutely toward reform.

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2. UN General Assembly

At the 70th UN General Assembly, the United States co-sponsored and joined consensus on the resolution on the "Rights of indigenous peoples." U.N. Doc. A/RES/70/232. The resolution was adopted without a vote on December 23, 2015.

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

On November 27, 2015, the United States filed its one-year follow-up response to recommendations of the Committee Against Torture on the Combined Third to Fifth Periodic Reports presented by the United States in 2014. See *Digest 2014* at 242-46 for a discussion of the U.S. presentation of its periodic reports in 2014. The follow-up report is available at <http://www.state.gov/j/drl/rls/250342.htm>, and excerpted below.

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1. Pursuant to the Committee's request, the United States provides the following information pertaining to four of the Committee's recommendations (¶¶ 12(a), 14(c), 17, and 26(c-d) of its Concluding Observations adopted November 20, 2014), taking into consideration the Committee's follow-up guidelines.

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4. As a preliminary note, we wish to remind the Committee that in preparation for our presentation last November, senior lawyers across the U.S. government considered questions posed by the Committee about important U.S. legal positions with respect to the Convention, and our delegation in November 2014 conveyed a number of changes and clarifications agreed upon in the course of that review process. The United States affirmed its understanding that where the text of the Convention provides that obligations apply to a State Party in "any territory under its jurisdiction," such obligations extend to certain places beyond the sovereign territory of the State Party, and more specifically, "territory under its jurisdiction" extends to "all places that the State Party controls as a governmental authority."

5. 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.

6. The delegation also clarified the United States' view that although the law of armed conflict is the controlling body of law with respect to the conduct of hostilities and the protection

of war victims, a time of war does not suspend the operation of the Convention, which continues to apply even when a State is engaged in armed conflict. The obligations to prevent torture and cruel, inhuman, and degrading treatment or punishment in the Convention remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of armed conflict.

7. Additionally, we wish to note one development since our presentation last November. In 2014, the Senate Select Committee on Intelligence asked the White House to declassify the executive summary, findings, and conclusions of its report on the CIA's former detention and interrogation program. President Obama determined that the report should be declassified with appropriate redactions necessary to protect national security, and supported the Senate Committee's release of the declassified report. The Senate Committee released the declassified executive summary, findings, and conclusions to the public in December 2014.

8. The Senate Committee's report contains a review of a program that included interrogation methods used on terrorism suspects in secret facilities at locations outside the United States. In one of his first Executive Orders after taking office in 2009, President Obama prohibited the use of harsh interrogation techniques and ended the detention and interrogation program described in the report. On November 25, 2015, he signed the National Defense Authorization Act for Fiscal Year 2016, which includes provisions codifying these key interrogation-related reforms from that Executive Order into U.S. law.

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On October 23, 2015, the Inter-American Commission on Human Rights of the Organization of American States held a thematic hearing on the "Human Rights Situation of Persons Affected by the U.S. Rendition, Detention, and Interrogation Program ("RDI Program")." For further information on thematic hearings held by the Commission relating to the United States in 2015, see Chapter 7. Kathleen Hooke, Assistant Legal Adviser for Human Rights and Refugees at the U.S. Department of State, delivered a statement at the hearing on the RDI Program, which is excerpted below.

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Last year, the Senate Select Committee on Intelligence asked the White House to declassify the executive summary, findings, and conclusions of the Committee report on the CIA's former detention and interrogation program. President Obama determined that the report should be declassified with appropriate redactions necessary to protect national security, and he supported and continues to support the Committee's release of the declassified report.

The Committee released the declassified executive summary, findings, and conclusions to the public in December 2014. In the interest of transparency, this public report is nearly 500 pages long and is only lightly redacted—93 percent of the summary report is entirely declassified. It details activities that took place under a CIA program that has since ended.

The decisions following the attacks of September 11, 2001, relating to this former program are part of our history and are not representative of the way we deal with the threat from terrorism we still face today. One of the great aspects of our democracy is that we have the

ability to look at our past and identify where we could and should do better. This report should be viewed as what it is: a recounting of a period in our history that has since passed.

The United States upholds 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. Torture is contrary to the founding principles of our country and to the universal values to which we hold ourselves and the international community.

I'd like to take a few moments to tell you about what we've done to prohibit and prevent torture going forward. First, as you know, six years ago President Obama issued an Executive Order formally ending the detention and interrogation program conducted by the CIA. Immediately upon taking office in 2009, President Obama issued Executive Order 13491, Ensuring Lawful Interrogations, January 22, 2009. The President directed the closure of any detention facilities operated by the CIA and prohibited the operation of any such facilities in the future.

Second, the President also mandated that, consistent with the Convention Against Torture and Common Article 3 of the 1949 Geneva Conventions, any individual detained in armed conflict by the United States or within a facility owned, operated, or controlled by the United States, in all circumstances, must be treated humanely, and not be subjected to violence to life and person nor to outrages upon personal dignity. This comports with the Detainee Treatment Act of 2005, which requires that "No individual in the custody or under the control of the U.S. Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."

Third, the President directed that no individual in U.S. custody in any armed conflict "shall . . . be subjected to any interrogation technique or approach, or any treatment related to interrogation that is not authorized by and listed in [the] Army Field Manual." The Manual explicitly prohibits threats, coercion, and physical abuse.

The United States confirms that the interrogation techniques in the Army Field Manual are binding on the U.S. military, as well as all Federal government agencies, including the intelligence agencies, with respect to individuals in U.S. custody or under U.S. effective control in any armed conflict, without prejudice to authorized non-coercive techniques of federal law enforcement agencies. The Field Manual contains detailed procedural requirements that must be followed prior to the use of listed techniques, including safeguards and a legal review. These procedural requirements help to ensure that the techniques in the Manual are implemented consistently with the requirements that all prisoners and detainees, regardless of status, be treated humanely, and explicitly prohibiting cruel, inhuman, or degrading treatment.

The Department of the Army conducts yearly reviews of the Army Field Manual to ensure that its provisions remain consistent with applicable law, policy, and practice and to assess whether updates are needed due to evolving operational circumstances and lessons-learned. In making public the Manual's list of all interrogation techniques approved for use during armed conflict, the United States has sought to demonstrate our commitment to transparency and accountability in this area. We welcome further engagement with civil society, and will continue to promote a robust dialogue on these issues.

Finally, last month, the United States announced that it would join the Group of Friends of the Convention Against Torture Initiative, which is a growing group of states, civil society, and experts in the field dedicated to the pursuit of universal ratification of the Convention Against Torture and to finding new and innovative ways to prevent torture globally.

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I'd like to now spend a few moments discussing some of the actions that federal agencies have taken to investigate and punish torture and cruel, inhuman, or degrading treatment or punishment in the United States, and to train interrogators to ensure humane treatment. I'll also speak briefly about our efforts to provide for rehabilitation of torture victims.

As a preliminary matter, 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. For example, 18 U.S.C. 2340A makes it a crime to commit torture outside the United States. Similarly, under the provisions of the Military Extraterritorial Jurisdiction Act (MEJA), persons employed by or accompanying the Armed Forces outside the United States may be prosecuted domestically if they commit a serious criminal offense overseas.

In addition, U.S. nationals who are not currently covered by MEJA are still subject to domestic prosecution for certain serious crimes committed overseas if the crime was committed within the special maritime and territorial jurisdiction of the United States—which includes, among others, U.S. diplomatic and military missions overseas, and the U.S. Naval Base at Guantanamo Bay, Cuba.

The U.S. government has investigated allegations of torture or cruel treatment. Prior to August 2009, career prosecutors in 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 CIA contractor and a DoD contractor. Other cases were declined for prosecution by the Department for a variety of reasons, consistent with the Principles of Federal Prosecution.

In 2009, the United States 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.

Representatives of the ACLU and the Global Justice Clinic today raised the question of further investigations or prosecutions. As a general matter, the Department of Justice does not comment on ongoing investigations or plans to initiate future investigations. The Department of Justice and the relevant law enforcement components approach cases involving allegations of torture or detainee abuse in the same manner that they approach all allegations of serious crimes: by conducting a thorough examination of the available facts, following those facts wherever they lead, and undertaking an impartial application of the law and the principles of Federal prosecution.

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. First, 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. Even so, the CIA has acknowledged that the results of these efforts are unsatisfying in view of the serious nature of these events, and in some instances it should have looked more deeply into leadership decisions to examine what could have been done better, and to determine what responsibility, if any, should have been assessed at a more senior level. Looking forward, the Agency will ensure that leaders focus more on management responsibility and systemic issues when reviewing accountability.

Second, the U.S. military investigates all credible allegations of misconduct by U.S. forces to determine the facts, including identifying those responsible for any violation of law, policy, or procedures; and multiple accountability mechanisms are in place to ensure that personnel adhere to those laws, policies, and procedures. The Department of Defense, or DoD, has conducted thousands of investigations since 2001 and it has prosecuted or disciplined hundreds of service members for misconduct, including mistreatment of detainees.

For example, more than 70 investigations concerning allegations of detainee abuse by military personnel in Afghanistan conducted by DoD resulted in trial by courts-martial. Close to 200 of these investigations of detainee abuse resulted in either non-judicial punishment or adverse administrative action, and many more were investigated and resulted in action at a lower level. The remainder were determined to be unsubstantiated, lacking in sufficient inculpatory evidence, or were included as multiple counts against one individual.

All courts-martial proceedings are a matter of public record. Convictions can result in, among other consequences, punitive confinement, reduction in rank, forfeiture of pay or fines, punitive discharge, or reprimand. Individuals have been held accountable for misconduct related to the abuse of detainees by personnel within their commands. These individuals include senior officers, some of whom have been relieved of command, reduced in rank, or reprimanded.

Beyond these accountability mechanisms, training measures are in place to safeguard against torture and cruel, inhuman, or degrading treatment or punishment in interrogations. For example, DoD intelligence interrogations are conducted only by properly trained and certified personnel. Training includes instruction on applicable law and policy; lawful interrogation methods and techniques; the humane treatment of detainees and how to identify signs of torture or cruel, inhuman or degrading treatment; and the procedures for the reporting of alleged violations. Routine refresher training is provided on a recurring basis. These are just some of the accountability and training measures in place in the United States to prevent torture and ill-treatment, and to ensure that credible allegations of torture or ill-treatment are investigated.

On the issue of rehabilitation, I'd also like to note that we support civil society organizations that campaign against torture and that treat its victims, and we are the leading donor to the UN Voluntary Fund for Victims of Torture. The Torture Victims Relief Act authorizes funding for a number of programs that provide rehabilitation services for survivors who suffered torture abroad, including funding the Department of Health and Human Services to support treatment centers inside the United States and programs for the treatment of survivors who suffered torture abroad. Funding in Fiscal Years 2013 and 2014 totaled \$21,300,000.

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I. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES

1. “Mandela Rules” for Treatment of Prisoners

On October 7, 2015, U.S. Under Secretary of State for Civilian Security, Democracy, and Human Rights Sarah Sewall delivered remarks welcoming the UN’s rollout of global standards for the treatment of prisoners, the “Mandela Rules.” Her remarks are excerpted below and available at <http://www.state.gov/j/remarks/248021.htm>.

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Today—sixty years after the U.N. General Assembly adopted the landmark Minimum Standards for the Treatment of Prisoners, we bring those standards into the 21st century with the Mandela Rules. These 122 rules represent a historic step toward affirming the fundamental dignity of prisoners everywhere and provide a comprehensive foundation to bring new decency and humanity to their treatment. The United States whole-heartedly endorses these rules and is proud to have participated in the collaborative process to produce them.

Though we rightly celebrate these new standards, the real challenge is what comes next: translating them into our policies and practice. That will not be easy, and we must support and push each other through the challenges implementation may pose.

We all have important work ahead, and the United States is no exception. While we are home to just five percent of the world’s population, we have 25 percent of the world’s prisoners. This summer, President Obama became the first-ever sitting president to visit a federal prison, where he spoke about the urgent need for prison reform in the U.S. He declared—unequivocally—that “we should not tolerate conditions in prison that have no place in any civilized country.” Conditions like overcrowding, corruption, and rape. This was not just a moral argument, but a pragmatic one. How people are treated while incarcerated directly affects how they behave once they return to our communities.

That is why the Mandela Rules stress the need for prisoners to have opportunities for educational and vocational training, along with moral or spiritual counseling. Programs like these are critical to helping prisoners become contributing members of society when they are released. Yet in too many places, horrid conditions, poor management, torture, and abuse can turn prisons into incubators for criminality and even radicalization.

That is why, at the White House Summit on Countering Violent Extremism last February, and again just last week here in New York, we made prison reform a pillar of our global agenda to address extremist threats like ISIL. Well-managed prisons that help rehabilitate and reintegrate inmates can make it more difficult for extremists to radicalize this population. So these efforts are not just about advancing human rights, but they can also enhance our collective security. As we prepare to implement these rules, we must remember that governments are not alone in this effort. Just as we benefited from the active participation of civil society to develop these rules, we should enlist civil society to implement them. These groups can help facilitate religious learning to help counter the warped ideologies of violent extremists. Civil society can also ensure that governments uphold the commitments embodied in this document, and can advise us when the Mandela Rules need further improvement in the years to come.

The United States will continue to partner with any government willing to realize the Mandela Rules, and we have worked closely with Ministries of Justice and corrections bureaus around the world to do just that. For example, with U.S. assistance, Afghanistan employs professional training modules for its correctional staff to ensure a higher standard of management and care. U.S. support also helped Morocco launch drug treatment and vocational programs for prisoners, along with a system for inmates to express grievances. There are many other examples I could cite, but it should be clear that we stand ready to partner with any country willing to implement these rules.

After all, that is our real challenge ahead. So as we move forward, let us live up to Mandela's example of moral leadership and make these rules a reality in our time. Thank you.

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On October 1, 2015, at the 30th session of the HRC, the United States joined consensus on a resolution entitled, "Human rights in the administration of justice, including juvenile justice." U.N. Doc. A/HRC/RES/30/7. However, the United States expressed concerns about several aspects of the resolution. On October 2, 2015, Ambassador Harper delivered an explanation of position on behalf of the United States, excerpted below and available at <https://geneva.usmission.gov/2015/10/06/u-s-joins-consensus-on-human-rights-in-the-administration-of-justice/>.

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The United States is pleased to join consensus on this year's resolution on human rights in the administration of justice. We also welcome the adoption of the revised United Nations Standard Minimum Rules for the Treatment of Prisoners, or "the Mandela Rules," and appreciate this resolution's emphasis on those non-binding rules. We thank the sponsors of this resolution for incorporating some of our suggestions into this text.

We are joining consensus despite our concern that the resolution still calls for States to comply with various principles and goals that are not obligations the United States has undertaken and are not consistent with U.S. law, federal sentencing guidelines and practice. For example, while the resolution emphasizes the importance of the interests of the child when deciding on sentencing of a parent or primary caregiver, we focus on other factors such as public safety and the severity of the criminal activity. The resolution also calls upon States to ensure that life imprisonment is not imposed on individuals under the age of 18 and that all decisions to deprive children of their liberty are subject to periodic review for necessity and appropriateness. It also provides that pretrial detention must be avoided wherever possible. These are not obligations that customary international law imposes on States or that the United States has undertaken by treaty.

The United States certainly agrees with the principle that discretionary decisions to deprive juveniles of liberty should be reasonable, necessary, and appropriate to the individual circumstances and only reached as a last resort and for the shortest appropriate period of time. To frame these principles in mandatory terms, however, implies that they are legally required. International law has left such matters to the discretion of competent courts or administrative authorities within the domestic legal framework of individual States. We will

therefore interpret such provisions as recommendations rather than as a reflection of obligations under international law.

Finally, the assertion that States should consider establishing an independent mechanism to monitor places of detention, including by making unannounced visits, is inconsistent with U.S. policy and practice. We interpret the Mandela Rules' call for external and independent monitoring of prisons to include monitoring bodies that may or may not be governmental. We believe that accountability through monitoring can be achieved as long as the monitoring body is independent of the prison administration.

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2. Independence of the Judiciary

On July 2, 2015, at the 29th session of the HRC, the United States joined consensus on a resolution on "Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers." Divya Khosla delivered a U.S. explanation of position, available at <https://geneva.usmission.gov/2015/07/02/independence-of-the-judiciary/>, which includes the following:

The United States has been, and remains, committed to the independence and impartiality of the justice system.

The United States fully supports the mandate of the Special Rapporteur on the independence of judges and lawyers. We agree that the Special Rapporteur should consult with all the relevant UN stakeholders, including the UN Commission on Crime Prevention and Criminal Justice and the UN Office on Drugs and Crime.

Further, in the administration of justice, we believe that the best interests of the child should be a significant, but not always primary, consideration. For example, in criminal matters, the interest of victims and society are often the primary considerations.

3. Arbitrary Detention

As discussed in *Digest 2014* at 248-54, the United States has continued to express concerns regarding an effort undertaken by the working group on arbitrary detention of the Human Rights Council to develop draft principles and guidelines concerning the right to challenge the lawfulness of detention before a court, as contemplated in HRC resolution 20/16. On April 21, 2015, the United States provided observations on the working group's first complete draft of the principles and guidelines. The U.S. observations are excerpted below and are also available at http://www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/March2015/USA_Observations.pdf.

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The United States appreciates the opportunity to comment on the Working Group's first complete draft of "Basic Principles and Guidelines" that it is developing in response to Human Rights Council resolution 20/16. The United States also appreciates the Working Group's consideration in posting to its website observations that the United States provided on November 12, 2014, in response to an earlier preliminary draft, and on March 16, 2015, upon learning of the Working Group's more extensive first draft. The United States commends the Working Group for its efforts to engage governments and stakeholders in this important endeavor, especially the September 2014 stakeholders' consultation.

The Working Group's first complete draft, comprising 21 proposed principles and 22 separately proposed guidelines, raises serious and complicated issues that could have widespread and unintended implications if not more carefully reviewed and revised than time allows before the Working Group's session that begins today. A rush to adoption now would only complicate further consideration and action by States.

The following observations, which supplement the United States' preliminary comments of November 12, 2014, are not exhaustive but reflect our most serious concerns.

First, the United States reiterates its strong disagreement with the Working Group's conclusions on non-derogability with respect to arbitrary detention and the right to judicial relief, both with reference to relevant obligations under the International Covenant on Civil and Political Rights (ICCPR) as well as assertions regarding customary international law. Provisions of the current Working Group draft in this regard, notably in draft Principle 4, are incorrect as a matter of international law. The Working Group could include a basic principle discouraging derogation or stating that any derogation of a State's obligation to respect and ensure to an individual the right to take proceedings before a court must conform strictly to that State's obligations under applicable international law.

Second, as previously observed, there are differing legal views regarding the territorial scope of human rights law, including with respect to an individual's right to challenge the lawfulness of detention in court. The United States' position on the scope of a State's responsibility in this regard is based on explicit language in Article 2(1) of the ICCPR. A State's ICCPR obligations apply only with respect to individuals who are *both* within the territory of a State Party *and* within that State Party's jurisdiction.¹² This understanding of the territorial scope of the Covenant is also reflected in Principle 5 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted in 1988 by the General Assembly in its resolution 43/173. This is an issue of particular relevance when addressing the jurisdiction and authority of domestic courts to review and grant relief from unlawful detention, as court jurisdiction in many States, including the United States, is generally geographically limited.

With this fundamental consideration in mind, the United States supports the basic principle that anyone detained within the territory of a given State has the right to challenge the legal basis for that detention in a court and to obtain court-ordered release if determined unlawful, as set forth in ICCPR Article 9(4). This right extends to any form of detention by or on behalf of a government authority and whenever the individual detained is located in the State

¹² See Observations of the United States of America on the Human Rights Committee's Draft General Comment 35, June 10, 2014 and previous U.S. Observations cited therein. The United States does not agree with contrary views of the Human Rights Committee, including as expressed in its final General Comment 35.

and subject to the jurisdiction of that State. State obligations under Article 9 do not apply extraterritorially.

Third, the United States urges the Working Group to refrain from specifically addressing situations of armed conflict, which fall beyond the scope of this project and the competence of the Working Group. The applicability of international human rights obligations in situations of armed conflict raises difficult questions regarding the role of international humanitarian law (IHL) as the *lex specialis* with respect to the conduct of hostilities and the protection of war victims, which are not adequately accounted for in the current draft Principles and Guidelines. For example, Principle 16 cites the International Court of Justice's (ICJ) opinion in the Nuclear Weapons case affirming the applicability of the ICCPR in armed conflict, absent derogation, as support for the proposition that the "right and corresponding procedural guarantees" set forth in Principle 16 "complement and mutually reinforce the rules of international humanitarian law." In that same case, however, the ICJ recognized that the law of armed conflict provides the *lex specialis* in situations of armed conflict, which the draft Principles and Guidelines fail to do, and defined the scope and content of the ICCPR right at issue with reference to the applicable IHL rule.

Instead, Principle 16 states a broad rule indicating that all detained persons in a situation of armed conflict are guaranteed the right to bring proceedings before a court of law to challenge the lawfulness of their detention. Principle 16 goes on to specify that prisoners of war should be entitled to bring proceedings before a court in certain circumstances, and Guideline 17 specifies further procedures with respect to civilian internees. The draft Principles and Guidelines do not point to any clear basis in law for many of these proposed requirements and recommendations, and the United States disagrees that these provisions, as broadly drafted, reflect existing international obligations. Indeed, rather than reinforce IHL, as claimed, they are in tension with the detailed protections and procedures required by the Geneva Conventions with respect to prisoners of war in international armed conflicts, as well as with respect to civilian internees.

The United States refers the Working Group to Article 5 of the Third Geneva Convention of 1949, as well as Articles 43 and 78 of the Fourth Geneva Convention of 1949. The United States also refers the Working Group to The Copenhagen Process on the Handling of Detainees in International Military Operations, which was a State-led process to develop non-binding guidelines to help ensure respect for international law in the handling of persons detained in international military operations, including internationalized non-international armed conflicts, peacekeeping operations, and law enforcement operations. The Copenhagen Process: Principles and Guidelines reflect the United States' views regarding best practices for detention operations in such international military operations, and cover a wide range of issues, including the humane treatment of detainees and periodic review of the reasons for detention. The United States notes, in particular, the principle set forth in Principle 12, which calls for prompt initial review and periodic reconsideration "by an impartial and objective authority that is authorized to determine the lawfulness and appropriateness of continued detention." The United States is also engaged in further discussions regarding appropriate protections for persons detained in non-international armed conflicts pursuant to Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent.

Finally, as a more general matter, the United States encourages the Working Group to scale back the draft, maintain a high level of generality, and differentiate more clearly between basic principles that reflect existing international law obligations, and guidelines that provide concrete *recommendations* to States regarding ways to avoid and redress arbitrary detention. As

currently drafted, the methodology employed by the Working Group for differentiating between principles and guidelines is unclear. The document might more usefully be structured by topic, eliminating redundancies and combining a basic legal principle under each topic together with relevant guidelines for States to consider in applying each basic legal principle.

We also encourage the Working Group to avoid using imperative terminology for recommendations intended to advance the progressive development of the law, including when advancing non-binding recommendations of treaty bodies and other UN or regional mechanisms, on subjects neither regulated by international law nor sufficiently standardized in State practice to constitute customary international law. At the very least, the draft needs to identify clearly, when it makes statements that purport to represent progressive development of the law in practice, that it is not characterizing the law as it currently exists. Use of imperative terms like “shall” and “must” are to be avoided in relation to these non-binding recommendations and goals. Although the Working Group has proposed a number of laudable recommendations that would improve the implementation of relevant rights in particular contexts, they may not have equal merit or practical application in all detention contexts or in different legal systems and likewise should not be expressed in mandatory terms.

The United States is grateful to the Working Group for the opportunity to review and comment on the Draft Principles and Guidelines as it progresses. The United States also looks forward to review and comment on the next draft the Working Group prepares based on further input from governments and stakeholders.

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4. Death Penalty

On October 1, 2015, at the 30th session of the HRC, the United States provided an explanation of its vote against resolution 30/5, “the question of the death penalty.” The resolution was adopted by a vote of 26-13, with eight abstentions. U.N. Doc. A/HRC/RES/30/5. The U.S. explanation of vote is excerpted below and available at <https://geneva.usmission.gov/2015/10/01/u-s-explanation-of-vote-hrc-resolution-on-the-question-of-the-death-penalty/>.

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The United States is disappointed that it must vote against this resolution. As in previous years, we had hoped for a balanced and inclusive resolution that would better reflect the position of states that continue to apply the death penalty lawfully. In particular, we cannot agree with this resolution’s orientation in favor of a moratorium or abolition. We reaffirm our longstanding position on the legality of the death penalty, when imposed and carried out in a manner consistent with a state’s international obligations.

We are deeply troubled whenever an individual subject to the death penalty is denied the procedural and substantive protections to which he or she is entitled. We likewise condemn any instance in which a method of execution or treatment during confinement is applied in such a manner as to amount to torture or cruel, inhuman or degrading treatment in violation of a state’s

international obligations. We cannot accept the implication, however, that all methods of execution have such a result.

The United States is committed to complying with its constitution, laws, and international obligations, and we encourage other countries that employ the death penalty to do so as well. It remains our hope that the upcoming biennial high-level panels to be convened on the death penalty, and the Secretary General's 2015-2017 supplement to his next report on capital punishment, will address all aspects of the issue, with due consideration to given to all national perspectives. This point is important given the wide divergence of views regarding its abolition or continued use both within and among nations.

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J. FREEDOM OF ASSEMBLY AND ASSOCIATION

At the 30th session of the HRC, the United States joined other countries in a statement on preventing reprisals. The joint statement follows and is available with the list of countries that joined at <https://geneva.usmission.gov/2015/09/25/u-s-joins-hrc-joint-statement-on-preventing-reprisals/>.

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We remain deeply concerned by continued acts of intimidation and reprisal against those who cooperate or seek to cooperate with the United Nations, its representatives and mechanisms in the field of human rights, including the Human Rights Council. We strongly condemn all acts of intimidation or reprisal and urge all States to prevent and refrain from such acts. As the Secretary General states in his Report on reprisals before this session, "all acts of intimidation and reprisal, no matter how subtle or explicit, are completely and utterly unacceptable and should be halted immediately and unconditionally."

We believe that everyone has the right to unhindered access to and communication with the United Nations, its representatives and mechanisms in the field of human rights. All Member States have a duty to respect, promote and ensure the realization of this right.

We welcome the increased attention devoted to reprisals by special procedures and treaty bodies. The recent adoption of the guidelines against intimidation or reprisals by the chairpersons of the human rights treaty bodies is especially welcome, as is the appointment by a number of treaty bodies of rapporteurs or focal points on reprisals.

States have the obligation and responsibility to prevent, investigate and ensure accountability for any acts of reprisal. The Secretary-General, the High Commissioner for Human Rights, as well as the President, together with the Bureau of the Human Rights Council also have a role in exposing and ensuring that States address such reprisals, and we especially welcome and appreciate the actions by the current President and Bureau in this regard.

Regional human rights bodies also have an important role to play. In this context, we particularly appreciate the resolution adopted last May by the African Commission on Human and Peoples' Rights extending the scope of the mandate of its Special Rapporteur on Human Rights Defenders in Africa, giving this mechanism the additional responsibility to document,

address, and report on cases of reprisals against civil society stakeholders and we would encourage other regional human rights bodies to take a similar approach.

As far as HRC resolution 24/24 is concerned, we take note of developments in New York and consider that it is now high time for the Secretary-General to appoint a focal point on the issue of reprisals, taking into consideration the concerns raised by some States on some of the provisions in the resolution. We trust that these concerns will be appropriately addressed while appointing the focal point.

Finally, we wish to reaffirm our conviction that the Human Rights Council has a moral and legal duty to address reprisals. During the last review of its work and functioning the Human Rights Council strongly rejected “any act of intimidation or reprisal” and urged “States to prevent and ensure adequate protection against such acts”. We are committed to continue making all necessary efforts in order to make this consensual decision by the Council a reality.

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On June 17, 2015, at the 29th session of the HRC, Eric Richardson delivered remarks at a clustered interactive dialogue including the Special Rapporteur for freedom of association and peaceful assembly. Mr. Richardson’s remarks include the following and are available at <https://geneva.usmission.gov/2015/06/17/u-s-statement-at-hrc-dialogue-on-freedom-of-expression-and-freedom-of-assembly/>.

We would like to thank S[pecial] R[apporteur] Kiai for his report. We applaud his emphasis on the importance of the Guiding Principles on Business and Human Rights. These play a significant role in helping states protect the rights to freedoms of peaceful assembly and association. We do not agree with some of the legal analysis, such as on extraterritorial obligations of states. We do agree, however, with many of the assertions presented in the report. Where States violate human rights, it is more difficult for businesses to respect those same rights. In some instances domestic law may require actions inconsistent with human rights. At times, State practices may encourage businesses to take actions that undermine the enjoyment of human rights. In contrast, States that respect human rights can create environments where businesses do not undermine the enjoyment of human rights. ...

K. FREEDOM OF EXPRESSION

1. General

a. Protection of Journalists

On May 27, 2015, Ambassador Power, U.S. Permanent Representative to the United Nations, addressed a UN Security Council open debate on the protection of journalists in

conflict situations. Her remarks are excerpted below and available at <http://usun.state.gov/remarks/6544>.

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[T]he first of three challenges I want to highlight today with respect to the protection of journalists [is]: How does the international community protect journalists from parties that deliberately target them? In the four-plus years since the Syrian conflict began, more than 80 journalists have been killed, and at least 90 more abducted, according to the Committee to Protect Journalists, CPJ. Countless more have been threatened, attacked, wounded, barrel-bombed or disappeared.

They have been targeted by both the Assad regime and violent extremist groups like ISIL, whose grotesque executions of journalists—alongside humanitarian aid workers, foreign soldiers, and people of different religions or political beliefs—seem aimed both at using their victims’ suffering as a recruiting tool, and at dissuading other journalists from covering the conflict. Unfortunately, their tactics seem to be working, as the videos of their executions are widely disseminated on social media, while both international and national coverage of the Syrian conflict itself has declined dramatically.

What the Assad regime, ISIL, and other State and non-State actors like them that target journalists have in common is that they do not want people to see them for what they really are—whether that is a regime willing to torture, bomb, gas, and starve its people in order to hold onto power, or a group masquerading as religious that routinely desecrates the basic dignity of human beings. ...

This brings me to the second challenge: How do we protect journalists and, more broadly, press freedoms, in situations in which violence is escalating and there is a risk of mass atrocities? This is important, as we know that a robust press can play a key role in helping prevent crises from metastasizing into full-blown conflicts and mitigating the conditions in which grave human rights violations tend to occur.

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Even in countries that are not experiencing conflicts or at imminent risk of sliding into unrest, the erosion of press freedoms is often a harbinger of the rolling back of human rights that are critical to healthy democracies. This is the third challenge I’d like to raise: How do we—and by we I mean the UN, bodies such as the Security Council, and our individual Member States—push back against the erosion of press freedoms by governments intent on silencing critical voices and other key outlets of free expression?

Look to any region, and you will see alarming warning signs of how the crackdown on press freedom is coupled with a broader crackdown on civil and political rights. ...

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It is worth noting that all around the world, for every individual or group targeted through prosecution, attacks and threats, there are countless more impacted—people who, seeing the

risks, either begin to self-censor, go into hiding, or flee the countries that so desperately need their independent voices.

Given the critical importance of press freedoms in advancing so many of the goals of this Council, let me make four recommendations in closing as to how we can meet these challenges.

First, we must condemn the governments and non-State actors that attack journalists, as well as the overly restrictive laws and regulations that undermine their freedom. It is much easier to prevent these spaces from closing than it is to fight to reopen them.

Second, we must give the journalists the tools they need to protect themselves, particularly working in conflict zones and repressive societies. The \$100 million that the United States has invested in training more than 10,000 at-risk journalists and human rights defenders in digital safety, and in providing them with anti-censorship tools, is one example. Another is the training provided by civil society groups such as the Institute for War and Peace Reporting, whose director in Iraq, Ammar al-Shahbender, was killed by a car bomb on May 2nd – a devastating loss for his family, the community of journalists he mentored, and his nation.

Third, we can be sure that the people who attack journalists are actually held accountable for their crimes. The failure to effectively investigate and prosecute these crimes sends a clear message to perpetrators that they can continue to commit these crimes without any consequences.

Fourth, and finally, we can help create programs to protect journalists operating in conflict zones, particularly those targeted for their work. Colombia shows how this can be done. The National Protection Unit established by the government in 2011 is empowered to protect nineteen vulnerable groups, including journalists and human rights defenders. As of last year, more than 80 journalists—this is extraordinary—were receiving protection measures ranging from cell phones and transport subsidies to bodyguards and armored cars. The program has an annual budget of \$160 million, which speaks to Colombia’s commitment to protecting these individuals, and the country’s recognition of the crucial role that these groups play.

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b. *Freedom of expression, including artistic and creative expression*

At the 30th session of the HRC, Latvia, Uruguay, and the United States led a joint statement reaffirming the right to freedom of expression, which was joined by 55 states and delivered by Ambassador Janis Karklins, Permanent Representative of Latvia to the United Nations in Geneva. The text of the joint statement follows and is also available with the list of states that joined at <https://geneva.usmission.gov/2015/09/18/hrc-statement-reaffirms-right-to-freedom-of-expression-including-creative-and-artistic-expression/>.

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We wholeheartedly reaffirm the right to freedom of expression. This right is enshrined in Article 19 of the ICCPR and guaranteed to all without discrimination. Its scope includes creative and artistic expression—as the ICCPR specifically addresses expression “in the form of art.” States

Parties to the ICESCR recognize the right, under Article 15, to participate in cultural life and benefit from the protection of interests resulting from one's artistic production. Under Article 27 of the UDHR, everyone has the right "to enjoy the arts."

We stand firm in our commitment to protect and promote the right to freedom of expression, including artistic and creative expression. In addition to being an integral part of the protected human right to freedom of expression, artistic and creative expression is critical to the human spirit, the development of vibrant cultures, and the functioning of democratic societies. Artistic expression connects us all, transcending borders and barriers.

Artistic expression can challenge us and change the way we view the world. Picasso's painting *Guernica* and the poetry of Wilfred Owen vividly highlighted the horrors of twentieth-century warfare. Art can also highlight injustices and inspire opposition to it. Artists from different parts of the world challenged the Latin American dictatorships in the 1970s and 1980s through their poetry, music and visual arts.

We witness on a daily basis the powerful social and emotional impact of artistic expression. We are transfixed and moved by Karim Wasfi playing his cello at the site of explosions in Baghdad. Artists like him all over the world, through their work, are drawing global attention to human rights issues. They stand in the face of terror, offering a very different narrative — one of humanity, beauty, and hope.

Artistic expression is critical to culture, heritage, and identity. In Mali, through the Timbuktu Renaissance Initiative, musicians and other artists are working with the government to revive and strengthen Mali's rich arts and culture. We welcome this good practice, in response to efforts to destroy the country's artistic heritage.

Those who suppress artistic expression fear its transformative effect. We have seen artistic expressions and creations come under attack because they convey specific messages and articulate symbolic values in a powerful way. There are many reasons used, wrongly, to silence artists, to quell their music, to hide their works from the world. Reasons for censorship may include the suppression of political dissent and of different values or beliefs. Women and persons belonging to minority groups are among those affected most.

Artists in many parts of the world are facing threats, censorship, and violations of their human rights. We condemn such violations, which may include extrajudicial executions, attacks on their physical integrity and arbitrary detentions. We strongly believe that reactions to controversial artwork should be expressed not through violence but through dialogue and engagement that are based on the exercise of the rights to freedom of expression and peaceful assembly. States must protect against and ensure accountability for violations of the right to freedom of expression.

We will continue to engage in the promotion and protection of the right to freedom of expression, including artistic and creative expression, wherever it is threatened.

We believe that this important topic merits the continued engagement of this Council and we look forward to doing so in a constructive manner.

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2. Freedom of Expression and Encryption and Anonymizing Technologies

On June 17, 2015, at the 29th session of the HRC, Eric Richardson delivered remarks at a clustered interactive dialogue with the Special Rapporteur on freedom of expression.

Mr. Richardson's remarks are excerpted below and available at <https://geneva.usmission.gov/2015/06/17/u-s-statement-at-hrc-dialogue-on-freedom-of-expression-and-freedom-of-assembly/>.

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The United States welcomes the report on the use of encryption and anonymizing technologies. While the United States is not in full agreement with some of the legal and technical analysis of the report, we certainly agree that these are topics worthy of careful consideration. We appreciate the report's focus on implications for the online security of Internet users, particularly human rights defenders and vulnerable populations. The report recognizes that encryption and anonymity technologies can both enable Internet users to freely express themselves and access useful information. At the same time they can be used by malicious actors to facilitate and conceal their abuses. How States promote the former and discourage the latter must be guided by their internationally-recognized human rights obligations.

Regulation of the use of such technologies follows a rule of law framework and abides by all applicable human rights obligations. There are important conversations to be had about appropriate legal regimes and due process protections in this regard. We must also take account of the practical and technological realities that impact access to information by law enforcement. The United States supports the adoption of strong encryption. We also encourage an informed discussion about how best to accomplish the twin goals of protecting privacy and public safety.

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L. FREEDOM OF RELIGION

1. U.S. Annual Report

On October 14, 2015, Secretary Kerry submitted to Congress the 2014 International Religious Freedom Report, pursuant to § 102(b) of the International Religious Freedom Act of 1998 (Pub. L. No. 105-292), as amended, 22 U.S.C. § 6412(b). The report is available at state.gov/religiousfreedomreport/. Secretary Kerry's remarks at the rollout of the report are available at <http://www.state.gov/secretary/remarks/2015/10/248198.htm>. Remarks by Ambassador-at-Large for International Religious Freedom David N. Saperstein are available at <http://www.state.gov/r/pa/prs/ps/2015/10/248201.htm>. A State Department media note summarizing key developments discussed in the 2014 report is excerpted below and available at <http://www.state.gov/r/pa/prs/ps/2015/10/248196.htm>.

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In 2014, non-state actors committed some of the world's most egregious abuses of religious freedom and other human rights. Government failure, delay, and inadequacy in combatting these groups often had severe consequences for people living under significant and dire restrictions on, and interference with, their exercise of freedom of religion. Other concerning trends over the year included significant increases in the number of recorded anti-Semitic incidents, and increasing restrictions on religious liberty imposed under the pretext of combatting terrorism and violent extremism.

Non-State Actors' Suppression of Religious Freedom

In the Middle East, Sub-Saharan Africa, and Asia, a range of non-state actors including terrorist organizations, set their sights on destroying religious diversity. Members of religious minorities were disproportionately affected. In these regions, religious intolerance and hostility, often toxically mixed with political, economic and ethnic grievances, frequently turned violent, resulting in death, injuries, and displacement.

Government Violations, Abuses, and Restrictions of Religious Freedom

The 2014 Report notes a continuation of many restrictive governmental policies affecting religious freedom including laws criminalizing religious activities and expression, the threat and enforcement of blasphemy and apostasy laws, prohibitions on conversion or proselytizing, and stringent or discriminatory application of registration requirements for religious organizations.

Combatting Terrorism and Violent Extremism as Justification for Restrictions on Religious Practice

In numerous authoritarian countries around the world, regimes co-opted the language of preventing and countering terrorism and countering violent extremism in their efforts to neutralize and repress political opposition emanating from peaceful religious individuals or groups.

Positive Developments in 2014

While the IRF report aims to shed light on a broad range of limitations on the exercise of religious freedom, it also seeks to highlight positive actions taken by some governments and civil society to provide greater protections for religious minorities and to take measures to ensure the human rights of individuals to worship, practice, learn, teach, and believe—according to their own conscience. Across the globe, religious, and civil society groups, as well as interfaith coalitions took steps to promote greater respect for religious beliefs, practices and diversity.

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2. Human Rights Council

On March 10, 2015, the United States participated in an interactive dialogue with the Special Rapporteur on Freedom of Religion or Belief at the 28th session of the Human Rights Council. Ambassador Harper delivered remarks on behalf the United States, which are excerpted below and available at <https://geneva.usmission.gov/2015/03/11/u-s-statement-at-hrc-dialogue-with-special-rapporteur-on-freedom-of-religion-or-belief/>.

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The United States thanks Special Rapporteur Bielefeldt for his excellent report and analysis on addressing violence in the name of religion. His choice of topic was unfortunately a prescient one. In recent months we have seen many horrific instances of violence related to religion, including in Western Europe, Africa, the Middle East, and my own country. This is an enormously important topic today.

The Special Rapporteur correctly states that a number of factors influence violence in the name of religion, including corruption, impunity, and exclusionary and repressive policies, as well as violent interpretations of religious texts. A holistic understanding of and approach to these factors are critical.

While many actors in society play important roles in addressing this type of violence, effective state institutions that respect human rights and are accountable to local populations are critical. When states oppress their people, or stifle dissent, or close the space for civil society, they sow the seeds of violent extremism.

As noted in the Special Rapporteur's report, states must protect the freedom of religion or belief and effectively enforce anti-discrimination laws so that all individuals are protected, regardless of whether they belong to minority religious groups. Religious leaders and other elements of civil society play an important role in countering violent extremism, but they can only fulfill their potential if the freedoms of religion, association and expression are fully protected.

The Special Rapporteur makes a number of prudent recommendations in his report.

We agree that states should revoke anti-blasphemy and apostasy laws, as they too often discriminate and create environments of fear and mistrust.

We agree that political and civil society leaders must speak out against violence and intolerance in the name of religion, because the best antidote to hate speech is more speech, including positive narratives that reinforce the values of tolerance and pluralism.

We agree that states must end impunity for human rights violations, and must create political systems that allow for full and equal participation by all members of society.

And we agree that education and community engagement are essential ingredients in promoting a culture of pluralism and respect throughout society.

Last month in Washington, President Obama hosted a Summit on Countering Violent Extremism, which brought together local, national, and international leaders from governments, the private sector, religious leaders and other members of civil society to discuss and collaborate on actions to address violent extremism. We look forward to continuing that conversation and joint action in the coming months.

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On June 3, 2015, the United States participated in the fifth meeting of the Istanbul Process for promoting implementation of UN Human Rights Council Resolution 16/18 on combating religious intolerance, discrimination, and violence, held in Jeddah, Saudi Arabia. The opening remarks of Arsalan Suleman, Acting U.S. Envoy to the Organization of Islamic Cooperation, are excerpted below and available at <http://www.state.gov/j/drl/rls/rm/2015/243260.htm>.

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This meeting comes at a critical time. We are all sadly familiar with the challenges we face in terms of violence, discrimination, and intolerance on the basis of religion or belief. In many parts of the world, religious minorities, including Christian, Shia, Sunni, Yezidi, Ahmedi, and Bahai communities, are facing discrimination and violence at the hands of state and non-state actors.

There is an urgent need to enhance global efforts to protect the rights of minorities, including religious minorities. In some cases, like for the Burmese Rohingya population, discrimination has reached such proportions that it has led to a regional humanitarian emergency. Non-state attacks against members of religious communities are also an urgent challenge. In April, for example, we were appalled by the murders of Christians in Libya and Kenya by terrorist groups.

We were shocked and saddened by the deplorable bombings in the past weeks of a mosque in Qatif, Saudi Arabia, where at least 21 people died and over 80 were injured, and the attempted attack on a mosque in Dammam, which killed four people. We condemn such deplorable, criminal acts and express our condolences to the families of the victims and the people of Saudi Arabia. Sadly, these are just the latest in a succession of actions seeking to foment sectarian tensions. Such terrorist acts, as well as divisive sectarian rhetoric, seek to tear societies apart.

We are also faced with intolerance and societal discrimination against members of religious communities in various parts of the world, including for Muslim communities in Europe and the United States. We have seen provocative demonstrations and efforts seeking to target such communities, and sadly we have also seen isolated incidents in which individual criminals have engaged in terrorist violence purportedly in response to certain forms of peaceful expression.

Effective implementation of Resolution 16/18 by governments can help address many of the challenges relating to religious intolerance, discrimination, and violence. Resolution 16/18 is a comprehensive action plan—it explicitly defines the shared values and commitments that serve as our foundation and guiding principles when dealing with religious intolerance. The resolution acknowledges that there is no justification for violence in response to peaceful expression.

It calls on governments to foster religious freedom and pluralism, to protect places of worship, to enforce anti-discrimination laws, to engage with members of religious communities, and to promote conflict resolution. It also encourages leaders in government and civil society to speak out against religious intolerance and to form collaborative networks to address these challenges.

The blueprint is clear and has the consensus of the international community. As the purpose of this gathering indicates, we must focus our attention on implementation. This discussion is both timely and necessary.

We must reaffirm our core values and strengthen political and civil rights protections for the members of all our communities, including members of religious and ethnic minority groups. Reaffirming our commitment to human rights will prevent the political marginalization that can drive members of vulnerable communities toward violent extremists. Freedom of expression, freedom of religion, and respecting religions and religious beliefs of others are critical to promoting peace and understanding worldwide.

President Obama and his Administration are wholly invested in this approach worldwide, and we are working with partners, including all of you, to promote peace and stability in the region and around the world.

Though the challenges are daunting, we've seen recent examples of how governments have responded to terrible tragedies in ways that further the values enshrined in Resolution 16/18. In Afghanistan, a young woman named Farkhunda was brutally killed by a mob following false allegations of blasphemy. On May 6, after an investigation and prosecution, an Afghan judge sentenced four of the individuals involved in the violence to death, with other participants receiving prison terms for their participation. Although we have concerns regarding due process, we welcome the Afghan justice system addressing the mob lynching of Ms. Farkhunda. In Pakistan, a mob beat, killed, and burned the bodies of a Christian couple, also on allegations of blasphemy. And on May 21, an anti-terrorism court charged 106 individuals involved with the crime.

As demonstrated in these cases, the appropriate way for governments to respond to such injustices is to take the necessary steps to ensure that perpetrators of violence are held accountable, and that there is no impunity for such crimes. Governments must act quickly, but they must also ensure that defendants are afforded due process and fair trial guarantees. That is the true essence of 16/18.

As to the way forward, it is important for us to continue having experts-focused meetings to discuss best practices for implementing each step of Resolution 16/18. Governments should then follow through and implement the experts' findings and recommendations as appropriate. And that implementation should focus on all aspects of the comprehensive action plan, not just one prong.

We encourage greater and more effective state reporting on implementation activity. Civil society can play an important role in promoting and monitoring implementation, as well as contributing to implementation directly as appropriate. For example, the Universal Rights Group's recent study on 16/18 implementation has provided useful analysis on the lack of reporting and gaps in implementation.

As we will discuss in further detail during the meeting, the United States has partnered with other states, namely Bosnia, Indonesia, and Greece, on workshops to discuss practical approaches to implementation. These technical engagements have focused in particular on best practices for promoting engagement with minority religious communities and enforcement of anti-discrimination laws. We welcome the opportunity to work with others on such workshops as a cooperative way to promote implementation of Resolution 16/18.

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On March 13, 2015, at the 28th session of the Human Rights Council, Ambassador Harper delivered a joint statement on behalf of 40 states. Ambassador Harper's statement followed after a joint statement on the human rights of Christians and other communities, particularly in the Middle East, on behalf of a group of states led by the Holy See, Lebanon, and the Russian Federation and including the United States. The statement delivered by Ambassador Harper is available at <https://geneva.usmission.gov/2015/03/13/joint-concurrence-statement-on-persecution-of-minority-communities-in-the-middle-east/>, and includes the following:

We share the well-founded concern about the situation facing Christians and members of other minority communities in the Middle East expressed in the previous statement. Cognizant that Muslims comprise the majority of victims of terrorism and persecution in the Middle East, we speak separately to underscore that our concern extends to all people facing persecution, without regard to religion or ethnicity.

M. RULE OF LAW, DEMOCRACY PROMOTION, AND CIVIL SOCIETY

On March 26, 2015, at the 28th session of the HRC, the United States provided an explanation of vote opposing an amendment to the resolution entitled “Human Rights, Democracy, and the Rule of Law.” The resolution was adopted by a recorded vote (35 to 0, with 12 abstentions) after the amendment failed. U.N. Doc. A/HRC/RES/28/14. China proposed the amendment on behalf of Russia, Cuba, Pakistan, Saudi Arabia, and Venezuela, calling for an added reference “to respect sovereignty, territorial integrity, and independence of states” and limiting NGO participation in the forum the resolution establishes. The resolution establishes a forum on human rights, democracy and the rule of law to allow dialogue and cooperation and identify best practices, challenges and opportunities. Participants in the Forum will include States, UN bodies, intergovernmental organizations, regional human rights organizations, academics and experts and non-governmental organizations. The U.S. explanation of vote is excerpted below and available at <https://geneva.usmission.gov/2015/03/26/eov-on-item-3-resolution-entitled-human-rights-democracy-and-the-rule-of-law/>.

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We regret the decision by some states to put forward an amendment to this resolution after the process of negotiations led by the core group has been extremely open and transparent.

We are seriously concerned that this amendment attempts to stifle the voices of civil society and restrict the space to provide differing views on the topics of human rights, democracy, and the rule of law. We are dismayed to see that the amendment is aimed at restricting civil society participation at the forum on a “no-objection basis.” The voices of civil society are vital to vibrant democracies and their participation in the forum should be welcome.

The United States strongly opposes the amendment before us today and will vote in favor of the resolution. We urge all Council members to do the same.

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On September 28, 2015, at the 30th session of the HRC, the United States led a joint statement entitled “Strengthening of a Pluralistic Civil Society,” which was joined by 58 states and delivered by Ambassador Harper. The joint statement follows, and is also available with the list of states that joined

at <https://geneva.usmission.gov/2015/09/28/joint-hrc-30-statement-on-strengthening-of-a-pluralistic-civil-society/>.

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The Vienna Declaration and Program of Action (VDPA) recommends actions to “promote democracy, development and human rights,” with special emphasis on “strengthening of a pluralistic civil society and the protection of groups which have been rendered vulnerable.” The VDPA recommends various efforts, including increased allocation of resources to programs that uphold the rule of law and promote human rights awareness, including through civil society.

We stand firm in our commitment, consistent with our human rights obligations, to support a pluralistic civil society. Protecting and promoting civil society space means recognizing the rights of individuals, as recognized by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, to organize and meet peacefully in groups to discuss and affect the issues that matter to them. People working together freely bring us innovation, economic growth, vibrant pluralistic democracies. Moreover, pluralism is related to tolerance.

In order to promote these goals, we call upon States: not to criminalize freedom of association; not to label nonviolent associations as “subversive”; not to attack or imprison civil society actors for peaceful activities; not to undertake reprisals, such as harassing or jailing individuals for engagement with UN or other international human rights mechanisms; and not to hinder the work of civil society organizations through undue restrictions, such as on communication and financing, including funding from foreign sources. We deplore all such measures intended to prevent individuals from organizing and working together.

We will work individually and together to defend pluralistic civil society. We will strive to review our own legislation and policies to ensure that civil society actors do not have burdensome or vague registration requirements; that unregistered associations are not prohibited per se; and that groups are able to access the funding necessary to conduct peaceful and legitimate activities. We call on governments not to promulgate restrictive legislation, administrative measures, policies, or criminal penalties aimed at interfering with the exercise of the right to freedom of association.

Mr. President, we will continue raising this important issue at the Council. We appreciate the work being done by OHCHR and the special procedures, and hope that work will continue.

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On September 28, 2015, at the 30th session of the HRC, Ambassador Harper delivered a US statement on civic space and non-governmental organizations. That statement is excerpted below and available at <https://geneva.usmission.gov/2015/09/28/u-s-statement-on-civic-space-and-ngos/>

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In the past, the United States has recommended that other states repeal laws that restrict civil society. Some respond to the recommendation with the inaccurate claim that the U.S. has similar laws. I will take this opportunity to discuss U.S. regulations of nongovernmental organizations, or NGOs, and how they in fact encourage and assist NGOs to be active, rather than restrict and repress them.

The ability of a person to organize with others and form groups is highly valued in the United States. U.S. law is designed to support and help people who want to form civil society organizations.

There are about a million and half non-governmental organizations (NGOs) in the United States. One can find an NGO in the U.S. on virtually every conceivable topic. The U.S. does not interfere with how NGOs accomplish their missions. They are free to collaborate with foreign NGOs or foreign governments. There are no broad regulations that restrict U.S. NGOs from attending conferences abroad, finding donors overseas or performing work internationally.

To establish an organization, most U.S. states have a general incorporation statute that makes the process routine – with no requirement for approval by the legislature or any official. These statutes limit the possibility of government abuse of power.

To receive nonprofit status in the United States, an individual files a simple registration form on behalf of the organization. Typically this involves a short description of the NGO's mission, its name, and its address, and payment of a modest fee. Individuals do not need to be U.S. citizens to form a new NGO. This registration is not used to impose burdens on organizations or to penalize unregistered organizations – rather, it is the basis for special benefits to organizations that encourage their establishment. Among other things, registration usually allows the organization to claim tax-exempt status.

The Foreign Agents Registration Act (FARA) covers all “persons,” including any individual, corporation, and association that is an agent of a foreign principal, but provides a number of exemptions from registration. These exemptions include persons whose activities are in “furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts.” Unlike some other states’ repressive laws, FARA is not tied to foreign government funding, does not impose a tax, does not limit advocacy, and applies equally, regardless of the foreign country involved. FARA provides transparency.

... We remain committed to maintaining the maximum amount of space and independence for civil society to operate.

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N. OTHER ISSUES

1. Protecting Human Rights While Countering Terrorism

Two resolutions relating to human rights and terrorism were presented at the 28th and 29th sessions of the HRC in 2015. The United States voted against the resolution sponsored by Egypt at the 28th session, entitled “Effects of Terrorism on the Enjoyment of Human Rights.” The U.S. explanation of vote is excerpted below and available at <https://geneva.usmission.gov/2015/03/26/resolution-entitled-effects-of-terrorism-on-the-enjoyment-of-human-rights/>.

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The United States is disappointed that this resolution has come up for a vote at this session, and before we had the collective opportunity to reach consensus on how best to further address the problem of the effects of terrorism on the enjoyment of human rights. The issue of countering terrorism while protecting human rights is of fundamental importance, as shown by ongoing international dialogue on that issue in this body and in the broader UN system. However, the draft resolution before us today is not the best way to advance that dialogue, and it contains many problematic elements that require us to vote against it.

It is essential that future efforts on this important topic are the result of careful deliberations and are able to garner consensus among the members of this body. Victims of terrorism deserve no less. Indeed, a divided Council is not inevitable on this issue. Many aspects of this text deviate from well-established consensus text on human rights and counterterrorism here in the HRC and in other fora. We realize that the sponsors of this text have sought to introduce a different perspective to ongoing discussions on terrorism before this Council. Had there been more time and sufficient negotiations, we believe that we could have overcome these problems yet again and produced a result that all delegations could have supported.

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The second resolution, entitled “Protection of Human Rights and Fundamental Freedoms while Countering Terrorism,” was presented by Mexico at the 29th session of the HRC in 2015. The U.S. co-sponsored the resolution and Ambassador Harper provided the following general comment on July 2, 2015. The general comment by the U.S. delegation on the subject of protecting human rights while countering terrorism is also available at <https://geneva.usmission.gov/2015/07/02/human-rights-and-fundamental-freedoms/>. The United States also cosponsored the resolution, presented by Mexico at the UN General Assembly Third Committee, on the same topic, which was adopted without a vote on December 17, 2015.

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The United States welcomes the continued attention of the Council to the issue of protecting human rights while countering terrorism. It is essential that this body returns to consensus on how best to further address this important issue and we appreciate the lead sponsors’ efforts to ensure all viewpoints are reflected in the final text of this resolution. States play a crucial role in protecting persons from acts of terrorism and, as is well-known, the United States has taken a range of measures to counter the scourge of terrorism. Further, each State has the primary responsibility to protect its populations from genocide, war crimes, crimes against humanity, and ethnic cleansing. Additionally, the United States wishes to clarify that the reference in operative

paragraph 4 to a responsibility of States to protect persons in their territory from acts of terrorism does not describe or give rise to any general international legal obligation.

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2. Countering Violent Extremism

At the 28th session of the HRC, 77 countries, including the United States, joined in a statement on countering violent extremism. The joint statement appears below and is available at <https://geneva.usmission.gov/2015/03/13/human-rights-council-75-country-joint-statement-on-countering-violent-extremism/>, along with a list of the countries that joined the statement.

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1. I have the honour to deliver this statement on behalf of a group of 77 countries. We wish to underscore our commitment to counter violent extremism in all of its forms and manifestations, while promoting and protecting human rights and fundamental freedoms.
2. We share the concerns expressed by the Human Rights Council regarding the increasing and serious human rights abuses and violations of international humanitarian law by violent extremist groups, including those involving unlawful killing, the deliberate targeting of civilians, forced conversions, targeted persecution of individuals on the basis of their religion or belief, displacement and abduction, abuses of women and minors, and acts of violence against members of ethnic and religious minorities, as well as sieges against civilians in villages inhabited by minorities.
3. We reaffirm that acts, methods and practices of violent extremism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of states and destabilizing legitimately constituted Governments, and that the international community should take the necessary steps to enhance cooperation to prevent and combat violent extremism.
4. We recognize that efforts to counter violent extremism will only succeed if citizens can address legitimate grievances through the peaceful democratic process and express themselves through strong civil societies, and reject the premise that violence is the only way to achieve changes in societies faced with violent extremism. We further recognize that violent extremism cannot and should not be associated with any religion, nationality, or civilization.
5. We deplore the suffering caused by violent extremism to the victims of violent extremism and their families in all its forms and manifestations, express our profound solidarity with them, encourage states to provide them with proper support and assistance while taking into account, when appropriate, considerations regarding remembrance, dignity, respect, justice and truth, in accordance with international law.

6. We reaffirm that states must ensure that any measures taken to counter violent extremism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law.
7. We encourage states to engage with members of relevant local communities and nongovernmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts and address the conditions conducive to the spread of violent extremism, including by empowering youth, women, religious, cultural and education leaders, and members of all other concerned groups of civil society and adopting tailored approaches to countering recruitment to this kind of violent extremism and promoting social inclusion and cohesion.
8. We reaffirm the commitment of states to take measures aimed at raising the awareness of and addressing the conditions conducive to violent extremism. These conditions include but are not limited to prolonged unresolved conflicts, dehumanization of victims of violent extremism in all its forms and manifestations; lack of the rule of law, respect for human rights, and good governance; and discrimination, political exclusion, and socioeconomic marginalization based on ethnicity, nationality, gender, or religion or belief. We also recognize that none of these conditions can excuse or justify acts of violent extremism.
9. We note that violations of human rights by states may contribute to radicalization and recruitment, and reaffirm the importance of Pillar 4 of the United Nations Global Counter-Terrorism Strategy. We call upon states and entities involved in supporting countering violent extremism efforts to continue to facilitate the promotion and protection of human rights and fundamental freedoms, as well as due process and the rule of law.
10. We emphasize that effectively preventing the spread of violent extremism requires international, localized, specialized, and expanded efforts. We reinforce the need to further empower youth, and women, as well as religious, cultural and education leaders, and all other concerned civil society actors, and to adopt tailored approaches, including those sensitive to local cultures and religious beliefs, to address this phenomenon.
11. We note that laws and policies designed to address violent extremism should promote the enjoyment of the freedoms of expression, peaceful assembly, association, movement, and religion or belief. We also note the importance of ensuring that civil society has an enabling environment to develop, promote, and advance comprehensive solutions to address violent extremism, as the contributions of civil society are essential to these efforts.
12. As members and observers of the Human Rights Council, we believe that the international community must continue to take further steps building upon the UN Charter and prior work of this and other UN bodies on this critical issue. We look forward to further attention to this topic in the Council.

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At the 30th session of the HRC, the United States co-sponsored the first-ever resolution on human rights and preventing and countering violent extremism. The resolution was adopted on October 2, 2015 by a vote of 37 to 3 with 7 abstentions. U.N. Doc. A/HRC/RES/30/15.

3. Remotely Piloted Aircraft Resolution

On March 26, 2015, the United States again voted no on a resolution adopted by the HRC on “ensuring use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including international human rights and humanitarian law.” U.N. Doc. A/HRC/RES/28/3. A resolution on the same subject was adopted by the HRC in 2014. U.N. Doc. A/HRC/RES/25/22. See *Digest 2014* at 278-79. The U.S. explanation of vote on resolution 28/3 is excerpted below and available at <https://geneva.usmission.gov/2015/03/26/u-s-votes-no-on-hrc-resolution-on-remotely-piloted-aircraft/>.

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This is the second year in which a resolution focused specifically on remotely piloted aircraft has been offered, and, as was the case last year, the United States will vote no. Our reasons for not supporting a resolution on this subject were set forth in the Explanation of Vote we provided last year, and I will reiterate those points today. The United States firmly supports the Human Rights Council’s important role in promoting respect for human rights in the context of our collective efforts to counter terrorism. However, we do not believe that the examination of specific weapons systems is a task for which the Human Rights Council is well-suited or for which it possesses the requisite expertise. We do not support efforts to take this body in that direction, and in doing so usurping the mandates of bodies intended for such matters. And to the extent that this resolution deals with cross-cutting issues pertaining to human rights and counterterrorism, this resolution is largely duplicative of work being undertaken in the Council and other venues.

At the international level, we have engaged in discussions in this body and elsewhere about remotely piloted aircraft in the context of broader discussions about human rights and counterterrorism. We are a traditional co-sponsor of the Mexican-run counterterrorism resolutions in the Human Rights Council and UN General Assembly, the two most recent iterations of which have explicitly addressed remotely piloted aircraft.

With respect to our own counterterrorism operations, as we have stated publicly at the highest levels of our government, the United States is committed to ensuring that our actions, including those involving remotely piloted aircraft, are undertaken in accordance with all applicable domestic and international law, and with the greatest possible transparency consistent with our national security needs.

In our view, this resolution should not have been tabled. The fact that this resolution has been run for the second year in a row compounds the unfortunate effect of diverting this Council’s attention from critically important issues that fall squarely within its competency and expertise and that would benefit from the Council’s increased focus, and that the international community looks to this body to address. Within the realm of human rights and counterterrorism, these issues include the use of force against peaceful protesters, the suppression of civil society or opposition voices on the pretext of countering terrorism, and the detention of such individuals without minimum due process guarantees. We look forward to future council sessions where our efforts can be channeled in more productive directions.

In this context, and for the reasons we have already noted, the United States will vote NO. We urge others to do the same.

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4. Putative Right to Peace

The United States again voted against the resolution on the right to peace at the 30th session of the HRC. U.N. Doc. A/HRC/RES/30/12. The explanation of vote referred to the well-known concerns of the United States about the topic. The U.S. explanation of vote is available at <https://geneva.usmission.gov/2015/10/02/u-s-explanation-of-vote-on-resolution-on-right-to-peace/>.

5. Putative Right to Development

On March 27, 2015, Ambassador Harper delivered a general statement on the “right to development,” as referenced in nine resolutions adopted by the Council. The U.S. statement is available at <https://geneva.usmission.gov/2015/03/27/u-s-explanation-of-vote-with-regard-to-the-right-to-development/>, and includes the following:

The concerns of the United States about the existence of a “right to development” are long-standing and well known. The “right to development” does not have an agreed international meaning. Furthermore, work is needed to make it consistent with human rights, which the international community recognizes as universal rights held and enjoyed by individuals and which every individual may demand from his or her own government. Of course, this position does not suggest in any way that the United States is opposed to development per se. To the contrary, the United States contributes more to international development than any other nation and has provided donor assistance to those in need on every continent, including through the US Agency for International Development, the Millennium Challenge Corporation, and the PEPFAR program.

See also the October 2, 2015 explanation of vote on the “right to development,” delivered by Ambassador Harper, available at <https://geneva.usmission.gov/2015/10/06/u-s-explanation-of-vote-on-right-to-development/>. And see discussion in Chapter 13 of the U.S. role in reaching the 2030 Agenda for Sustainable Development.

6. Privacy

Ambassador Keith Harper delivered the explanation of position for the United States on the HRC resolution on “the right to privacy in the digital age,” at the 28th session of the

HRC on March 26, 2015. The resolution was adopted without a vote. U.N. Doc. A/HRC/RES/28/16. Ambassador Harper’s statement (as prepared for delivery) is excerpted below and available at <https://geneva.usmission.gov/2015/03/26/establishment-of-an-hrc-mandate-on-privacy-rights-comes-at-a-critical-time/>.

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We join consensus on today’s resolution because it reaffirms human rights the United States has long championed domestically and internationally—privacy rights and the rights to freedom of expression, peaceful assembly, and association—as set forth in the International Covenant on Civil and Political Rights (the ICCPR)—and the exercise of those rights online and offline. We have long viewed these rights as pillars of democracy.

The establishment of a mandate on privacy rights comes at a critical time. Today, human rights defenders, civil society activists, and ordinary citizens in all parts of the world increasingly face repression, censorship, reprisals, and arbitrary or unlawful interference with privacy. We support the mandate because of the need to strengthen respect for the right to protection from unlawful or arbitrary interference with privacy, in all contexts, as stated in the ICCPR.

The mandate established by this resolution is broad, encompassing issues related to privacy rights in all situations and contexts. We read the term “digital age” as a broad reference to the prevailing technologies of the era in which we live. The term is not limited to any particular technology. Nor does it limit the scope of this resolution or work of the Special Rapporteur to infringements on privacy rights via any particular type of technology or solely to technology-based infringements on privacy rights. We further note that human rights should not be limited to applying in a certain age but that they are universal, indivisible and applicable in all ages.

We understand this resolution to be consistent with longstanding U.S. views regarding the ICCPR, including Articles 2, 17, and 19, and interpret it accordingly. Further, we reiterate that under Article 17 of the ICCPR, the standard as to whether any interference with privacy is permissible is whether it is lawful and not arbitrary. We welcome the resolution’s endorsement of this key concept. An interference with privacy must be reasonable given the circumstances. Article 17 does not impose a standard of necessity and proportionality; such concepts are derived from certain regional jurisprudence, are not broadly accepted internationally, go beyond that which is required by the text of Article 17, and are not supported by the travaux of the treaty. We hope the Special Rapporteur will help promote respect for the right to protection from arbitrary or unlawful interference with privacy. We look forward to working together to achieve this important goal.

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7. Human Rights and Firearms

On July 2, 2015, at the 29th session of the HRC, the United States called for a vote and abstained on a resolution entitled “Human rights and the regulation of civilian acquisition, possession and use of firearms.” The resolution was adopted by a vote of 41-0, with six abstentions. The U.S. explanation of vote, delivered by Ambassador Harper, is excerpted below, and available at <https://geneva.usmission.gov/2015/07/02/human-rights-and-the-regulation-of-civilian-acquisition-possession-and-use-of-firearms/>.

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The United States has an unwavering commitment to protecting innocent lives from all forms of unlawful violence. We are still grieving over the incomprehensible loss of life in Charleston, South Carolina, and in a church that, as President Obama said, has “a sacred place in the history of Charleston and in the history of America.” These types of tragedies happen too frequently, and we continue to look inward as a nation for domestic solutions.

And that reflects the crux of our concern with this resolution, and why we regretfully have called a vote and abstained.

We understand the co-sponsors intend this resolution to raise awareness of the human rights implications of the misuse of firearms. We nonetheless remain concerned that this resolution could be interpreted by some to address topics far beyond the competency of the Human Rights Council.

To avoid such misinterpretation, the United States must state its position. We do not believe that a State’s regulation of the purely domestic acquisition, possession, and use of firearms is an appropriate topic for international attention generally or the Human Rights Council specifically. Further, we do not regard the domestic actions suggested by this resolution to be required by international human rights obligations. And we do not interpret this resolution as giving any international body or its representatives a voice in the domestic regulation of firearms.

We agree that domestic regulatory action can help deter the criminal misuse of firearms. We regard firearms transfer or possession by private persons or non-state actors as falling within the sovereign responsibility that each government has toward its population. And we believe that it is the sovereign and exclusive right of any state to regulate and control conventional arms within its territory, pursuant to its own legal or constitutional system.

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8. Persons with Albinism

On March 26, 2015, the United States joined consensus on a resolution at the 28th session of the Human Rights Council entitled “Independent Expert on the Enjoyment of Human Rights by Persons with Albinism,” and delivered an explanation of position, excerpted below and available at <https://geneva.usmission.gov/2015/03/26/u-s-joins-consensus-on-resolution-to-protect-human-rights-of-persons-with-albinism/>.

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The United States is pleased to join consensus on this resolution which establishes an Independent Expert to promote and protect the human rights of persons with albinism.

We believe that States must take effective measures to protect the human rights and fundamental freedoms of all persons, such as those with albinism, including effective prosecution of perpetrators of violence. Future discussions on how to prevent attacks against persons with albinism can be greatly informed by examining the root causes of discrimination.

We note the relevance of international instruments, including the Convention on the Rights of Persons with Disabilities, in addressing issues of stigma and violence, including against these persons and indeed all persons with disabilities. In that regard, we are pleased that this resolution underscores that persons with albinism have the same human rights as all other persons. In particular, we note that all persons are equal before the law and are entitled without any discrimination to equal protection of the law.

We encourage the future mandate holder to coordinate closely with other mandate holders addressing relevant thematic issues, including but not limited to the Special Rapporteur on the Rights of Persons with Disabilities.

The absence of a sunset clause in this resolution is regrettable. In addition to the need to prioritize use of limited resources, a sunset clause would allow the HRC membership to assess the effectiveness of the mandate and determine whether or not it should be continued.

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9. Human Rights and the World Drug Problem

On March 27, 2015, the United States joined consensus on a resolution at the 28th session of the Human Rights Council entitled “Contribution of the Human Rights Council to the United Nations General Assembly Special Session on the World Drug Problem of 2016,” and delivered an explanation of position, excerpted below and available at <https://geneva.usmission.gov/2015/03/27/eop-on-item-8-resolution-entitled-contribution-of-the-human-rights-council-to-the-united-nations-general-assembly-special-session-on-the-world-drug-problem-of-2016/>.

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The importance of respect for human rights is front and center in the UN drug conventions, a cornerstone of all international drug control policy, as well as in all the declarations and resolutions from the General Assembly and the Commission on Narcotic Drugs (CND). There is no dispute on the role of respect for human rights in drug control efforts. That is why we join consensus on this resolution.

The topic and the panels of the 2016 UNGASS were decided at the 2015 CND; one panel discussion highlights the cross-cutting nature of human rights in international drug policy. To make a serious contribution to that discussion, any contributions from this Council should be submitted as timely as possible. ...

We would also like to make clear that we appreciate this resolution's reference to "persons in vulnerable situations" in operative paragraph 1. This includes all persons belonging to marginalized and vulnerable groups, including those categories not specifically enumerated in the Universal Declaration of Human Rights such as persons with disabilities and LGBT persons.

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10. Protection of the Family

On July 3, 2015, the United States voted against HRC resolution 29/22, entitled "Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development." The resolution was adopted by a vote of 29-14, with four abstentions. A general statement delivered by the United States on behalf of Australia, Canada, and the United States, is excerpted below and available at <https://geneva.usmission.gov/2015/07/06/u-s-hrc-joint-statement-on-protection-of-the-family/>.

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Ensuring that families are safe environments where all members are able to reach their full potential and enjoy their human rights is essential to ensuring the social development of all people. This overarching principle would have been the basis for a strong, consensus text that would be reflective of our shared values. The text before us, however, fails to recognize both the diversity of families, and the fundamental primacy of ensuring the human rights of all family members.

All countries recognize that violence can occur in the context of families, and that this violence takes place in all regions of the world. Our countries remain deeply concerned about harmful practices such as child, early and forced marriage and female genital mutilation. We are also troubled by issues such as sexual abuse of children and domestic violence. These actions take place in the context of the family or are due to a decision by adult family members.

Though this resolution recognizes some of these human rights abuses, ..., the text appears to express more concern about the impact that these serious human rights abuses can

have on the family unit, and social policies aimed at the family, than on the victims themselves. We are deeply disappointed that the text appears to represent a deliberate attempt to prioritize family cohesion and “The Family,” above human rights of individual family members.

These abuses are intolerable. Their impact is often devastating and long lasting. This is why we cannot support a text that does not recognize the primacy of ensuring the human rights of individual family members above all else.

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11. Labor Rights

On March 27, 2015, at the 28th session of the HRC, Eric Richardson delivered the U.S. explanation of position for a resolution entitled “Right to Work,” on which the United States had joined consensus the preceding day. That explanation is excerpted below, and available at <https://geneva.usmission.gov/2015/03/27/eop-on-item3-resolution-entitled-right-to-work/>.

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We joined consensus yesterday on the resolution on the Right to Work in recognition that this right is enshrined in article 23 of the Universal Declaration on Human Rights. However, we are concerned that this resolution impinges upon the roles and responsibilities of the ILO. Although we are able to join consensus, we do not believe that this Council should undertake further action on this topic. We should not take up the limited time and resources of this Council and of the Office of the High Commissioner on a topic that is already well-resourced through another international institution.

The United States joins consensus on the understanding that this resolution does not imply that states must join human rights instruments to which they are not a party, or otherwise implement obligations under these instruments. Furthermore, in joining consensus, the United States does not recognize any change in the current state of treaty or customary international law. We interpret this resolution’s references to the right to work and the right to the enjoyment of just and favorable conditions of work with respect to States Parties to the ICESCR, in light of its Article 2(1).

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Cross References

Visa restrictions on human rights abusers in Venezuela, **Chapter 1.B.3.a.**

Asylum, refugee, and migrant protection issues, **Chapter 1.C.**

Submission to the IACHR on unaccompanied children, **Chapter 1.C.3.**

Trafficking in persons, **Chapter 3.B.3.**

Alien Tort Statute and Torture Victim Protection Act, **Chapter 5.B.**

ILC work on crimes against humanity, **Chapter 7.D.**

Submissions to IACHR on death penalty cases, **Chapter 7.E.1.**

Gatt case (discrimination by airline against citizen of Israel), **Chapter 11.A.4.**

Corporate Responsibility Regimes, **Chapter 11.I.2.**

Sustainable Development, **Chapter 13.A.2.**

Sanctions, including relating to human rights violators, **Chapter 16.A.**

Atrocities prevention, **Chapter 17.C.1.**

International humanitarian law, **Chapter 18.A.6.**

Detainees, **Chapter 18.C.**

CHAPTER 7

International Organizations

A. UNITED NATIONS

1. UN General Assembly

The 70th UN General Assembly convened in September 2015 in New York. President Obama addressed the UNGA on September 28, 2015. Daily Comp. Pres. Docs. 2015 DCPD No. 00657. His remarks are excerpted below.

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Mr. President, Mr. Secretary-General, fellow delegates, ladies and gentlemen: Seventy years after the founding of the United Nations, it is worth reflecting on what, together, the members of this body have helped to achieve.

Out of the ashes of the Second World War, having witnessed the unthinkable power of the atomic age, the United States has worked with many nations in this Assembly to prevent a third world war: by forging alliances with old adversaries, by supporting the steady emergence of strong democracies accountable to their people instead of any foreign power, and by building an international system that imposes a cost on those who choose conflict over cooperation, an order that recognizes the dignity and equal worth of all people.

That is the work of seven decades. That is the ideal that this body, at its best, has pursued. Of course, there have been too many times when, collectively, we have fallen short of these ideals. Over seven decades, terrible conflicts have claimed untold victims. But we have pressed forward, slowly, steadily, to make a system of international rules and norms that are better and stronger and more consistent.

It is this international order that has ...underwritten unparalleled advances in human liberty and prosperity. It is this collective endeavor that's brought about diplomatic cooperation between the world's major powers and buttressed a global economy that has lifted more than a

billion people from poverty. It is these international principles that have helped constrain bigger countries from imposing our will on smaller ones and advanced the emergence of democracy and development and individual liberty on every continent.

This progress is real. It can be documented in lives saved and agreements forged and diseases conquered and in mouths fed. And yet we come together today knowing that the march of human progress never travels in a straight line, that our work is far from complete; that dangerous currents risk pulling us back into a darker, more disordered world.

Today, we see the collapse of strongmen and fragile states breeding conflict and driving innocent men, women, and children across borders on an epic scale. Brutal networks of terror have stepped into the vacuum. Technologies that empower individuals are now also exploited by those who spread disinformation or suppress dissent or radicalize our youth. Global capital flows have powered growth and investment, but also increased risk of contagion, weakened the bargaining power of workers, and accelerated inequality.

How should we respond to these trends? There are those who argue that the ideals enshrined in the U.N. Charter are unachievable or out of date, a legacy of a postwar era not suited to our own. Effectively, they argue for a return to the rules that applied for most of human history and that predate this institution: the belief that power is a zero-sum game, that might makes right, that strong states must impose their will on weaker ones, that the rights of individuals don't matter, and that in a time of rapid change, order must be imposed by force.

On this basis, we see some major powers assert themselves in ways that contravene international law. We see an erosion of the democratic principles and human rights that are fundamental to this institution's mission; information is strictly controlled, the space for civil society restricted. We're told that such retrenchment is required to beat back disorder, that it's the only way to stamp out terrorism or prevent foreign meddling. In accordance with this logic, we should support tyrants like Bashar al-Asad, who drops barrel bombs to massacre innocent children, because the alternative is surely worse.

The increasing skepticism of our international order can also be found in the most advanced democracies. We see greater polarization; more frequent gridlock; movements on the far right, and sometimes the left, that insist on stopping the trade that binds our fates to other nations, calling for the building of walls to keep out immigrants. And most ominously, we see the fears of ordinary people being exploited through appeals to sectarianism or tribalism or racism or anti-Semitism; appeals to a glorious past before the body politic was infected by those who look different or worship God differently; a politics of "us" versus "them".

The United States is not immune from this. Even as our economy is growing and our troops have largely returned from Iraq and Afghanistan, we see in our debates about America's role in the world a notion of strength that is defined by opposition to old enemies, perceived adversaries: a rising China or a resurgent Russia, a revolutionary Iran or an Islam that is incompatible with peace. We see an argument made that the only strength that matters for the United States is bellicose words and shows of military force, that cooperation and diplomacy will not work.

As President of the United States, I am mindful of the dangers that we face; they cross my desk every morning. I lead the strongest military that the world has ever known, and I will never hesitate to protect my country or our allies, unilaterally and by force where necessary.

But I stand before you today believing in my core that we, the nations of the world, cannot return to the old ways of conflict and coercion. We cannot look backwards. We live in an integrated world, one in which we all have a stake in each other's success. We cannot turn back

those forces of integration. No nation in this Assembly can insulate itself from the threat of terrorism or the risk of financial contagion, the flow of migrants or the danger of a warming planet. The disorder we see is not driven solely by competition between nations or any single ideology. And if we cannot work together more effectively, we will all suffer the consequences. That is true for the United States as well.

No matter how powerful our military, how strong our economy, we understand the United States cannot solve the world's problems alone. In Iraq, the United States learned the hard lesson that even hundreds of thousands of brave, effective troops, trillions of dollars from our Treasury, cannot by itself impose stability on a foreign land. Unless we work with other nations under the mantle of international norms and principles and law that offer legitimacy to our efforts, we will not succeed. And unless we work together to defeat the ideas that drive different communities in a country like Iraq into conflict, any order that our militaries can impose will be temporary.

And just as force alone cannot impose order internationally, I believe in my core that repression cannot forge the social cohesion for nations to succeed. The history of the last two decades proves that in today's world, dictatorships are unstable. The strongmen of today become the spark of revolution tomorrow. You can jail your opponents, but you can't imprison ideas. You can try to control access to information, but you cannot turn a lie into truth. It is not a conspiracy of U.S.-backed NGOs that expose corruption and raise the expectations of people around the globe; it's technology, social media, and the irreducible desire of people everywhere to make their own choices about how they are governed. Indeed, I believe that in today's world, the measure of strength is no longer defined by the control of territory. Lasting prosperity does not come solely from the ability to access and extract raw materials. The strength of nations depends on the success of their people—their knowledge, their innovation, their imagination, their creativity, their drive, their opportunity—and that, in turn, depends upon individual rights and good governance and personal security. Internal repression and foreign aggression are both symptoms of the failure to provide this foundation.

A politics of—and solidarity that depend on demonizing others, that draws on religious sectarianism or narrow tribalism or jingoism, may at times look like strength in the moment, but over time its weakness will be exposed. And history tells us that the dark forces unleashed by this type of politics surely makes all of us less secure. Our world has been there before. We gain nothing from going back.

Instead, I believe that we must go forward in pursuit of our ideals, not abandon them at this critical time. We must give expression to our best hopes, not our deepest fears. This institution was founded because men and women who came before us had the foresight to know that our nations are more secure when we uphold basic laws and basic norms and pursue a path of cooperation over conflict. And strong nations, above all, have a responsibility to uphold this international order.

Let me give you a concrete example. After I took office, I made clear that one of the principal achievements of this body—the nuclear nonproliferation regime—was endangered by Iran's violation of the NPT. On that basis, the Security Council tightened sanctions on the Iranian Government, and many nations joined us to enforce them. Together, we showed that laws and agreements mean something.

But we also understood that the goal of sanctions was not simply to punish Iran. Our objective was to test whether Iran could change course, accept constraints, and allow the world to verify that its nuclear program will be peaceful. For 2 years, the United States and our

partners—including Russia, including China—stuck together in complex negotiations. The result is a lasting, comprehensive deal that prevents Iran from obtaining a nuclear weapon, while allowing it to access peaceful energy. And if this deal is fully implemented, the prohibition on nuclear weapons is strengthened, a potential war is averted, our world is safer. That is the strength of the international system when it works the way it should.

That same fidelity to international order guides our responses to other challenges around the world. Consider Russia's annexation of Crimea and further aggression in eastern Ukraine. America has few economic interests in Ukraine. We recognize the deep and complex history between Russia and Ukraine. But we cannot stand by when the sovereignty and territorial integrity of a nation is flagrantly violated. If that happens without consequence in Ukraine, it could happen to any nation gathered here today. That's the basis of the sanctions that the United States and our partners impose on Russia. It's not a desire to return to a cold war.

Now, within Russia, state-controlled media may describe these events as an example of a resurgent Russia—a view shared, by the way, by a number of U.S. politicians and commentators who have always been deeply skeptical of Russia and seem to be convinced a new cold war is, in fact, upon us. And yet look at the results. The Ukrainian people are more interested than ever in aligning with Europe instead of Russia. Sanctions have led to capital flight, a contracting economy, a fallen ruble, and the emigration of more educated Russians. Imagine if, instead, Russia had engaged in true diplomacy and worked with Ukraine and the international community to ensure its interests were protected. That would be better for Ukraine, but also better for Russia and better for the world, which is why we continue to press for this crisis to be resolved in a way that allows a sovereign and democratic Ukraine to determine its future and control its territory. Not because we want to isolate Russia—we don't—but because we want a strong Russia that's invested in working with us to strengthen the international system as a whole.

Similarly, in the South China Sea, the United States makes no claim on territory there. We don't adjudicate claims. But like every nation gathered here, we have an interest in upholding the basic principles of freedom of navigation and the free flow of commerce and in resolving disputes through international law, not the law of force. So we will defend these principles, while encouraging China and other claimants to resolve their differences peacefully.

I say this recognizing that diplomacy is hard, that the outcomes are sometimes unsatisfying, that it's rarely politically popular. But I believe that leaders of large nations, in particular, have an obligation to take these risks, precisely because we are strong enough to protect our interests if and when diplomacy fails.

I also believe that to move forward in this new era, we have to be strong enough to acknowledge when what you're doing is not working. For 50 years, the United States pursued a Cuba policy that failed to improve the lives of the Cuban people. We changed that. We continue to have differences with the Cuban Government. We will continue to stand up for human rights. But we address these issues through diplomatic relations and increased commerce and people-to-people ties. As these contacts yield progress, I'm confident that our Congress will inevitably lift an embargo that should not be in place anymore. Change won't come overnight to Cuba, but I'm confident that openness, not coercion, will support the reforms and better the life the Cuban people deserve, just as I believe that Cuba will find its success if it pursues cooperation with other nations.

Now, if it's in the interest of major powers to uphold international standards, it is even more true for the rest of the community of nations. Look around the world. From Singapore to

Colombia to Senegal, the facts show that nations succeed when they pursue an inclusive peace and prosperity within their borders and work cooperatively with countries beyond their borders.

That path is now available to a nation like Iran, which, as of this moment, continues to deploy violent proxies to advance its interests. These efforts may appear to give Iran leverage in disputes with neighbors, but they fuel sectarian conflict that endangers the entire region and isolates Iran from the promise of trade and commerce. The Iranian people have a proud history and are filled with extraordinary potential. But chanting “Death to America” does not create jobs or make Iran more secure. If Iran chose a different path, that would be good for the security of the region, good for the Iranian people, and good for the world.

Of course, around the globe, we will continue to be confronted with nations who reject these lessons of history, places where civil strife and border disputes and sectarian wars bring about terrorist enclaves and humanitarian disasters. Where order has completely broken down, we must act, but we will be stronger when we act together.

In such efforts, the United States will always do our part. We will do so mindful of the lessons of the past, not just the lessons of Iraq, but also the example of Libya, where we joined an international coalition under a U.N. mandate to prevent a slaughter. Even as we helped the Libyan people bring an end to the reign of a tyrant, our coalition could have and should have done more to fill a vacuum left behind. We’re grateful to the United Nations for its efforts to forge a unity Government. We will help any legitimate Libyan Government as it works to bring the country together. But we also have to recognize that we must work more effectively in the future, as an international community, to build capacity for states that are in distress, before they collapse.

And that’s why we should celebrate the fact that later today the United States will join with more than 50 countries to enlist new capabilities—infantry, intelligence, helicopters, hospitals, and tens of thousands of troops—to strengthen United Nations peacekeeping. These new capabilities can prevent mass killing and ensure that peace agreements are more than words on paper. But we have to do it together. Together, we must strengthen our collective capacity to establish security where order has broken down and to support those who seek a just and lasting peace.

Nowhere is our commitment to international order more tested than in Syria. When a dictator slaughters tens of thousands of his own people, that is not just a matter of one nation’s internal affairs, it breeds human suffering on an order of magnitude that affects us all. Likewise, when a terrorist group beheads captives, slaughters the innocent and enslaves women, that’s not a single nation’s national security problem, that is an assault on all our humanity.

I’ve said before, and I will repeat: There is no room for accommodating an apocalyptic cult like ISIL, and the United States makes no apology for using our military, as part of a broad coalition, to go after them. We do so with a determination to ensure that there will never be a safe haven for terrorists who carry out these crimes. And we have demonstrated over more than a decade of relentless pursuit of Al Qaida, we will not be outlasted by extremists.

But while military power is necessary, it is not sufficient to resolve the situation in Syria. Lasting stability can only take hold when the people of Syria forge an agreement to live together peacefully. The United States is prepared to work with any nation, including Russia and Iran, to resolve the conflict. But we must recognize that there cannot be, after so much bloodshed, so much carnage, a return to the prewar status quo.

Let’s remember how this started. Asad reacted to peaceful protests by escalating repression and killing that, in turn, created the environment for the current strife. And so Asad

and his allies cannot simply pacify the broad majority of a population who have been brutalized by chemical weapons and indiscriminate bombing. Yes, realism dictates that compromise will be required to end the fighting and ultimately stamp out ISIL. But realism also requires a managed transition away from Asad and to a new leader and an inclusive Government that recognizes there must be an end to this chaos so that the Syrian people can begin to rebuild.

We know that ISIL, which emerged out of the chaos of Iraq and Syria, depends on perpetual war to survive. But we also know that they gain adherents because of a poisonous ideology. So part of our job, together, is to work to reject such extremism that infects too many of our young people. Part of that effort must be a continued rejection by Muslims of those who distort Islam to preach intolerance and promote violence, and it must also be a rejection by non-Muslims of the ignorance that equates Islam with terror.

This work will take time. There are no easy answers to Syria. And there are no simple answers to the changes that are taking place in much of the Middle East and North Africa. But so many families need help right now; they don't have time. And that's why the United States is increasing the number of refugees who we welcome within our borders. That's why we will continue to be the largest donor of assistance to support those refugees. And today we are launching new efforts to ensure that our people and our businesses, our universities, and our NGOs can help as well, because in the faces of suffering families, our Nation of immigrants sees ourselves.

Of course, in the old ways of thinking, the plight of the powerless, the plight of refugees, the plight of the marginalized did not matter. They were on the periphery of the world's concerns. Today, our concern for them is driven not just by conscience, but should also be driven by self-interest. For helping people who have been pushed to the margins of our world is not mere charity, it is a matter of collective security. And the purpose of this institution is not merely to avoid conflict, it is to galvanize the collective action that makes life better on this planet.

The commitments we've made to the sustainable development goals speak to this truth. I believe that capitalism has been the greater creator of wealth and opportunity that the world has ever known. But from big cities to rural villages around the world, we also know that prosperity is still cruelly out of reach for too many. As His Holiness Pope Francis reminds us, we are stronger when we value the least among these and see them as equal in dignity to ourselves and our sons and our daughters.

We can roll back preventable disease and end the scourge of HIV/AIDS. We can stamp out pandemics that recognize no borders. That work may not be on television right now, but as we demonstrated in reversing the spread of Ebola, it can save more lives than anything else we can do.

Together, we can eradicate extreme poverty and erase barriers to opportunity. But this requires a sustained commitment to our people so farmers can feed more people, so entrepreneurs can start a business without paying a bribe, so young people have the skills they need to succeed in this modern, knowledge-based economy.

We can promote growth through trade that meets a higher standard. And that's what we're doing through the Trans-Pacific Partnership, a trade agreement that encompasses nearly 40 percent of the global economy, an agreement that will open markets, while protecting the rights of workers and protecting the environment that enables development to be sustained.

We can roll back the pollution that we put in our skies and help economies lift people out of poverty without condemning our children to the ravages of an ever-warming climate. The same ingenuity that produced the Industrial Age and the Computer Age allows us to harness the

potential of clean energy. No country can escape the ravages of climate change. And there is no stronger sign of leadership than putting future generations first. The United States will work with every nation that is willing to do its part so that we can come together in Paris to decisively confront this challenge.

And finally, our vision for the future of this Assembly, my belief in moving forward rather than backwards, requires us to defend the democratic principles that allow societies to succeed. Let me start from a simple premise: Catastrophes, like what we are seeing in Syria, do not take place in countries where there is genuine democracy and respect for the universal values this institution is supposed to defend.

I recognize that democracy is going to take different forms in different parts of the world. The very idea of a people governing themselves depends upon governing—government giving expression to their unique culture, their unique history, their unique experiences. But some universal truths are self-evident: No person wants to be imprisoned for peaceful worship; no woman should ever be abused with impunity or a girl barred from going to school; the freedom to peacefully petition those in power without fear of arbitrary laws. These are not ideas of one country or one culture. They are fundamental to human progress. They are a cornerstone of this institution.

I realize that in many parts of the world there is a different view: a belief that strong leadership must tolerate no dissent. I hear it not only from America's adversaries, but privately, at least, I also hear it from some of our friends. I disagree. I believe a government that suppresses peaceful dissent is not showing strength; it is showing weakness, and it is showing fear. History shows that regimes who fear their own people will eventually crumble, but strong institutions built on the consent of the governed endure long after any one individual is gone.

That's why our strongest leaders, from George Washington to Nelson Mandela, have elevated the importance of building strong, democratic institutions over a thirst for perpetual power. Leaders who amend constitutions to stay in office only acknowledge that they failed to build a successful country for their people. Because none of us lasts forever. It tells us that power is something they cling to for its own sake, rather than for the betterment of those they purport to serve.

I understand democracy is frustrating. Democracy in the United States is certainly imperfect. At times, it can be dysfunctional. But democracy—the constant struggle to extend rights to more of our people, to give more people a voice—is what allowed us to become the most powerful nation in the world.

It's not simply a matter of principle; it's not an abstraction. Democracy—inclusive democracy—makes countries stronger. When opposition parties can seek power peacefully through the ballot, a country draws upon new ideas. When a free media can inform the public, corruption and abuse are exposed and can be rooted out. When civil society thrives, communities can solve problems that governments cannot necessarily solve alone. When immigrants are welcomed, countries are more productive and more vibrant. When girls can go to school and get a job and pursue unlimited opportunity, that's when a country realizes its full potential.

That is what I believe is America's greatest strength. Not everybody in America agrees with me, but that's part of democracy. I believe that the fact that you can walk the streets of this city right now and pass churches and synagogues and temples and mosques, where people worship freely; the fact that our Nation of immigrants mirrors the diversity of the world—you can find everybody from everywhere here in New York City—the fact that, in this country,

everybody can contribute, everybody can participate, no matter who they are or what they look like or who they love, that's what makes us strong.

And I believe that what is true for America is true for virtually all mature democracies. And that is no accident. We can be proud of our nations without defining ourselves in opposition to some other group. We can be patriotic without demonizing someone else. We can cherish our own identities—our religion, our ethnicity, our traditions—without putting others down. Our systems are premised on the notion that absolute power will corrupt, but that people—ordinary people—are fundamentally good; that they value family and friendship, faith and the dignity of hard work; and that with appropriate checks and balances, governments can reflect this goodness. I believe that's the future we must seek together. To believe in the dignity of every individual, to believe we can bridge our differences and choose cooperation over conflict—that is not weakness, that is strength. It is a practical necessity in this interconnected world.

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The people of our United Nations are not as different as they are told. They can be made to fear, they can be taught to hate, but they can also respond to hope. History is littered with the failure of false prophets and fallen empires who believed that might always makes right, and that will continue to be the case. You can count on that. But we are called upon to offer a different type of leadership, leadership strong enough to recognize that nations share common interests and people share a common humanity and, yes, there are certain ideas and principles that are universal.

That's what those who shaped the United Nations 70 years ago understood. Let us carry forward that faith into the future, for it is the only way we can assure that future will be brighter for my children and for yours.

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On September 17, 2015, Bathsheba Nell Crocker, Assistant Secretary of State for International Organization Affairs, delivered remarks at the Carnegie Endowment for International Peace in Washington, DC on U.S. priorities at the 70th UNGA. Her remarks are excerpted below and available at <http://www.state.gov/p/io/rm/247018.htm>.

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...[I]nternal and external stresses are challenging relations among member states, they're challenging the UN system ability to evolve and reform, and they're challenging the UN's ability to address issues ranging from the high politics to humanitarian emergencies. The evolving refugee crisis is a sign of this.

Internal stresses that limit the UN's ability to perform are well known and include management and reform issues, inefficiencies, lack of transparency, mismanagement, sexual exploitation and abuse by peacekeepers, and a stubborn clinging to outdated issues like the anti-Israel bias.

External stresses are equally troubling, and threaten to chip away at the UN's credibility. An unfortunate trend in recent years suggests that some member states have an inconsistent

dedication to the UN's central purpose, with examples of politicization of UN bodies, and particularly those bodies with historically technical or humanitarian missions.

Evidence of this trend includes the UN humanitarian agencies being denied access to populations in need or to critical logistical facilities, and more broadly, a humanitarian system that is badly stretched at a time of historic highs of major humanitarian emergencies; attacks on UN peacekeepers in missions in Africa and peacekeeping missions being denied resupply by host governments; special envoys of the UN secretary-general being accused of political bias as a means of justifying denial of access, and humanitarian coordinators being expelled; efforts to politicize technical bodies that need to be apolitical in order to work, and indeed bodies that have been so apolitical throughout their decades of existence that they literally have no practice of voting and are now being uncomfortably forced into it. For example, Middle East political realities too often find traction, even in lesser-known entities such as ... the UN Committee on the Peaceful Uses of Outer Space, where Israel's application for membership was recently blocked.

This trend is disturbing. It threatens to undermine the assumed neutrality of the UN and UN agencies, and this in turn undercuts their value, in some cases their ability to function, and their credibility, which is at the end of the day the UN's most valuable currency. At its worst, it creates the circumstances where the denial of access and support can be used as a weapon against vulnerable populations.

But in the world of today, where needs are outpacing the system's capabilities, we need to reaffirm a broad commitment to the founding ideals of the UN. These challenges surface, I think, the need for us to make the case in New York later this month for the continued worthwhile pursuit of this shared enterprise. And we are structuring our engagement to focus on four key objectives: locking in renewed commitment to UN peacekeeping, engaging a broader range of actors on countering ISIL and violent extremism, and advancing goals on climate and sustainable development. All of these are instructive examples of our continued reliance as the U.S. on the multilateral system to advance our objectives, of our commitment to strengthening and updating that system, and of our leadership across it.

We approach UNGA this year in the shadow of the worst refugee crisis since the end of World War II. In a way, it is a sad example of how not dealing effectively across the four themes I just noted, plus weaknesses in the humanitarian network, have all come together to produce this massive movement of people. We will use UNGA this year for important high-level discussions on that crisis.

And our engagement at UNGA this year, like last, aims to use this venue more strategically to seize the advantage of diplomatic opportunities and use multilateral meetings and speeches to push U.S. priorities deliberately. Last year, we advanced our priorities on big issues of the day, including ISIL, Iraq, Ebola, and climate. President Obama, for example, chaired a UN Security Council session on foreign terrorist fighters, which resulted in a UN Security Council resolution that laid out a new policy and legal framework for dealing with that crisis and imposed obligations on member states; senior-level interactions between the P5+1 and Iran propelled the nuclear negotiations; Secretary Kerry hosted an Ocean Conference that resulted in meaningful commitments by member states; the first resolution in the new General Assembly last year focused on the crisis of Ebola, and there was a Security Council resolution on the same issue; the Vice President last year hosted a summit on strengthening UN peacekeeping at which 30 countries came together and made new commitments to that exercise; and there was Security Council action on CVE and events focused on the destruction of cultural heritage and property.

Some of these things will certainly recur this year, with our strong intent again being to employ UNGA thoughtfully and strategically, with definitive action anticipated on several fronts. And in that context, I will briefly discuss the four thematic priorities we will take into this year's UNGA: peace and security, global development, climate change, and countering violent extremism.

... 2015 marks the expiration of the Millennium Development Goals, or the so-called MDGs, which registered some significant successes, focusing largely on eliminating poverty, hunger, and disease. And the MDGs reveal the benefits of a common approach to development goals. For example, extreme poverty has been cut by more than half since 2000, per capita incomes in the developing world have more than doubled, and malnutrition rates have been cut by 40 percent.

... [M]ore than 150 world leaders—and the pope—are expected at the launch of the UN Sustainable Development Summit, at which member states will endorse the so-called 2030 Agenda for Sustainable Development—an ambitious, inclusive development framework that serves as the successor to the MDGs. The 2030 agenda, it must be said, is much larger than the MDG agenda, which included eight goals. The 2030 agenda includes 17 goals—the so-called Sustainable Development Goals—and 169 targets.

For the United States, this summit serves as a point of departure. U.S. development priorities are included in the 2030 agenda, including ending extreme poverty, the role of women and girls, inclusive economic growth, good governance and accountable institutions, and environment and sustainability. And importantly, the agreement breaks the age-old development mold. It reflects the creative input of all member states and of impacted civil society experts, academics, and implementers who all came together—it wasn't just donors this time—to influence the shape of this new agenda. It connects crucial issues that have too often been addressed in isolation, bringing environmental issues together with development issues, and it also includes thoughtful treatment of issues not always brought ...in development circles, like peace and security and governance. Because of its broad inclusivity, the agenda has global legitimacy, and it presents a real opportunity to tackle these challenges more effectively in the coming decade.

Together with the agreement reached this summer in Addis on financing for development, the 2030 agenda enshrines a new model of development that is as much about the right policy-enabling environments and mobilizing domestic and private resources as it is about official development assistance.

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Turning now to peace and security, today's challenges show the demand for nimble, effective UN peace operations. It has, in fact, never been greater. We have today over 120,000 blue helmets serving in 16 peacekeeping missions from Haiti to the Congo. And they are deploying and operating in ever more difficult circumstances.

In that context, on September 28th President Obama, the secretary-general, and several other heads of state and government will host a high-level summit on peacekeeping, at which a significant number of countries are expected to attend. Over the last year, the United States has used the momentum generated by the Vice President's summit on peacekeeping at last year's UNGA to encourage new commitments from member states to expand the pool of resources available to peacekeeping operations. And we anticipate that this year, participating nations will

announce significant new commitments during the summit, as well as make political-level commitments both to important doctrinal issues like protection of civilians, and to much needed reforms in UN peacekeeping operations, including those spelled out in a report by the high-level panel on peace operations that was released over the summer.

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On climate, of course, the big ticket issue this year will be the UN Framework Convention on Climate Change meeting in Paris in December, at which we and many other nations are determined to reach an ambitious, inclusive, and durable agreement designed to combat this urgent challenge. In advance of that meeting, events this year at UNGA and interactions will serve to galvanize the highest-level political support as we head toward Paris.

* * * *

And finally, on countering violent extremism, which remains at the top of the President's agenda, and the UN is a key platform for the United States to strengthen multilateral cooperation to counter terrorism. At UNGA this year, we will be looking to strengthen global initiatives to counter ISIL, foreign terrorist fighters, and violent extremism. We will convene a Leaders' Summit on Countering ISIL and Violent Extremism on September 29th in New York to highlight strides made against ISIL this year, as well as progress made since the February White House Summit on Countering Violent Extremism. The summit and various related side events will also serve as fora to announce new commitments to support these efforts.

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The United States is at the forefront of efforts to drive positive evolution in the management cultures of the UN, and there have been some encouraging results. We have improved budget transparency and accountability, stronger investigation tools, progress on whistleblower protection and internal review mechanisms and audit transparency, but there is much, much more to be done in this effort. And the slow-footed response on the issue of sexual exploitation and abuse only makes clear how much more work there is to be done.

We mark 70 years of the UN this year, and in doing so it's important to pause and consider the institution's role in global affairs. For the United States, this role is clear. And while the system's weaknesses and failings demand action, we should tackle them in the interest of strengthening an indispensable partner. As we gear up for UNGA, we are looking at a series of events that will showcase steadfast, clear-eyed, and instrumental U.S. leadership, a commitment we are also demanding of others. The conflicts and crises of today are, of course, many, and we need the UN as a credible bulwark against these global challenges. ...

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2. Ambassador Power's Congressional Testimony

On June 16, 2015, Ambassador Samantha Power, U.S. Permanent Representative to the UN, testified before the House Foreign Affairs Committee on the importance of the UN

to U.S. interests. Her testimony is excerpted below and available at <http://usun.state.gov/remarks/6564>.

* * * *

As the members of this Committee know, we are living in a time of daunting global crises. In the last year alone, Russia continued to train, arm, and fight alongside separatists in eastern Ukraine; a deadly epidemic spread across West Africa; and monstrous terrorist groups seized territory across the Middle East and North Africa, committing unspeakable atrocities. These are the kinds of threats that the United Nations exists to prevent and address. Yet it is precisely at the moment when we need the UN most that we see the flaws in the international system, some of which have been alluded to already.

This is true for the conflict in Ukraine—in which a permanent member of the UN Security Council is violating the sovereignty and territorial integrity that it was entrusted with upholding. It is true of the global health system that—despite multiple warnings of a spreading Ebola outbreak, including those from our own CDC—was slow to respond to the epidemic. And it is true of UN peacekeepers, who too often stand down or stand by when civilians they are responsible for protecting come under attack. Thus leaving populations vulnerable and sometimes open to radicalization.

Representing our nation before the United Nations, I have to confront these and other shortcomings every day. Yet though I am clear-eyed about the UN's vulnerabilities, the central point I want to make to this Committee is that America needs the United Nations to address today's global challenges. The United States has the most powerful set of tools in history to advance its interests, and we will always lead on the world stage. But we are more effective when we ensure that others shoulder their fair share and when we marshal multilateral support to meet our objectives. Let me quickly outline five ways we are doing that at the UN.

First, we are rallying multilateral coalitions to address transnational threats. Consider Iran. In addition to working with Congress to put in place unprecedented U.S. sanctions on the Iranian government, in 2010 the Obama Administration galvanized the UN Security Council to authorize one of the toughest multilateral sanctions regimes in history. The combination of unilateral and multilateral pressure was crucial to bringing Iran to the negotiating table, and ultimately, to laying the foundation whereby we were able to reach a framework agreement that would, if we can get a final deal, effectively cut off every pathway for the Iranian regime to develop a nuclear weapon.

Consider our response to the Ebola epidemic. Last September, as people were dying outside hospitals in West Africa, hospitals that had no beds left to treat the exploding number of Ebola patients, the United States chaired the first-ever emergency meeting of the UN Security Council dedicated to a global health issue. We pressed countries to deploy doctors and nurses, to build clinics and testing labs, and to fill other gaps that ultimately helped bend the outbreak's exponentially rising curve. America did not just rally others to step up, we led by example, thanks also very much to the support of this Congress, deploying more than 3,500 U.S. Government civilian and military personnel to Liberia, which has been Ebola-free since early May.

Second, we are reforming UN peacekeeping to help address the threats to international peace and security that exist in the 21st century. There are more than 100,000 uniformed police

and soldiers deployed in the UN's sixteen peacekeeping missions around the world—that is a higher number than in any time in history—with more complex responsibilities also than ever before. The United States has an abiding strategic interest in resolving the conflicts where peacekeepers serve, which can quickly cause regional instability and attract extremist groups, as we have seen in Mali. Yet while we have seen peacekeepers serve with bravery and professionalism in many of the world's most dangerous operating environments, we've also seen chronic problems, too often, as mentioned, including the failure to protect civilians.

We are working aggressively to address these shortfalls. To give just one example, we are persuading more advanced militaries to step up and contribute soldiers and police to UN peacekeeping. That was the aim of a summit that Vice President Biden convened at the UN last September, where Colombia, Sweden, Indonesia and more than a dozen other countries announced new troop commitments; and it is the message I took directly to European leaders in March, when I made the case in Brussels that peacekeeping is a critical way for European militaries to do their fair share in protecting our common security interests, particularly as they draw down in Afghanistan. This coming September, President Obama will convene another summit of world leaders to build on this momentum and help catalyze a new wave of commitments and generate a new set of capabilities for UN peacekeeping.

Third, we are fighting to end bias and discrimination at the UN. Day in and day out, we push back against efforts to delegitimize Israel at the UN, and we fight for its right to be treated like any other nation—from mounting a full-court diplomatic press to help secure Israel's permanent membership into two UN groups from which it had long and unjustly been excluded, to consistently and firmly opposing one-sided actions in international bodies. In December, when a deeply unbalanced draft resolution on the Israel-Palestinian conflict was hastily put before the Security Council, the United States successfully rallied a coalition to join us in voting against it, ensuring that the resolution failed to achieve the nine votes of Security Council members required for adoption. We will continue to confront anti-Israel bias wherever we encounter it.

Fourth, we are working to use UN tools to promote human rights and affirm human dignity, as we did by working with partners to hold the first-ever Security Council meeting focused on the human rights situation in North Korea in December. We used that session to shine a light on the regime's horrors...

Fifth, we are doing everything within our power to make the UN more fiscally responsible, more accountable, and more nimble—both because we have a responsibility to ensure American taxpayer dollars are spent wisely, and because maximizing the efficiency of our contributions means saving more lives and better protecting the world's most vulnerable people. Since the 2008 to 2009 fiscal year, we have reduced the cost-per-peacekeeper by 18 percent, and we are constantly looking for ways to right-size missions in response to conditions on the ground, as we will do this year through substantial drawdowns in Côte d'Ivoire, Haiti, and Liberia, among other missions.

Let me conclude. ...

Some may view the expectation that America can help people overcome their greatest challenges and secure their basic rights as a burden. In fact, that expectation is one of our nation's greatest strengths, and one we have a vested interest in striving to live up to—daunting as it may feel in the face of so many crises. But we cannot do it alone, nor should we want to. That is why it is more important than ever that we use the UN to rally the multilateral support needed to confront today's myriad challenges.

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3. UNESCO

On November 6, 2015 Deputy Secretary of State Antony J. Blinken delivered the U.S. National Statement at UNESCO in Paris. His remarks are excerpted below and available at <http://www.state.gov/s/d/2015/249260.htm>.

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Mister President of the General Conference, Madam Director-General, distinguished delegates, it is an honor to represent the United States at the 38th session of the General Conference during UNESCO's 70th anniversary.

I'm grateful for this opportunity to affirm our candidacy for reelection to UNESCO's Executive Board and to reiterate our nation's belief in the undeniably important role that UNESCO plays in upholding our collective peace and security.

Seventy years ago, out of the rubble of war and the pain of unfathomable national loss, our predecessors made one of the wisest decisions in human history. With the gift of foresight and the courage of hope, they resisted the impulse to concentrate power in the hands of the victors. Instead, they built an international system of institutions, norms, and rules dedicated to the peace, stability, and prosperity for every nation.

They stood up a force of blue helmets to protect civilians. They created organizations to safeguard public health, defend human rights, and respond to humanitarian crises. And they founded UNESCO to preserve the common spirit of our humanity while cherishing its diversity of traditions, cultures, and faiths.

Taken together, these institutions have given life to a global order that provides still to this day the best and sometimes the only means to prevent conflict, energize progress, and allow countries to resolve their differences diplomatically and peacefully.

As an integral pillar of this order, UNESCO stands on the frontlines of some of our toughest challenges equipped with some of our most powerful weapons: the lasting impact of a quality education, the skepticism of a free press, the expertise of our cultural preservationists, and the latest tools to sustainability manage our precious resources.

Across all of these critical issues, the United States is deeply engaged as a leader and partner with UNESCO. We were very pleased to join many of you earlier this afternoon to elevate the role of education in preventing and countering violent extremism—a role that received ringing endorsement by more than 85 co-sponsors during the session of the Executive Board. I was also proud to highlight a new UNESCO and US-led education initiative to equip students with the skills to embrace inclusion and resist violent extremism, and I encourage all UNESCO members to join this effort.

Wherever our values are under greatest threat, we see UNESCO's work making a difference—from preserving cultural heritage in Syria and Iraq to protecting the safety of journalists and the free flow of information to fighting for a quality education for all our children.

We are honored to be a partner in these initiatives. At the 197th Executive Board last month, we were proud co-sponsors of several important resolutions, including...

...highlighting UNESCO's work to combat climate change in advance of the Paris Climate Conference...

...advancing freedom of expression, supporting equal access to education, and protecting cultural heritage in Ukraine...

...and recommending the admission of Kosovo as a member of this organization. The constitution of UNESCO is clear on this issue, there is an undeniable path for Kosovo membership in the organization, a path which is not diverted and not blocked by United Nations Security Council resolution 1244. This is not a question of recognition or non-recognition. Countries that do not recognize Kosovo have supported its membership in specialized UN agencies including the World Bank and the IMF. Our co-sponsorship of the resolution conveys our strong belief that Kosovo should be welcomed by the General Conference as a full member.

A founding member of UNESCO, we remain committed to its ideals and aspirations. As a candidate for the Executive Board, the United States renews that promise, reiterates our determination to restore full funding for the organization, and pledges our continued, determined leadership.

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The goals we've set for ourselves—from fighting climate change to achieving universal access to education to fighting violent extremism—are only possible if we work together to utilize these shared gifts, so that our collective efforts to make the world a little bit healthier, a little bit wealthier, a little bit wiser are empowered by the talents of all of our citizens. This is the *raison d'être* not only of UNESCO—but of all those who have high hopes and big dreams for the future.

On behalf of Secretary Kerry, it is my honor and privilege to reaffirm our position as a proud candidate for the executive board. I extend my sincere appreciation to this institution, its leadership, and its mission of peace.

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The United States was reelected to the UNESCO Executive Board. Secretary Kerry issued a press statement on November 11, 2015, saying, "I am very pleased the United States has been reelected to the Executive Board of [UNESCO]." His press statement is available at <http://www.state.gov/secretary/remarks/2015/11/249414.htm>, and also includes the following:

As other countries' representatives underscored with me in Paris, U.S. leadership is essential if the organization is to successfully carry out its mission.

I am determined to restore U.S. funding to UNESCO, and hopeful that Congress will act to provide the Administration the authority needed to waive the current legislative restrictions that prohibit U.S. contributions to the organization.

To our partners in UNESCO, the United States pledges to continue to work closely with you to address the urgent challenges we all face, including

countering violent extremism, expanding educational opportunities for women and girls, stimulating groundbreaking scientific research, protecting and preserving the world's cultural heritage, conserving ocean health, and promoting freedom of the press and protection of journalists.

4. U.S. Support for Israel at the UN

On November 24, 2015, Ambassador David Pressman, Alternate Representative to the UN for Special Political Affairs, delivered the U.S. explanation of vote on a UN General Assembly resolution concerning the situation in the Middle East. Ambassador Pressman expressed the U.S. view that actions targeting Israel at the UN do not advance the Middle East peace process. For further discussion of the Middle East peace process and activities of the Quartet in 2015, see Chapter 17. Ambassador Pressman's statement is excerpted below and available at <http://usun.state.gov/remarks/7010>.

* * * *

Mr. President, the United States remains profoundly troubled by the repetitive and disproportionate number of one-sided General Assembly resolutions designed to condemn Israel—a total of 18 this year. This one-sided approach damages the prospects for peace by undermining trust between parties and the kind of international support critical to achieving peace. All parties to the conflict have responsibilities for ending it, and we are disappointed that UN members continually single out Israel without acknowledging the responsibilities and difficult steps that must be taken on all sides.

It is manifestly unjust that the United Nations—an institution founded upon the idea that all nations should be treated equally—is so often used by Member States to treat Israel unequally.

Of these annual resolutions, three are particularly troubling: the resolution on the “Division for Palestinian Rights of the Secretariat;” the resolution on the “Committee on the Exercise of the Inalienable Rights of the Palestinian People;” and the resolution on the “Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories.” These resolutions renew mandates for UN bodies established decades ago, wasting valuable resources and reinforcing the systemic UN bias against Israel. All Member States should evaluate the effectiveness of supporting and funding these bodies.

The United States remains firmly committed to advancing a two-state solution. We continue to urge all sides to take steps to stop the violence, improve conditions on the ground in the West Bank and Gaza, and move the diplomatic process forward.

This means reversing current trends where terrorism, violence, settlements, and demolitions are increasingly creating a one-state reality and imperiling the viability of a two-state solution. It means resuming the Oslo transition to greater Palestinian civil responsibility.

We believe that doing so will enhance security and stability for the Israelis and Palestinians alike.

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I would like to reiterate that the United States has consistently opposed every effort to delegitimize Israel or undermine its security at the United Nations and we will continue to do so with vigor.

Our continued opposition to the resolution on “Israeli Settlements in the Occupied Palestinian Territory, including Jerusalem, and the Occupied Golan,” however, should not be understood to mean that we support settlement activity. On the contrary, we view Israeli settlement activity as illegitimate and counterproductive to the cause of peace.

During the past year, we have been deeply concerned by Israel’s advancement of plans for thousands of additional housing units in the West Bank and East Jerusalem. We have made clear that such action only draws condemnation from the international community, poisons the atmosphere, and undermines the prospects for peace.

While the United States unequivocally rejects Israeli settlements in territories occupied in 1967, this does not justify the repetitive and one-sided General Assembly resolutions facilitating the condemnation of Israel. These resolutions set back our collective efforts to advance a peaceful resolution to the conflict between the Israelis and Palestinians, and they damage the institutional credibility of the United Nations.

Biased resolutions will not advance peace; only hard choices made in the context of bilateral negotiations will do that. The cause of peace would be well-served by more balance and less bias in the General Assembly of the United Nations.

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On December 13, 2015, Ambassador Power delivered remarks on the meaning of U.S. partnership to Israel at the UN. Her remarks are excerpted below and available at <http://usun.state.gov/remarks/7043>.

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But today, I want to focus first on a different kind of “defense” relationship. I’m referring to our efforts to defend Israel at the United Nations, and to fight every day for something that no nation should actually have to fight for: the ability to be treated just like any other country. That’s the objective. It shouldn’t be hard. Now, the UN is an institution that celebrates in its charter “the equal rights of nations large and small.” And yet, as you know well, unfortunately the UN has been a place where Israel is not always treated fairly. Just a few weeks ago, we marked the 40th anniversary of one of most infamous of those moments, the moment when a huge majority in the UN General Assembly voted to declare Zionism as “a form of racism.” Seventy-two nations voted for that resolution 40 years ago, more than double the number that voted against it.

While that deplorable resolution was revoked 16 years later by an overwhelming majority of UN Member States—including many of those who had originally voted for it—bias against

Israel at the UN does persist. Member States have sought to use the Security Council, the General Assembly, the Human Rights Council, and other UN institutions as platforms to try to delegitimize the country. And when they do, the United States pushes back. Consider the UN Human Rights Council, which has only one permanent agenda item devoted to a single country: that's Israel. Think about the absurdity of that for the moment given the state of the world. The one country in the world with a standing agenda item is not Syria, which gasses its people and barrel bombs them without mercy. It is Israel.

Before the United States rejoined the Human Rights Council in 2009, more than half of all country-specific resolutions it adopted focused on Israel. That is many more resolutions than are dedicated to North Korea, for example—and North Korea is a country where the UN estimates that between 80 and 120,000 people are being held in gulags in which they are routinely tortured, raped, starved, and worked to death. Since the U.S. has become a member of the Human Rights Council, we've helped cut the proportion of Israel-focused resolutions in half—to one-quarter of all resolutions. And that is still far too high, but I think a measurable improvement that results largely from our efforts.

We also fight relentlessly for Israel's full and equal participation in UN bodies. Again, this shouldn't be hard, but it is stunningly difficult. While membership in these groups may sound bureaucratic, ...these are the places where actual UN policies are hammered out, and where key UN leadership posts are determined. They're also a symptom of a phenomenon. For years Israel was the *only* UN Member State that was excluded from being in a regional body at the UN in Geneva; it was an orphan. And in New York, though its voting record coincided with other countries in a like-minded human rights caucus, Israel was shut out. ... In January 2014, after a sustained, full court diplomatic press, we helped secure for Israel permanent membership in what's called the "Western European and Others Group"—the group that the United States also belongs to; in February 2014 we secured Israel's membership in that like-minded human rights caucus from which it should have never been excluded.

Just this past fall, we have secured Israel's inclusion in the Committee on the Peaceful Uses of Outer Space, COPUOS (for people interested in the acronym: COPUOS). This is a body that has a global scope, and includes a full range of countries—from those with massive space programs to those with none at all. Now, the practice with COPUOS—over the course of 57 previous sessions—had been to consider membership candidates as a single slate by consensus. Yet when Israel was one of the six countries put forward as a block in June, a group of Arab states insisted that each candidate be voted on separately at the next meeting. So, no more "clean slate." In other words—breaking with convention in order to deny Israel's membership. We got to work, spending months methodically persuading other countries to co-sponsor a resolution that would ensure Israel was able to join COPUOS. We worked the phones; we cornered countries' representatives at the UN in strange places; U.S. ambassadors around the world made the case in nations' capitals. And last week, 155 countries voted for the block of six new COPUOS members, including Israel. And here's the even better news: not a single country opposed the vote. ...

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This surge in hate is why it is so important that—in January of this year—we joined Israel and the European Union in sponsoring the first-ever meeting on anti-Semitism in the UN. And it took place in the very same chamber where the "Zionism is racism" resolution was passed

40 years before. More than 50 countries and organizations came together to condemn this horrific problem, and pledged to take concrete and urgent steps to confront it. Implementation and follow through was key, but this is the role the UN can and must play.

Now, the other area in which the United States has been a partner to Israel is in our efforts to achieve a lasting peace between Israel and the Palestinians, as well as between Israel and its Arab neighbors. President Obama's commitment to achieving a two-state solution has been unwavering. And it has been driven by his deeply held conviction—as he said in Jerusalem in March of 2013, and has repeated consistently since—that, as he puts it, “peace is necessary, just, and possible.” We believe that to this day, and we remain committed to Israel's future as a secure, democratic, and Jewish state. And we are committed to an independent and viable Palestinian state, where Palestinians can live with freedom and with dignity.

* * * *

... President Obama has called on both sides to demonstrate, in words and actions, a genuine commitment to a two-state solution. It is why, at the UN and in other international fora, we will continue to support efforts that will strengthen stability and security in the region, and oppose efforts that we believe would undermine a two-state solution. It is why we will continue to support the UN Relief and Works Agency, the UN agency that helps Palestinian refugees and to which the United States is the largest donor, while working to improve its operations; it's why we'll continue to contribute to UN-led reconstruction efforts in Gaza; and speak up for Israel's right to defend itself. And it is why we remain committed to diplomacy and will continue to participate actively in the Quartet. When the ministers who make up the Quartet—from the EU, Russia, the UN, and the United States—met during this year's UN General Assembly in September in New York, they proposed immediate and concrete steps, including increasing Palestinian civil authority and strengthening the Palestinian economy; steps that would resume the transition envisaged by the Oslo accords without undermining Israel's security. If taken, steps like these could begin to reduce tension, rebuild a baseline of trust, and lay the foundation for the bigger, more complex decisions that will need to be made down the road. These steps can also help make Israelis and Palestinians believe that a political process has a chance of eventually fulfilling their legitimate aspirations to two states, for two peoples, in security and in peace.

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B. PALESTINIAN MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS

On January 8, 2015, the Department of State spokesperson provided an answer to a taken question regarding Palestinian efforts to accede to the Rome Statute of the International Criminal Court. The answer follows and is available at <http://www.state.gov/r/pa/prs/ps/2015/01/235695.htm>.

As we have said previously, we have made clear our opposition to Palestinian action in seeking to join the Rome Statute of the International Criminal Court.

This step is counter-productive, will damage the atmosphere with the very people with whom Palestinians ultimately need to make peace, and will do nothing to further the aspirations of the Palestinian people for a sovereign and independent state.

The view of the United States is that the Palestinians have not yet established a state. Neither the steps that the Palestinians have taken, nor the actions the UN Secretariat has taken in performing the Secretary-General's functions as depositary for the Rome Statute, warrant the conclusion that the Palestinians have established a "state," or have the legal competences necessary to fulfill the requirements of the Rome Statute. The United States does not believe that the Palestinians are eligible to become a party to the Rome Statute or any of the other treaties at issue, or that the United States is in treaty relations with the Palestinians under any of the treaties that they are seeking to join.

As the UN spokesperson said last April, and as the United Nations specifically confirmed yesterday, the treatment of such documents by the depositary is "an administrative function performed by the Secretariat as part of the Secretary-General's responsibility as depositary," and it is for states to resolve "any legal issues raised by instruments circulated by the Secretary-General."

Ultimately, the parties can only realize their aspirations, including the desire of Palestinians for statehood, through direct negotiations with each other. The United States will continue to work to advance the interest we share in bringing about a lasting peace between the Israelis and Palestinians.

On January 16, 2015, the ICC Prosecutor announced her decision to open a preliminary examination into the "situation in Palestine," in response to the January 1, 2015 declaration submitted by the Palestinians under article 12(3) of the Rome Statute accepting the jurisdiction of the ICC over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014." See ICC website at https://www.icc-cpi.int/Pages/item.aspx?name_pr1083. The U.S. Department of State issued a press statement on the ICC Prosecutor's decision on January 16, 2015, below, and also available at <http://www.state.gov/r/pa/prs/ps/2015/01/236082.htm>.

We strongly disagree with the ICC Prosecutor's action today. As we have said repeatedly, we do not believe that Palestine is a state and therefore we do not believe that it is eligible to join the ICC. It is a tragic irony that Israel, which has withstood thousands of terrorist rockets fired at its civilians and its neighborhoods, is now being scrutinized by the ICC. The place to resolve the differences between the parties is through direct negotiations, not unilateral actions by either side. We will continue to oppose actions against Israel at the ICC as counterproductive to the cause of peace.

C. INTERNATIONAL COURT OF JUSTICE

On February 6, 2015, Judge Joan Donoghue began her second term as a member of the International Court of Justice. The United States strongly supported Judge Donoghue's candidacy during the 2014 elections in the UN General Assembly and Security Council. Judge Mohamed Bennouna of Morocco also began his second term, and Judges James Crawford of Australia, Kirill Gevorgian of Russia, and Patrick Robinson of Jamaica were all seated as new members of the Court.

On November 5, 2015, Ms. Cassandra Q. Butts, Senior Advisor for the U.S. Mission to the UN, delivered remarks on the International Court of Justice at the 70th UN General Assembly. Ms. Butts's remarks are excerpted below and available in full at <http://usun.state.gov/remarks/6969>.

* * * *

The United States would like to congratulate President Abraham on his election to the presidency earlier this year. We also congratulate Judges Joan Donoghue and Mohamed Bennouna on their re-election, and Judges James Crawford, Kirill Gevorgian, and Patrick Robinson on their election as new members of the Court.

We would like to thank President Abraham for his leadership of the Court over much of the past year, and for his recent report regarding the activities of the Court between August 2014 and July 2015. In reviewing the report, we are again struck by how productive the Court continues to be. Over the course of the year, the Court issued two judgements and nine orders, and held public hearings in two cases. In addition, the Court remained seized of a number of other matters, with twelve cases in total on the Court's list.

We commend the Court's increasing ability to respond promptly and efficiently to requests put before it, particularly in light of the Court's growing caseload, as well as the growing factual and legal complexity of its cases, and we appreciate that the Court has set for itself a particularly demanding schedule of hearings and deliberations. We believe these efforts will continue to bolster the confidence in the Court, and often provide States the opportunity to resolve disputes before they escalate. This year, as in years past, the Court has taken up a considerable range of topics including genocide, boundary disputes, the use of force, and the interpretation of international agreements, among others. It is the result of such efforts that we continue to see states turn to the Court to resolve their disputes peacefully.

We also want to remark upon the Court's continued public outreach to educate key sectors of society—law professors and students; judicial officials and government officials and the general public—on the work of the Court and to increase understanding of the ICJ's work. We appreciate the efforts the Court has made to increase accessibility and transparency, including by making its recordings available to watch live and on demand on UN Web TV. All of these efforts complement and expand the efforts of the United Nations to promote the rule of law globally and to promote a better understanding of public international law.

As we approach the 70th anniversary of the Court's inaugural session at the Peace Palace, we have a unique opportunity to reflect on the Court's important role and on the impressive legal jurisprudence the Court has developed. The International Court of Justice was established under Article 92 of the UN Charter as the principal judicial organ of the United Nations, and in its nearly seven decades of work since then, has contributed immeasurably to the peaceful settlement of disputes and to the development and understanding of international law.

The preamble of the Charter underscores the determination of its drafters "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." This goal lies at the core of the Charter system, and in particular of the Court. The United States is pleased to join others today in celebrating and applauding nearly 70 years of the Court's work.

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D. INTERNATIONAL LAW COMMISSION

1. ILC Member Sean Murphy's Candidacy for Re-election

In October 2015, the United States nominated Professor Sean D. Murphy of the George Washington University Law School for re-election to the ILC. In conjunction with the campaign to re-elect Professor Murphy, Secretary of State John F. Kerry signed a letter announcing the nomination. The text of the letter is excerpted below.

* * * *

I am pleased to inform you that the United States has nominated Professor Sean Murphy for re-election to the International Law Commission. Elections for the Commission will be held in the fall of 2016, and I seek your support for Professor Murphy's re-election.

Professor Murphy has been a distinguished international lawyer for more than 25 years. He has been a professor of international law at George Washington University Law School since 1998 where he is tenured as the Patricia Roberts Harris Research Professor of Law. Before joining George Washington University, he served with distinction for eleven years as an attorney in the Office of the Legal Adviser of the Department of State, including as the Legal Counselor at the U.S. Embassy in The Hague. He has been a visiting professor at universities across the world and is the author of prominent works on international law, including influential casebooks on public international law and U.S. foreign relations law. He is a frequent commentator in the media and a prominent voice among American lawyers and scholars on a wide range of legal issues.

During his first term on the International Law Commission, Professor Murphy contributed to the Commission's work in a number of areas. Most notably, the Commission added an important topic he proposed, "Crimes against Humanity," to its active agenda in 2014 and appointed him Special Rapporteur for the topic.

The International Law Commission is of great importance to all of us who value the codification and development of international law. In addition to his service on the Commission, Professor Murphy has been an influential ambassador for it. His tireless efforts to describe the

Commission and its work, by speaking publicly and writing extensively about the Commission's history and current topics, have raised the Commission's profile in the United States.

I am confident Professor Murphy has the commitment and vision to help guide the Commission in its important work in the years ahead. His knowledge, temperament, and dedication to the development of international law make him an outstanding choice for this important position. I strongly support his re-election, and I hope you will support his candidacy in the 71st session of the General Assembly.

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2. ILC's Work at its 67th Session

On November 3, 2015, the United States provided a statement at the 70th UN General Assembly Sixth Committee on the Report on the Work of the International Law Commission ("ILC") at its 67th session. The November 3 statement addresses the topics of most-favored-nation clauses; the protection of the atmosphere; and chapter 12 of the ILC's report regarding other decisions and conclusions. The U.S. statement is excerpted below and available

at <https://papersmart.unmeetings.org/media2/7654634/united-states-of-america.pdf>.

* * * *

Most-Favored-Nation Clause

With respect to the topic of the Most-Favored-Nation Clause, ...we believe the report can serve as a useful resource for governments and practitioners who have an interest in this information.

We support the Study Group's decision not to prepare new draft articles or to revise the 1978 draft articles, and instead to include a summary of conclusions in the final report, which were adopted by the Commission. We also agree with the conclusion that the interpretation of most-favored-nation clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in the Vienna Convention on the Law of Treaties. Each MFN clause is the product of a specific treaty negotiation and can differ considerably in its language, structure, and scope from MFN clauses that appear in other treaties. Each MFN clause is also dependent on other provisions in the specific treaty in which it is located and thus, while there is value in generally studying such clauses, they resist uniform meaning.

Protection of the Atmosphere

With respect to the topic of "Protection of the Atmosphere," Mr. Chairman, we continue to be concerned about the direction it appears to be taking.

Our original concerns, which have only intensified as this topic has progressed, run along two main lines.

First, we did not believe that the 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... But we have been disappointed. Both the first and second reports evinced a desire to recharacterize the understanding and to take an expansive view of the topic. And while we had concerns with many aspects of the draft guidelines provisionally adopted by the Commission this summer, the most serious concerns draft guideline 5, paragraph 1, which purports to describe States' obligations to cooperate with respect to the protection of the atmosphere. We do not believe this provision reflects customary international law and we believe it should be reconsidered.

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.

Other decisions and conclusions...

We...note the addition of the topic of *jus cogens* to the Commission's active agenda. We are pleased with the selection of Dire Tladi as the Special Rapporteur...

We urge the Commission...to focus clearly and carefully on treaty practice, notably under the rules reflected in the Vienna Convention on the Law of Treaties, and on other State practice that illuminates the nature and content of *jus cogens*, the criteria for its formation, and the consequences flowing therefrom. ...

* * * *

On November 6, 2015, Assistant Legal Adviser Todd Buchwald delivered remarks on behalf of the United States at the 70th UN General Assembly Sixth Committee on the Report of the ILC on the Work of its 67th Session. He discussed the work of the ILC on multiple subjects, including: the identification of customary international law; crimes against humanity; and subsequent agreements and subsequent practice in relation to the interpretation of treaties. Mr. Buchwald's remarks on customary international law and crimes against humanity are excerpted below and available at <http://usun.state.gov/remarks/6968>. His remarks on subsequent practice are excerpted in Chapter 4.

* * * *

Mr. Chairman, with respect to the topic "Identification of customary international law," the United States thanks the Special Rapporteur, Sir Michael Wood, for yet another very impressive report. As with Sir Michael's previous work, the third report makes substantial contributions to

this important topic. We also thank the Drafting Committee for the Draft Conclusions provisionally adopted this year based upon his work.

While we believe that the Special Rapporteur and Drafting Committee have very successfully addressed many aspects of this important topic, the United States has some remaining concerns. We would like to comment on our primary concern and mention two others today.

Mr. Chairman, the United States remains particularly concerned about Draft Conclusion 4 and its discussion of the role of the practice of international organizations in contributing to the formation or expression of customary international law. We are concerned that it may be interpreted to mean that the practice of international organizations may serve as directly relevant practice, i.e., play the same role as State practice, in the formation and identification of customary international law, at least in some circumstances.

We have two points regarding that conclusion.

First, the United States does not believe that the case law or that the views expressed by States themselves have generally recognized that the actions of international organizations “as such”—in other words, as distinct from the practice of their member States—contributes directly to the formation of customary rules. The report of the Special Rapporteur provides very little support for this proposition, notwithstanding the existence of international organizations for more than a century. Therefore, we believe that the treatment of the role of international organizations in paragraph 2 of Draft Conclusion 4 needs to be reconceived in order to avoid misleading users of the final product, including the judges and lawyers who may not be particularly well-versed in public international law and for whom the Draft Conclusions are largely intended.

In our view, international organizations can play important, indirect roles in the process by which the practice of States generates custom, including as the fora in which State practice and *opinio juris* may develop or be articulated and, in many fields, as the key actors to which States respond in ways that may generate State practice or evidence of *opinio juris*. This, however, is not the same thing as saying that the practice of the international organization itself constitutes practice that should be counted along with State practice when determining the existence of a customary rule.

One possible exception to this division of roles between States and international organizations may be the European Union, and perhaps other organizations that might now or in the future exercise similar competences. However, even if such organizations “as such” contribute directly to the formation of custom in some areas, we do not believe that such a limited, exceptional role for certain international organizations supports the broad language of paragraph 2 of Draft Conclusion 4.

Second, if the International Law Commission believes that it is important to address the role of international organizations in the identification of customary rules, the United States believes that it would be better for the role of international organizations to be considered separately from that of States. By addressing international organizations separately, the Commission would be able to recognize and address the fact that international organizations include a great variety of entities, with differing roles, competences, and practices. Doing so would also allow the Commission to identify the specific cases in which the Commission believes that the practice of international organizations is directly relevant for the purposes of the creation of customary rules and explain how their practice would be “counted.” For example, it could consider whether the practice of one or more international organizations could result in the

creation of a new customary rule despite there being insufficient State practice, or whether the practice of international organizations could block the creation of a customary rule even when State practice in favor is otherwise sufficient. The United States believes that a discussion of a role for the practice of international organizations in the creation and identification of custom needs to address these issues to avoid the suggestion that international organizations are like States in these respects.

Mr. Chairman, before we conclude, we would like to make two additional points. The first involves the tenor of the Draft Conclusions as a whole. Our concern here is that the Draft Conclusions—by inviting readers to find evidence of customary international law in a wide variety of sources—may be understood to suggest that customary international law is easily created or inferred. We do not believe that it is the case and, therefore, hope that the commentary will underscore that only when the strict requirements for extensive and virtually uniform practice of States, including specially affected States, accompanied by *opinio juris* are met is customary international law formed.

Similarly, we continue to be concerned that the draft conclusion on “particular custom” does not adequately articulate when such custom is and is not created. We hope that will be clarified in the commentary or future revisions of the draft conclusions.

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Mr. Chairman, on the topic of “crimes against humanity,” the United States is following the Commission’s work with great interest. Special Rapporteur Sean Murphy has brought tremendous value to bear in the Commission’s work on this topic, including the difficult questions that this topic implicates.

The commentary’s description of the lineage of the concept of crimes against humanity—from the Charter of the International Military Tribunal at Nürnberg through Yugoslavia and Rwanda Tribunals to the ICC—is a sober reminder of the importance of this topic. It is also a testament to the important role the development of the concept of “crimes against humanity” has played in the pursuit of accountability for some of the most horrific episodes of the last hundred years.

As the description of this topic noted, the widespread adoption of certain multilateral treaties regarding serious international crimes—such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide—has made a valuable contribution to international law, and 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 difficulty of some of the legal issues that it implicates . . . We are continuing to study the ILC’s work carefully, as it presents a number of complex issues, on which we are still developing our views. . . .

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On November 11, 2015, Mark Simonoff, Minister Counselor for the U.S. Mission to the UN, delivered remarks at the 70th UN General Assembly Sixth Committee on the Report of the ILC on the Work of its 67th Session. His remarks cover several topics, including: protecting the environment in relation to armed conflict; immunity of State officials from foreign criminal jurisdiction; and provisional application of treaties. Mr.

Simonoff's remarks are excerpted below and available at <http://usun.state.gov/remarks/6976>. See Chapter 4 for excerpts from Mr. Simonoff's remarks on provisional application of treaties.

* * * *

Thank you, Mr. Chairman. Concerning the topic "Protection of the environment in relation to armed conflict," we greatly appreciate the diligent and thoughtful work of Special Rapporteur Marie Jacobsson, the drafting committee, and the rest of the Commission. We noted with interest the draft introductory provisions and principles that have been completed by the drafting committee. Nevertheless, we have substantial concern with the content and phrasing of a number of the draft principles, as well as the direction in which they appear to be orienting this project.

We have a general concern that most of the draft principles are phrased in mandatory terms, purporting to provide what "shall" be done, despite the fact that the principles go beyond existing legal requirements of general applicability.

Relatedly, we are troubled by the presence among the principles of rules extracted from certain treaties that we do not believe reflect customary law. For example, draft principle II-4 repeats a prohibition in Additional Protocol I, AP I, on attacks against the natural environment by way of reprisals that we do not believe exists as a matter of customary international law. To the extent the rule is offered to encourage normative development, we remain in disagreement with it, consistent with the objections we have stated on other occasions.

We are also concerned that the draft principles appear to suggest that the Commission will address questions about the concurrent application, in situations of armed conflict, of bodies of international law other than international humanitarian law. For example, draft principle II-1 refers to "applicable international law *and, in particular, the law of armed conflict.*" Our consistent view has been that the Commission should avoid such questions, and it would appear appropriate to do so in that all of the draft principles are drawn from the law of armed conflict.

Other draft principles could benefit from further refinement or adjustment.

For example, concerning draft principle I-(x) we have concerns about the inclusion of the phrase "or otherwise" insofar as it may be taken to suggest that a designation to which one side has not consented may nevertheless have legal effects. For example, even though a State may remove its military objectives from an area in order to reduce the likelihood that an opposing State, during armed conflict, would conduct attacks in the area or view such an area as a military objective, a unilateral designation would not create obligations for an opposing State to refrain from capturing the area or placing military objectives inside it during armed conflict.

We also recommend omitting "cultural importance" as a basis for designating an area, as that reference is beyond the scope of these principles as specified in the introduction. Further, in connection with draft principle II-5, we suggest clarifying that States that are not Party to an agreement would not be bound by its provisions, especially if a non-Party is the State in whose territory the area is located. Similarly, in connection with draft principle II-5, we suggest clarifying that if a designated area contains a military objective, the entire "area" would not necessarily forfeit protection from being made the object of attack.

With respect to draft principle II-2, we do not believe it is useful or correct to state that all of the law of armed conflict "shall be applied" to the natural environment. Whether a

particular rule of the law of armed conflict is applicable with respect to the natural environment may depend on the context, including the contemplated military action. To the extent draft principle II-2 is intended merely to confirm the applicability of existing law, the principle seems too vague and ambiguous to accomplish that purpose. We hope the principle is *not* intended to modify the applicability of existing law.

We also recommend that draft principle II-3 be eliminated or revised—perhaps with the addition of a caveat such as “where appropriate—in that environmental considerations will not in all cases be relevant in applying “the principle of proportionality and the rules on military necessity” in the context of *jus in bello*. More fundamentally, it is unclear to us exactly what is meant by the phrase “environmental considerations” and the requirement that such considerations be “taken into account.”

Lastly, we recommend using the term “natural environment” rather than “environment” for clarity.

* * * *

Mr. Chairman, turning to the topic of Immunity of State Officials from Foreign Criminal Jurisdiction...

We note that the new draft article 6, paragraph 1, limits immunity *ratione materiae* to acts performed in an official capacity. This provision is sensible in light of the draft articles provisionally adopted by the Commission last year, in particular draft article 5, which provides that State officials acting as such enjoy immunity from the exercise of foreign criminal jurisdiction, and draft article 2(e), which defines “State official” as an individual who either represents the State or exercises State functions. In its comments last year, the United States noted that draft articles 2(e) and 5 appeared to express a broad view of immunity *ratione materiae*, subject to exceptions and procedural requirements

By contrast, the new draft article 6, as narrowed by the new definition in draft article 2(f), limits the reach of immunity *ratione materiae*. In particular, draft article 2(f) defines the phrase “an act performed in an official capacity” to mean “any act performed by a State official in the exercise of State authority.” This definition results in a narrower scope of immunity than would exist if the definition turned solely on whether the official's conduct could be attributed to a State, a factor analyzed in the Special Rapporteur's report. Both the definition in draft article 2(f) and exceptions to immunity are important and difficult issues that merit ongoing and careful consideration, and we look forward to the work of the Special Rapporteur and the Commission on them as this topic moves forward.

Draft article 6, paragraphs 2 and 3, provide that immunity *ratione materiae* subsists even after the individuals concerned have ceased to be State officials, and that individuals who formerly enjoyed immunity *ratione personae* continue to enjoy immunity as to their official acts. Both articles are consistent with the treaty-based immunities of diplomats, consular officers, and UN officials, who continue to enjoy residual immunity for their official acts even after they have left their respective offices.

The other major areas yet to be addressed are exceptions to immunity and procedural aspects of immunity. The Special Rapporteur proposes to address in her next report the issue of limits and exceptions to immunity, which she accurately noted is the most politically sensitive issue to be addressed in this project. ...

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3. ILC's Work on Crimes Against Humanity

On February 10, 2015, the U.S. Mission to the UN responded to an invitation to states to submit their views on the topic of crimes against humanity, one of the topics on the agenda of the ILC. U.N. Doc. A/69/118 (2014). Excerpts follow from the response of the United States. The full text of the response is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The United States is pleased to respond to the International Law Commission's request to provide relevant information regarding domestic legislation and decisions of national courts regarding crimes against humanity.

The International Law Commission requested information on whether the State's national law at present expressly criminalizes "crimes against humanity" as such. The United States does not expressly criminalize "crimes against humanity" as such. There are several U.S. laws criminalizing conduct that may in some circumstances amount to crimes against humanity, namely a criminal prohibition on torture, *see* 18 U.S.C. § 2340A; a criminal prohibition on war crimes, *see* 18 U.S.C. § 2441; and a criminal prohibition on genocide, *see* 18 U.S.C. § 1091. However, these statutes do not criminalize all conduct that *might* amount to crimes against humanity, and some of the constituent acts of crimes against humanity as defined in certain international texts are not found in U.S. domestic law. There are also a host of other statutes with extraterritorial application that might apply depending on the circumstances (e.g., terrorism offenses, statutes dealing with international violent crime, etc.), and there are state-level criminal laws that may address several of the acts falling within the scope of crimes against humanity but do not necessarily apply to acts committed outside the United States.

The International Law Commission also requested information on the text of the relevant criminal statute(s). The relevant statutes are:

Torture Statute, 18 U.S.C. § 2340

* * * *

War crimes statute, 18 U.S.C. § 2441

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Genocide Statute, 18 U.S.C. § 1091

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The International Law Commission also requested information on under what conditions the State is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity (e.g. when the offense occurs within its territory or when the offense is by its national or resident). As reflected in the statutory language above, the torture statute provides for jurisdiction where the alleged offender is a national of the United States, or the alleged offender is present in the United States, regardless of the nationality of the victim or alleged offender. The war crimes statute gives rise to jurisdiction where the alleged offender or victim is a member of the U.S. military and/or a U.S. national. The genocide statute provides for jurisdiction where the offense is committed in whole or in part in the United States or if the alleged offender is a U.S. national, a lawful permanent resident of the United States, a stateless person whose habitual residence is in the United States, or is present in the United States.

The International Law Commission also requested information on decisions of the State's national courts that have adjudicated crimes against humanity. Because there is no explicit criminal prohibition on crimes against humanity, as such, in the United States, U.S. courts have not adjudicated prosecutions for crimes against humanity.

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4. ILC's Work on Protection of the Atmosphere

Also on February 10, 2015, the United States responded to the ILC's request for relevant information "on domestic legislation and the judicial decisions of the domestic courts" regarding protection of the atmosphere. Excerpts follow from the U.S. response, which is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The United States is pleased to respond to the International Law Commission's request to provide relevant information regarding domestic legislation and judicial decisions of domestic courts on protection of the atmosphere. This response provides examples of U.S. legislation and judicial decisions that relate to this topic. The United States has sought to provide examples that fall within the scope of the International Law Commission's work on this topic. The examples below do not constitute an exhaustive list of relevant U.S. legislation or judicial decisions. Further, in most instances such U.S. legislation is not adopted and such judicial decisions are not issued based on a belief that they are required by U.S. obligations under international law. Rather, such U.S. legislation is typically the product of political choices made within the United States as to how best to address environmental problems affecting the United States and such judicial decisions are in implementation of that legislation. In some instances, however, U.S. treaty obligations may be one of the reasons why U.S. legislation on a specific issue (such as ozone depletion) is adopted and U.S. courts may be guided by aspects of that treaty regime when deciding a case arising under such legislation.

I. EXAMPLES OF DOMESTIC LEGISLATION

Since potential harms relating to the atmosphere arise in a broad range of very different contexts, the U.S. has a variety of laws and regulations, at the federal, state, and local levels that address in different ways a multitude of issues relating to air pollution and other potential harm to the atmosphere. Such laws and regulations can take very different forms: e.g. emissions standards; cap-and-trade regimes; loan guarantees to promote new technologies; tax regimes; and other regulatory mechanisms.

At the federal level, the U.S. has sophisticated and detailed statutory and regulatory regimes in a variety of areas of atmospheric protection. As the following examples demonstrate, these regimes are designed to address their unique problems in unique ways, and are not subject to general rules that span or seek to harmonize them. The U.S. experience has been that a “one size fits all” approach to this topic is not effective, efficient, or practical.

A. FEDERAL LEGISLATION

1. Clean Air Act (CAA), 42 U.S.C. § 7401-7626. The CAA limits the emission of pollutants into the atmosphere from stationary and mobile sources in order to protect human health and the environment from the effects of airborne pollution. The CAA includes, *inter alia*, provisions that address acid rain, emissions that deplete the ozone layer, and toxic pollutants such as the accumulation of heavy metals. The U.S. Environmental Protection Agency (EPA) has adopted extensive regulations implementing this Act. See 40 CFR Subchapter C.

2. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or “Superfund”), 42 U.S.C. § 9601-9675, and § 311 of the Clean Water Act (CWA), 33 U.S.C. 1321. CERCLA and CWA section 311 authorize the Federal government to clean up environmental contamination wherever it is found, usually in or on earth or water. This legislation has an impact on curbing air pollution because much oil and chemical contamination will evaporate into the air if not cleaned up. The National Contingency Plan, 40 CFR Part 300, governs cleanups under CERCLA and CWA section 311. 3. Resource Conservation and Recovery Act (RCRA) 42 U.S.C. § 3004(n). This legislation directs EPA to promulgate standards for organic air emissions from hazardous waste management at RCRA treatment, storage, and disposal facilities. EPA regulates leaks from process vents, such as open-ended pipes or stacks, and equipment used to treat hazardous waste, including valves, pumps, compressors, flanges, and pressure relief devices. [40 C.F.R. sections 264 and 265 subparts AA and BB.] EPA also regulates leaks from hazardous waste tanks, containers, and surface impoundments. (40 C.F.R. sections 264 and 265 subpart CC.) The subpart CC regulations also apply to tanks and containers used to accumulate hazardous waste at facilities that are “large quantity generators” of hazardous waste. These RCRA regulations generally require use of equipment that actively controls air emissions, and include specific operation, design, inspection, repair, and reporting requirements.

4. The Act to Prevent Pollution from Ships (APPS), 33 U.S.C. § 1901 - 1915: This Act implements a number of treaty requirements, including Annex VI of the MARPOL Convention relating to air emissions from ships.

5. Uranium Mill Tailings Radiation Control Act (UMTRCA), 42 USC § 2022 et seq. UMTRCA amended the Atomic Energy Act by directing EPA to set generally applicable health and environmental standards to govern the stabilization, restoration, disposal, and control of effluents and emissions at both active and inactive mill tailings sites. Title I of the Act covers inactive uranium mill tailing sites, depository sites, and vicinity properties. It directs EPA, the

Department of Energy, and the Nuclear Regulatory Commission to undertake standards of protection and compliance.

6. Nuclear Waste Policy Act (NWPA), 42 USC § 10101 et seq. The NWPA supports the use of deep geologic repositories for the safe storage and/or disposal of radioactive waste in order to protect air, land, and water from contamination. The Act establishes procedures to evaluate and select sites for geologic repositories and for the interaction of state and federal governments. It also provides a timetable of key milestones the federal agencies must meet in carrying out the program.

7. Energy Policy Act (EnPA), 42 USC 13201 et seq. (2005). The Act addresses energy production in the United States, including: (1) energy efficiency; (2) renewable energy; (3) oil and gas; (4) coal; (5) Tribal energy; (6) nuclear matters and security; (7) vehicles and motor fuels, including ethanol; (8) hydrogen; (9) electricity; (10) energy tax incentives; (11) hydropower and geothermal energy; and (12) climate change technology. For example, the Act provides loan guarantees for entities that develop or use innovative technologies that avoid the by-production of greenhouse gases. Another provision of the Act increases the amount of biofuel that must be mixed with gasoline sold in the United States.

8. Public Health Service Act (PHSA), 42 USC 201 et seq. This act, which consolidates laws related to the public health service, *inter alia* provides EPA the authority to monitor environmental radiation levels and provide technical assistance to states and other federal agencies in planning for and responding to radiological emergencies.

B. STATE LEGISLATION

Environmental law in the United States does not fall exclusively within the federal domain. Rather, various aspects of environmental law are regulated at the state level in recognition that different problems arising in different locations may require different types of legal measures that are tailored to the particular context in which they are applied. As such, all U.S. states have laws and regulations addressing air pollution. The cooperative federalism approach adopted by the federal Clean Air Act sets out distinct roles and obligations for the federal government and for state and local governments. State laws enacted to satisfy federal Clean Air Act obligations generally must be approved by EPA. See, e.g., 40 CFR Part 52 (approved state implementation plans designed to attain national ambient air quality standards). In certain circumstances, states are allowed to enact legal requirements that are more stringent than the federal requirements. 42 U.S.C. §7416.

The following are examples of state statutes that address air pollution and other relevant topic areas.

1. New Jersey: Air Pollution Control Act (1954), N.J. Stat. Ann. § 26:2C-1 (West): This act regulates motor vehicles exhaust emission standards and test methods.

2. Rhode Island: R.I. Admin. Code 25-4-10:10.2: This act establishes Emission Reduction Plans in case of air pollution alert, warning or emergency.

3. Colorado: "Colorado Air Pollution Prevention and Control Act," Colo. Rev. Stat. Ann. § 25-7-101-25-7-139 (West): This Act contains a list of substances that are declared to be hazardous air pollutants and are subject to regulation under this act.

4. California: Protect California Air Act of 2003, Cal. Health & Safety Code § 42500-42507 (West): This Act focuses on implementing the requirement that all new and modified sources, unless specifically exempted, must apply control technology and offset emissions increases as a condition of receiving a permit. It establishes non-vehicular emissions regulations.

5. Florida: Florida Radiation Protection Act, FL ST T. XXIX, Ch. 404: This Act relates to low-level radioactive waste management.

6. Illinois: Illinois Radon Awareness Act, 420 Ill. Comp. Stat. Ann. 46/1-46/99: This Act regulates radon testing and disclosure.

II. DOMESTIC JUDICIAL DECISIONS

U.S. federal and state court decisions relating to the atmosphere generally address the specific provisions of the particular statute or regulation that have been challenged. There have been thousands of court cases that address air pollution and related atmospheric harm in some manner. In relation to air pollution, the two most significant types of cases are: (1) cases interpreting the Clean Air Act and determining whether an EPA rule is consistent with the Act; and (2) enforcement cases brought against polluters for violating the Act. The following are examples of some recent, notable federal court decisions relating to air pollution.

CTS Corporation v. Waldburger, 134S. Ct. 2175 (2014): This decision affects the ability of litigants to recover personal injury or property damages resulting from the release of a hazardous substance, pollutant or contaminant subject to the provisions of CERCLA. CERCLA Section 9658 preempts the application of state statutes of limitations to state tort claims in certain circumstances. The Court held that Section 9658 does not preempt state “statutes of repose,” which automatically terminate a cause of action after a specified number of years regardless of when the harm is first discovered, because the statutory language does not refer to “statutes of repose.” Noting that Congress could have preempted statutes of repose, but failed to do so, the Court observed that the states are independent sovereigns in the federal system and, accordingly, their powers are not preempted absent clear and manifest Congressional purpose.

Sierra Club v. U.S. E.P.A., 762 F.3d 971 (9th Cir. 2014): Environmental organizations filed petition pursuant to the Clean Air Act (CAA) for review of an EPA order granting a permit for new natural gas-fired power plant to be built and operated under old air quality standards. The Court held, *inter alia*, that the CAA unambiguously required that the project comply with regulations in effect at the time the permit was issued.

Alaska v. Kerry, 972 F. Supp. 2d 1111(D. Alaska 2013): The U.S. District Court for the District of Alaska dismissed the case brought by the state of Alaska and joined by the Resource Development Council (“RDC”) challenging the procedure by which an emissions control area (“ECA”) off the coast of Alaska was established pursuant to the International Convention for the Prevention of Pollution from Ships (“MARPOL”), including Annex VI, and domestic implementing legislation (the Act to Prevent Pollution from Ships, “APPS,” 33 U.S.C. §§ 1901 to 1915). The court considered the applicability of the political question doctrine to the first cause of action in the complaint, which alleged violations of the APPS and the Administrative Procedure Act (“APA”) in the establishment of the ECA. The court agreed with the United States that the first cause of action raises a nonjusticiable political question and was therefore not subject to judicial review. The court also rejected claims under the Treaty Clause of the U.S. Constitution and the separation of powers doctrine, specifically, claims that the executive branch did not have the domestic authority to implement the amendment to MARPOL.

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E. OTHER ORGANIZATIONS

1. Inter-American Commission on Human Rights

The United States made several submissions to the Inter-American Commission on Human Rights (“IACHR” or “Commission”) in 2015. See Chapter 1 for discussion of and excerpts from the June 30, 2015 submission by the United States on the IACHR draft report on the situation of refugee and migrant families and unaccompanied children in the United States. See Chapter 18 for discussion of and excerpts from the March 30, 2015 U.S. submission to the Commission on the treatment of detainees at Guantanamo. The United States also participated in hearings and other proceedings at the IACHR. The Charter of the Organization of American States (“OAS”) authorizes the IACHR to “promote the observance and protection of human rights” in the Hemisphere. The Commission hears individual petitions and provides recommendations 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 American States 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.

a. *Petitions regarding the death penalty*

On August 7, 2015, the United States submitted observations and a response to various communications it received from the Commission regarding the case of petitioner Bernardo Tercero, No. 12.994. Petitioner Tercero was sentenced to death in state court in Texas in 2000. Petitioner was afforded opportunities for direct appellate review in state courts as well as *habeas* review in federal district and appeals courts. The U.S. response argues that Tercero’s petition to the Commission is inadmissible and that the Commission may reconsider its decision on admissibility though it had already been rendered. The response also restates the longstanding U.S. position that the imposition of the death penalty for the most serious crimes and in accordance with the law does not violate any international legal obligations of the United States. The response addresses claims regarding failure to receive consular notification by explaining that consular notification is not a human right under the American Declaration, but a right upheld among States in the Vienna Convention on Consular Notification. The IACHR issued its merits report, Report No. 51/15, on August 25, 2015, requesting that the United States, *inter alia*, grant Tercero a review of his trial and sentence.

On the same day, Tercero was granted an additional opportunity for *habeas* review in Texas court and his execution was stayed. The United States informed the Commission in a letter on August 25, 2015 that Tercero’s petition should be deemed

inadmissible under Article 31 of the Commission's Rules of Procedure because the petitioner is still exhausting his domestic remedies. The U.S. letter also requests that the Commission rescind its Report No. 51/15 on the merits of Tercero's petition. The August 25, 2015 correspondence with the Commission is available at <http://www.state.gov/s/l/c8183.htm>.

On September 10, 2015, the U.S. Department of State forwarded information regarding the status of the Tercero petition to the governor of Texas. The letter, available at <http://www.state.gov/s/l/c8183.htm>, includes the following explanation of U.S. support for the IACHR:

Under the OAS Charter, the Commission has a mandate to examine respect for human rights commitments under the Declaration throughout the Americas, including by state and provincial authorities in federal systems such as the United States, Canada, Mexico, and Brazil. Although the IACHR only issues recommendations, and cannot compel action by federal or state governments in countries such as the United States that have not ratified the American Convention on Human Rights, the United States greatly respects its work and considers the IACHR to play a vital role in safeguarding and promoting human rights in the Western Hemisphere, most significantly because it shines a light on abuses in countries that might otherwise escape outside scrutiny. Keeping in mind the critically important work the IACHR performs across the countries of the Americas, the United States participates actively in IACHR cases and hearings concerning alleged human rights violations within the United States. The United States will continue to do so and, where relevant, make appropriate requests of U.S. state authorities for information or other assistance related to matters before the IACHR. ...

On August 6, 2015, the United States made similar admissibility arguments in a letter to the Commission regarding the petition of Linda Carty, No. P-2309-12. Carty appealed her conviction in Texas state court through both direct appeal in Texas state courts and through *habeas* petitions in state and federal court. After filing her petition with the Commission, petitioner's application for further *habeas* review was granted by a Texas appellate court. The United States informed the Commission that this further review renders the petition inadmissible because petitioner has not yet exhausted domestic remedies. The August 6, 2015 correspondence with the Commission regarding Carty is available at <http://www.state.gov/s/l/c8183.htm>.

b. *Group petitions and Commission authority with respect to precautionary measures*

On September 1, 2015, the United States provided its observations on the petition of Jurijus Kadamovas *et al.*, No. P-1285-11. The U.S. response explains that the petition is inadmissible under Articles 28, 31, and 34 of the Commission's Rules of Procedure. The petition was brought by two prisoners purporting to represent themselves and several

fellow prisoners regarding their treatment in prison. As the U.S. response explains, the claims regarding this group of petitioners are too vague and non-specific to meet the threshold requirements of Articles 28 and 34. For petitioners Kadamovas and Bolden, the petition is deficient on the additional ground of failure to exhaust.

Excerpts follow (with footnotes omitted) from the final section of the U.S. response, addressing the Commission's purported authority to require precautionary measures. The U.S. response in its entirety is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

As noted, the Commission requested precautionary measures in this case on December 27, 2011. The United States once again respectfully submits that the Commission does not have authority to request or require that the United States adopt precautionary measures. The practice of requesting precautionary measures is based on Article 25(1) of the Rules, which states:

[T]he Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures. Such measures, whether related to a petition or not, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system.

Importantly, this rule was approved by the Commission and not by the Member States of the Organization of American States (OAS) themselves. Through this rule, the Commission apparently considers itself to possess not only the power to *request* that a State adopt precautionary measures—which implies that the State may choose to decline the request—but also to *require* the measures, in a manner akin to the Inter-American Court of Human Rights (“Court”). This is evident from terms used in other subparagraphs of Article 25, which speak of the Commission granting, extending, modifying, and lifting the precautionary measures—as opposed to making, modifying, or withdrawing a *request* for such measures. Communications sent by the Commission over the years also refer to precautionary measures with language evincing the belief that when the Commission requests precautionary measures, it is in effect imposing them and that their implementation is not optional.

While the Commission's arrogation of such a power is perhaps understandable, it is not within the mandate given to the Commission by the OAS Member States. Article 25(1)'s reference to purported sources of a precautionary measures power—Article 106 of the OAS Charter, Article 41(b) of the American Convention on Human Rights (“American Convention”), Article 18(b) of the Commission's Statute, and Article XIII of the American Convention on Forced Disappearance of Persons—do not change this reality. Article 106 of the Charter established the Commission to promote the observance and protection of human rights, but makes no further mention of its specific powers. Article 41(b) of the American Convention and Article 18(b) of the Statute empower the Commission to make recommendations to OAS Member States “for the adoption of progressive measures in favor of human rights” and “appropriate measures to further the observance of those rights,” but are silent on precautionary measures, and *a fortiori* on any power to require them. Whatever precautionary measures power

may have been sanctioned by States Parties to the American Convention on Forced Disappearance of Persons in that treaty's Article XIII is not applicable to the United States as a nonparty to that Convention.

The Commission's Statute does, in fact, refer to *provisional* measures, but only in the context of States Parties to the American Convention. Even there, it does not give the Commission the power to request or require such measures directly of a Member State. Instead, the Statute merely gives the Commission the power to request the Inter-American Court of Human Rights ["Court"] to take provisional measures in serious and urgent cases involving States Parties to the American Convention that have accepted the jurisdiction of the [Court], where the case has not yet been submitted to the [Court]. Article 63(2) of the American Convention, in turn, empowers the [Court] to act on such a request. There is no provision in the Statute or the American Convention that provides authority for the Commission to request the [Court] to issue provisional measures with respect to a nonparty to the American Convention, for the [Court] to do so, or for the Commission to itself require any OAS Member State—American Convention party or not—to take precautionary measures. For a nonparty to the American Convention the Commission is empowered, at most, to make a nonbinding recommendation that it take precautionary measures.

As such, the United States has construed the Commission's request for precautionary measures as a nonbinding recommendation that the United States take precautionary measures. The United States respectfully declines that recommendation, and requests that the Commission withdraw the recommendation. For Petitioners Ortiz, Mikhel, and Umana, the Commission has no information whatsoever on which to ground a determination that they face irreparable harm—no specific facts, no information about remaining domestic remedies, or otherwise—beyond the bare fact that they were sentenced to death; and Petitioner Sinnistera, as noted above, has already died of natural causes. The Commission has only slightly more information about Petitioner Kadamovas. Moreover, Petitioners are not, in fact, in imminent danger of irreparable harm. None is currently scheduled to be executed, and some are still pursuing domestic remedies. The U.S. Department of Justice is continuing to review the federal execution protocol used by the Federal Bureau of Prisons as well as policy issues related to the death penalty, and no executions will occur during the pendency of that review.

* * * *

On September 14, 2015, the United States responded to a petition filed by Oswaldo Lucero *et al.*, P-1506-08, broadly alleging "violations of the human rights of Latinos" by the United States on behalf of named petitioners and several unnamed individuals. The U.S. response enumerates the grounds for finding the petition inadmissible and also addresses its lack of merit. First, concerning the unnamed petitioners, the United States points out that the Commission only has competence to consider allegations of "concrete violations of the rights of specific individuals." Second, concerning those petitioners who are identified, many of the perpetrators of the violence against them have been prosecuted, the local police in one area of the incidents have received hate crimes training, and, more broadly, the United States has increased its prosecution of hate crimes. The U.S. response addresses allegations regarding its immigration enforcement, explaining how the claims are false or fail to

account for recent reforms. The response further explains that the claims are inadmissible under Article 34 for failing to allege any violation of the American Declaration because Declaration commitments extend only to state action, not the conduct of private individuals. This petition, like others addressed by the United States, also fails the exhaustion requirement in Article 31 of the Commission's Rules of Procedure. Excerpts on the exhaustion requirement follow (with footnotes omitted) from the U.S. response in *Lucero*, which is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The Commission should also declare the Petition inadmissible because the Petitioners have not satisfied their duty to demonstrate that they have “invoked and exhausted” domestic remedies under Article 20(c) of the Commission's Statute and Article 31 of the Rules. While the Statute and Rules require the Commission to examine the full array of domestic remedies that may address the Petitioners' claims, the Petition contains no details on any Petitioner's attempts to invoke or exhaust domestic remedies. Petitioners merely aver that any such attempt would be futile because they cannot sue the federal government under one statute—42 U.S.C. § 1983—and so they should be excused from not attempting to pursue any domestic remedies, even against state and local officials. Yet as the Commission has noted, the burden is on the petitioner to “resort to and exhaust domestic remedies to resolve the alleged violations,” and “[m]ere doubt as to the prospects of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”

Petitioners paint far too narrow a picture of the remedies available in the U.S. legal system for the types of wrongs they allege. The U.S. domestic legal system provides several avenues for redress that serve to prevent human rights abuses, hold human rights abusers accountable, and provide relief to victims. Available remedies can include, *inter alia*: (1) criminal punishment of the individuals responsible for violations against the victim; (2) relief aimed at improving an institution or system; and (3) money damages to the victims.

With respect to *criminal punishment*, the Commission has broadly construed “remedy” to include both civil remedies and remedies of a criminal nature, and has acknowledged that the primary method for redress in some cases is a “criminal domestic remedy.” Subsequent to the filing of the Petition, the named Petitioners received an effective criminal domestic remedy: authorities conducted an investigation, located and arrested the perpetrators, put them on trial, and secured convictions and substantial prison sentences. Implicit in the requirement of exhaustion 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. Because justice was manifestly done in the named Petitioners' cases, the Commission should find their claims inadmissible for failure to satisfy the exhaustion requirement. For the unnamed Petitioners, the Commission should, consistent with its own precedent, also find their claims inadmissible for failure to exhaust because the Petitioners provide no evidence whatsoever that the incident in question “was reported to the proper authorities to adequately put them on notice to conduct a criminal investigation.”

With respect to *relief aimed at improving an institution or system*, as described above, DOJ conducted an investigation which led to an agreement with the Suffolk County Police

Department under which the latter committed, among other things, to ensure training for officers on hate crimes and to strengthen outreach efforts in Latino communities. DOJ has opened more than 20 pattern and practice investigations of law enforcement agencies in the last six years, and is currently enforcing approximately 16 landmark agreements with state or local law enforcement agencies. It also seeks to identify and address potential policing issues before they become systemic problems. In March, the Presidential Task Force on 21st Century Policing released its report with 59 recommendations, following a three-month-long public consultation process to identify and promote effective, community-based crime reduction practices.

With respect to *civil suits*, the Commission has found claims inadmissible under Article 31 of the Rules because the petitioner was pursuing a private lawsuit against his or her alleged perpetrator. Here, Petitioners provide no explanation of whether they attempted to pursue the ample opportunities they have under state law to bring a civil tort suit against those private actors they claim are responsible for their injuries. In the U.S. system, tort suits are the principal way for private individuals to secure monetary damages or other redress for wrongs committed by other private individuals.

Finally, as concerns civil suits against government authorities, bases for civil actions in cases of credible, verifiable, and substantiated human rights violations include: bringing a civil action in federal or state court under the federal civil rights statute, 42 U.S.C. § 1983, directly against state or local officials for money damages or injunctive relief; seeking damages for negligence of federal officials and for negligence and intentional torts of federal law enforcement officers under the Federal Tort Claims Act, 22 U.S.C. § 2671 *et seq.*; suing federal officials directly for constitutional tort damages under provisions of the U.S. Constitution, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and *Davis v. Passman*, 442 U.S. 228 (1979); challenging official action through judicial procedures in state courts and under state law, based on statutory or constitutional provisions; and seeking civil damages from participants in conspiracies to deny civil rights under 42 U.S.C. § 1985. Despite their duty to do so, Petitioners make no showing in the Petition that they pursued any civil suit under § 1983 against any state or local governments or officials—those whose acts and omissions constitute the bulk of the alleged misconduct described in the Petition—and do not explain how such an attempt would be futile; nor do they cite any attempt at all to pursue civil suits under other statutes against federal, state, or local governmental authorities.

* * * *

c. U.S. suggestions for more effective screening of petitions

On October 27, 2015, the IACHR held a meeting of certain OAS Member States, including the United States, Canada, and countries of the English-speaking Caribbean, on reorganization of the IACHR Secretariat and case management. The United States delivered the following oral remarks.

* * * *

As the Commission is aware, the United States strongly supports the Commission's work. Like the other OAS member states, we have committed ourselves not only to the Commission's role in protecting and promoting human rights through examination of thematic issues, but also through the individual petition process. It is the management of this process, however, that gives us the most concern. Specifically, the Commission's substantial backlog of cases threatens to undermine its effectiveness and its legitimacy, particularly in the eyes of those petitioners who have waited many years for resolution of their petitions.

While we do not have statistics on other member states, a few statistics on U.S. cases may help enlighten this discussion. According to our records, the Commission has 73 individual cases against the United States open on its docket that have passed the threshold requirements for consideration. Of the 73, 49 are at the admissibility stage, and 24 are at the merits stage. Of the 73, the United States has yet to file a response in 10. We are the first to admit that 10 is too high a number, and we are working diligently to complete responses in those cases. The other 63 open cases are pending a Commission decision or other action. Some have been pending for many years—many since the mid-2000s, and the oldest since 1994.

We acknowledge the Commission's recent efforts to reduce this severe backlog. We have made a number of suggestions in recent years for more efficient case management, including that the Commission should archive or close cases where the petitioner has died or is no longer interested in prosecuting the case, or where the respondent state has done all that it can to implement recommendations in a final report. No stakeholder benefits from leaving finished or dormant cases open indefinitely. The Commission should focus not only on processing new or high-profile petitions, but also—perhaps more importantly—by disposing of old cases. As the adage goes, justice delayed is justice denied. For the future, the Commission should consider new criteria for filtering petitions so that it may focus on those that present the most pressing human rights claims which could have a broader regional impact. The Commission should impose strictly enforced page and font requirements on petitions. We would welcome a further meeting to discuss our case-management ideas in more detail.

Finally, we believe that financial limitations are the single most important crisis facing the system and contribute substantially to the backlog problem. There must be an increase in the IACHR's budget to achieve many of the goals outlined here today. As such, we encourage member states to provide more voluntary funding.

Thank you again for the presentation and for your attention to our concerns.

* * * *

d. Hearings

In March 2015, the IACHR held five hearings related to the United States. Four were thematic hearings—on racial discrimination in criminal justice, trafficking in persons, human rights in Puerto Rico, and the situation in Guantanamo. In October 2015, the IACHR held three hearings related to the United States, all thematic—on extractive industries' impact on sacred places of indigenous peoples; on alleged excessive force by police against African Americans; and on the alleged rendition, detention, and interrogation program. U.S. remarks at the hearing on the alleged rendition, detention, and interrogation program are discussed in Chapter 6.

The only adversarial hearing in which the United States was involved in 2015 was on the petition brought on behalf of Leopoldo Zumaya and Francisco Berumen Lizalde, No. P-119006 (Case No. 12.834). The petition alleged that U.S. treatment of undocumented workers violates the American Declaration. The United States had previously filed a written submission on the petition and presented oral remarks at the hearing on March 16, 2015. Before addressing the inadmissibility and merits of the claims, the United States delivered general comments about the Commission's authority. The Commission issued a preliminary merits report, Report No. 83/15, in favor of the petitioners on December 31, 2015, and the United States thereafter filed a letter disagreeing that the alleged conduct violated any international legal obligations owed by the United States. Excerpts follow from the U.S. March 16 oral statement.

* * * *

We welcome this opportunity to discuss the petition brought on behalf of Leopoldo Zumaya and Francisco Berumen Lizalde. As explained more fully in our written brief, the United States respectfully disagrees that Petitioners' experiences demonstrate a failure by the United States to uphold its commitments under the American Declaration. We do not believe the Commission should further consider Petitioners' claims because each has failed to exhaust the domestic remedies available to him. If the Commission chooses to further consider this matter, it should deny the claims because they lack merit. While we believe the claims should be dismissed, however, we look forward to continuing our engagement with civil society in our shared goal of advancing the rights and protections of all workers, including undocumented workers.

Before proceeding, we would offer three preliminary observations. First, the Petitioners' written briefs go into significant detail on cases of alleged employment discrimination and retaliation wholly unrelated to Petitioners' claims. Yet in 2011, the Commission narrowed this matter to the claims of Mr. Zumaya and Mr. Berumen Lizalde. Our remarks therefore focus on these claims.

Second, we note our longstanding position that the American Declaration is a non-binding instrument that does not itself, or through the OAS Charter, create legal rights or impose legal obligations on states. Nonetheless, the United States faithfully respects its political commitments to uphold the Declaration.

Third, we would also note that the Commission is not competent to entertain claims or issue recommendations with respect to the International Covenant on Civil and Political Rights or the International Convention on the Elimination of All Forms of Racial Discrimination. It should therefore disregard Petitioners' request to do so here.

* * * *

e. Lack of authority to consider international humanitarian law claims

On October 6, 2015, the United States submitted its response to the petitions filed on behalf of Moath Al Alwi, Petition No. P-98-15 and Mustafa Al Hawsawi, Petition No. P-

1385-14. The U.S. brief demonstrates the inadmissibility of these petitions under the Commission’s Rules of Procedure. In addition, the brief explains why the Commission is not competent to consider claims under international humanitarian law. Excerpts follow from the U.S. submission (with some footnotes omitted), which is also available in full at <http://www.state.gov/s/l/c8183.htm>. For discussion of U.S. treatment of detainees at Guantanamo, including the March 30, 2015 U.S. submission to the Commission on the subject, see Chapter 18.

* * * *

Petitioners allege that the United States has “violated” certain specific rights recognized in the American Declaration of the Rights and Duties of Man (“American Declaration”) through their detention at the Guantanamo Bay Detention Facility (“Guantanamo”). The United States has undertaken a political commitment to uphold the American Declaration, a non-binding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS).¹³ Article 20 of the Statute of the Commission sets forth the Commission’s powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights (“American Convention”), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal remedies have been pursued and exhausted. The Commission also lacks competence to issue a binding decision vis-à-vis the United States on matters arising under other international human rights treaties, whether or not the United States is a party, or under customary international law.

Even if the Commission considered the American Declaration to be binding on the United States, it could not apply it to determine the legality of the petitioners’ detention because, 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. Moreover, the Commission has no competence under its Statute or 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.³

* * * *

2. International Renewable Energy Agency

On September 3, 2015, President Obama issued Executive Order 13705, “Designating the International Renewable Energy Agency as a Public International Organization

¹³ As the American Declaration is non-binding, the United States understands any allegation of a “violation” of it to be an allegation that a country has not lived up to its political commitment to uphold the American Declaration.

³ The law of war and international human rights law contain many provisions that complement one another and are in many respects mutually reinforcing. Despite the general presumption that specific law of war rules govern the entire process of planning and executing military operations in armed conflict, certain provisions of human rights treaties may apply in armed conflicts. However, treaties and customary international law may not be applied by the Commission through the non-binding American Declaration.

Entitled To Enjoy Certain Privileges, Exemptions, and Immunities.” 80 Fed. Reg. 54,403 (Sep. 9, 2015). Excerpts follow from the executive order.

* * * *

Section 1. Designation. By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 1 of the International Organizations Immunities Act (22 U.S.C. 288), and having found that the International Renewable Energy Agency is a public international organization in which the United States participates within the meaning of the International Organizations Immunities Act, I hereby designate the International Renewable Energy Agency as a public international organization entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act. This designation is not intended to abridge in any respect privileges, exemptions, or immunities that such organization otherwise may have acquired or may acquire by law.

Sec. 2. General Provisions.

- (a) Nothing in this order shall be construed to impair or otherwise affect:
- (i) the authority granted by law to an executive department, agency, or the head thereof; or
 - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.
- (d) This order is not intended to, and does not, impair any right or benefit, substantive or procedural, enforceable at law or in equity that arises as a consequence of the designation in section 1 of this order.

* * * *

Cross References

U.S. actions to comply with ICJ Avena decision, **Chapter 2.A.1.**

International Criminal Court, **Chapter 3.C.1.**

Palestinian Authority efforts to accede to treaties, **Chapter 4.A.1.**

ILC's work on law of treaties, **Chapter 4.A.7.**

OAS adoption of Inter-American Convention on Human Rights of Older Persons, **Chapter 6.B.4.b.**

Immunity of the UN, **Chapter 10.E.**

Middle East peace process, **Chapter 17.A.**

UN peacekeeping, **Chapter 17.B.1.**

Sexual Exploitation and Abuse ("SEA") by peacekeepers, **Chapter 17.B.4.b.**

CHAPTER 8

International Claims and State Responsibility

A. CUBA CLAIMS TALKS

On December 8, 2015, the United States and Cuba held their first government-to-government claims discussion in Havana. See December 7, 2015 State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/12/250426.htm>. Mary McLeod, Acting Legal Adviser for the U.S. Department of State, led the U.S. delegation. The media note identifies the variety of claims that are the subject of the talks:

...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 of the United States Government. The Government of Cuba has also raised claims against the United States related to the embargo. ...

The media note also explains that the reestablishment of diplomatic relations between the United States and Cuba allows the State Department to “more effectively represent U.S. interests and values in Cuba and strengthen our ties with the Cuban people.” For more information about the process of reestablishing and normalizing relations with Cuba, see Chapter 9.

B. IRAN CLAIMS

In January 2015, the Iran-United States Claims Tribunal (“Tribunal”) concluded hearings and began deliberations on Iran’s claims in Case A/15 (II:A), pertaining to the United States’ obligation to arrange for the transfer of Iranian property held by private parties in the United States. In March 2015, the Tribunal issued a correction in favor of the United States to its July 2, 2014 Award in Case A/15(IV); it denied the United States request for an additional award in that Case. In July 2015, the United States paid to Iran

the amount required by the Tribunal's July 2, 2014 Award (as corrected) in Case A/15(IV). On August 27, 2015, Iran indicated in a letter to the Tribunal that it disagreed with the United States' calculation of post-Award interest; the United States has responded to Iran's letter.

Professor David Caron was appointed to replace Judge Charles Brower as one of the three U.S.-appointed members of the Tribunal, effective December 2, 2015. See the website of the Tribunal, <http://www.iusct.net>.

C. HOLOCAUST ERA CLAIMS

1. U.S.-France Agreement on Compensation

As discussed in *Digest 2014* at 313-15, the United States and France negotiated an agreement regarding compensation for certain victims who were deported from France to Nazi labor and death camps during the Holocaust. In 2015, the U.S.-France "Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are not Covered by French Programs" entered into force and the U.S. State Department began accepting claims applications. Information and documents about the compensation program are available at www.state.gov/deportationclaims. The text of the Agreement follows and is available at <http://www.state.gov/documents/organization/251005.pdf>. The agreement includes an exchange of rectifying notes on June 10 and June 11, 2015 that make two corrections: (1) replacing "Vichy Government" with "de facto authority claiming to be the 'government of the French State,'" and making the equivalent replacement in the French text; and (2) replacing the word "seau" in the Annex of the French-language text with the word "sceau."

* * * *

The Government of the United States of America, And The Government of the French Republic,
Hereinafter referred to jointly as "the Parties,"

Wishing to further develop the relations between their two countries in a spirit of friendship and cooperation and to resolve certain difficulties from the past,

Recognizing and condemning the horrors of the Holocaust, including the tragic deportation of Jewish individuals from France during the Second World War,

Noting that since 1946 the Government of the French Republic has implemented extensive measures to restore the property of and to provide compensation for victims of anti-Semitic persecution carried out during the Second World War by the German Occupation authorities or

the de facto authority claiming to be the “government of the French state”, including a pension program designed to address the wrongs suffered by Holocaust victims deported from France and a specific program for orphans,

Noting that the Government of the French Republic remains committed to providing compensation for the wrongs suffered by Holocaust victims deported from France through such measures to individuals who are eligible under French programs,

Recalling that on July 16, 1995 the President of the French Republic solemnly recognized the State’s responsibility in the process of deportation of those victims and an imprescriptible debt towards them,

Recognizing that some Holocaust victims deported from France, their surviving spouses and their assigns, were not able to gain access to the pension program established by the Government of the French Republic for French nationals, or by international agreements concluded by the Government of the French Republic in this area,

Having held discussions in a spirit of friendship and cooperation with the shared aim of resolving through dialogue issues relating to the non-coverage of such persons,

Resolved by common consent and by way of an amicable, extra-judicial and non-contentious manner to address the issue of compensation for such persons,

Believing that it is in the interest of both Parties to guarantee the foreign sovereign immunity of France for Holocaust deportation claims and to provide through this Agreement a mechanism for providing compensation for any and all claims brought by such persons,

Recognizing that France, having agreed to provide fair and equitable compensation to such persons under this Agreement, should not be asked or expected to satisfy further claims in connection with deportations from France during the Second World War before any court or other body of the United States of America or elsewhere,

Noting that this Agreement constitutes the exclusive and final means for addressing those claims between the United States of America and France,

Noting the Parties’ intent that this Agreement should, to the greatest extent possible, secure for France an enduring legal peace regarding any claims or initiatives related to the deportation of Holocaust victims from France,

Having both consulted with various stakeholders, including representatives of Jewish communities, claimants, and members of legislative bodies regarding Holocaust deportation,

Believing that this Agreement will provide as expeditious as possible the mechanism for making fair and speedy payments to now elderly victims,

Have agreed as follows:

Article 1

For purposes of this Agreement, and except as otherwise indicated by use of a specific term:

1. Reference to “France” means the French Republic, the Government of the French Republic, any current or past agency or instrumentality of the French Government (whether owned in whole or in majority by the French Republic), their successor entities under any status, and any official, employee, or agent of the French Republic acting within the scope of his or her office, employment, or agency.
2. Reference to “French nationals” means natural persons who, at the time this Agreement enters into force, are nationals of the French Republic.
3. Reference to “Holocaust deportation” means the transportation of an individual from France towards a location outside of France during the Second World War as part of the anti-Semitic persecution carried out by the German Occupation authorities or the de facto authority claiming to be the “government of the French state”.
4. Reference to “Holocaust deportation claim” means a claim for compensatory or other relief in connection with Holocaust deportation.

Article 2

The objectives of this Agreement are to:

1. Provide an exclusive mechanism for compensating persons who survived deportation from France, their surviving spouses, or their assigns, who were not able to gain access to the pension program established by the Government of the French Republic for French nationals, or by international agreements concluded by the Government of the French Republic to address Holocaust deportation claims;
2. Create a binding international obligation on the part of the United States of America to recognize and affirmatively protect the sovereign immunity of France within the United States legal system with regard to Holocaust deportation claims and, consistent with its constitutional structure, to undertake all actions necessary to ensure an enduring legal peace at the federal, state, and local levels of the Government of the United States of America.

Article 3

1. This Agreement shall not apply to Holocaust deportation claims of French nationals.
2. This Agreement shall not apply to Holocaust deportation claims of nationals of other countries who have received, or are eligible to receive, compensation under an international agreement concluded by the Government of the French Republic addressing Holocaust deportation.
3. This Agreement shall not apply to persons who have received, or are eligible to receive, compensation under the Government of the French Republic’s compensation program

instituting a reparation measure for orphans whose parents died in deportation (Decree no. 2000-657 of 13 July 2000).

4. This Agreement shall not apply to Holocaust deportation claims of persons who have received compensation under another State's program providing compensation specifically for Holocaust deportation or who have received compensation under any program of any institution providing compensation specifically for Holocaust deportation.

Article 4

1. Within thirty (30) days of the date this Agreement enters into force, the Government of the French Republic shall transfer to the Government of the United States of America a payment of U.S. \$60 million, to be used by the Government of the United States of America for making payments under this Agreement, as provided for in Article 6.
2. The Parties agree that this payment constitutes the final, comprehensive, and exclusive manner for addressing, between the United States of America and France, all Holocaust deportation claims not covered by existing compensation programs, which have been or may be asserted against France in the United States of America or in France.
3. The Parties further agree that any payment to an individual under this Agreement shall constitute the final, comprehensive, and exclusive manner for addressing all Holocaust deportation claims by that individual not covered by existing compensation programs, which have been or may be asserted against France in any forum.
4. In accordance with the applicable domestic procedures of the United States, the Government of the United States of America will deposit amounts received from the Government of the French Republic in an interest-bearing account in the United States Treasury until distribution, pursuant to a determination by the Secretary of State of the United States of America or his designee.

Article 5

Upon payment of the sum referred to in Article 4 of this Agreement, the Government of the United States of America:

1. By this Agreement, confirms its recognition in connection with any Holocaust deportation claims of:
 - (i) the sovereign immunity of France and the property of France; and
 - (ii) the diplomatic, consular, or official immunity of French officials, employees, and agents and the property of each,as such sovereign, diplomatic, consular, and official immunities are normally recognized within the United States legal system for other foreign states, their agencies, instrumentalities, officials, employees, and agents, and the property of each.
2. Shall secure, with the assistance of the Government of the French Republic if need be, at the earliest possible date, the termination of any pending suits or future suits that may be filed in any court at any level of the United States legal system against France concerning any Holocaust deportation claim.

3. Shall, in a timely manner, and consistent with its constitutional structure, undertake all actions necessary to achieve the objectives of this Agreement, which include an enduring legal peace, at the federal, state, and local levels of government in the United States of America and shall avoid any action that:
 - a. Contradicts the terms of the Agreement, and in particular challenges the sovereign immunity of France concerning any Holocaust deportation claim; or
 - b. Stands as an obstacle to the accomplishment and execution of the Agreement.
4. Shall require, before making any distribution payment to an eligible recipient under this Agreement, that the recipient execute a writing following the form of the Annex attached to this Agreement, including (i) a waiver of all of the recipient's rights to assert claims for compensatory or other relief in any forum against France concerning Holocaust deportation or pension programs related thereto; (ii) a declaration that the recipient has not received, and will not claim, any payment under French programs or an international agreement concluded by the Government of the French Republic relating to Holocaust deportation; and (iii) a declaration that the recipient has not received any payment under any other State's compensation program or under the compensation program of any foreign institution relating specifically to Holocaust deportation.

Article 6

1. The Government of the United States of America shall distribute the sum referred to in Article 4(1) of this Agreement according to criteria which it shall determine unilaterally, in its sole discretion, and for which it shall be solely responsible.
2. Notwithstanding the preceding paragraph:
 - a. In developing criteria for distributing the sum referred to in Article 4(1), the United States shall consider the objectives of this Agreement set out in Article 2.
 - b. Any Holocaust deportation claim of a person within the scope of Articles 3(1), 3(2), 3(3), or 3(4) of this Agreement is not eligible for compensation under this Agreement, and the United States of America, upon determining that a claim comes within the scope of Articles 3(1), 3(2), 3(3), or 3(4), shall declare inadmissible and reject any such claim.
 - c. In determining whether a claim comes within the scope of Article 3(1), for administration of the distribution, the United States of America shall rely on the sworn statement of nationality appearing in the opening paragraph of the writing appearing as the Annex to this Agreement. In determining whether a claim comes within the scope of Article 3(2), 3(3), or 3(4), for administration of the distribution, the United States shall rely on the sworn representations numbered 5 and 6 in the writing appearing as the Annex to this Agreement, as well as on any relevant information obtained under Article 6(6) of this Agreement.
3. The Government of the United States of America or an entity designated by the Government of the United States of America shall have exclusive competence for distribution of the sum referred to in Article 4(1) of this Agreement, and the Government of the French Republic shall have no rights related to such distribution.
4. The Government of the United States of America shall take reasonable steps to provide sufficient notice about the distribution of funds under this Agreement to persons who

may qualify under the criteria determined by the Government of the United States of America pursuant to Article 6(1) of this Agreement.

5. In accordance with applicable domestic procedures of the United States of America, the Government of the United States of America shall provide an appropriate period of time for persons to submit a claim for compensation under this Agreement.
6. Subject to their respective applicable laws, the Parties shall exchange information helpful to implementation of this Agreement, including information required to ensure that no claimant receives an inadmissible payment pursuant to Article 6(2)(b) of this Agreement.
7. At the request of the Government of the French Republic, the Government of the United States of America shall each year provide a report on the implementation of this Agreement which shall include, at a minimum, statistical data related to payments and categories of beneficiaries. This obligation shall expire one year following the date on which the United States completes the distribution of the sum referred to in Article 4(1) of this Agreement as provided for in Article 6(1) of this Agreement.

Article 7

The Annex attached hereto forms an integral part of this Agreement.

Article 8

Any dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the Parties.

Article 9

Each Party shall notify the other of completion of the national procedures required in order for this Agreement to enter into force, which shall occur on the first day of the second month following the day on which the later notification is received. The Parties recognize that, upon entry into force, this Agreement imposes binding international obligations.

Done at Washington, D.C., this 8th day of December, 2014, in duplicate, in the English and French languages, both texts being equally authentic.

* * * *

2. U.S. Statement of Interest in Pending Litigation

Article 5(2) of the 2014 U.S.-France Agreement creates an international obligation for the United States to secure the termination of U.S. litigation against France concerning any Holocaust deportation claim. However, that provision leaves the means by which termination would be effected to the discretion of the United States, and it requires the Government of France to assist in any such termination "if need be." As the defendant in such a lawsuit and consistent with the Foreign Sovereign Immunities Act, France would first assert its sovereign immunity by asking the trial court to dismiss the suit. At

that point, the United States may then support the request for dismissal with a filing that explains the United States' interest in the litigation.

The United States advocated for dismissal of Holocaust deportation claims in the U.S. District Court for Northern Illinois in favor of the compensation program established under the 2014 U.S.-France Agreement and the program overseen by the French Commission for the Compensation of the Victims of Acts of Despoilment Committed Pursuant to Anti-Semitic Laws in Force During the Occupation (known by its French acronym "CIVS"). The U.S. statement of interest in this case, *Scalin et al. v. SNCF*, No. 15-cv-3362 (N.D. Ill.), is excerpted below (with footnotes omitted) and available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

D. The 2014 Executive Agreement

The United States recently reaffirmed its support for French efforts to compensate Holocaust victims and their families, including the specific efforts to address wrongs suffered in connection with the deportations from France. In December 2014, the United States and France signed an Executive Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are not Covered by French Programs ("2014 Executive Agreement," attached as Ex. B) designed to expand upon the French pension program providing compensation to surviving Holocaust deportees and surviving spouses of deportees, but which was available only to French nationals and nationals of countries with relevant international agreements with France. Pursuant to the 2014 Executive Agreement, France has provided the United States with a \$60 million lump-sum payment to administer a program to cover U.S. citizens and other foreign nationals who are not eligible to receive compensation under the French pension program. *Id.* at art. 4(1).

The 2014 Executive Agreement specifically notes that France has instituted "extensive measures to restore the property of and to provide compensation for" Holocaust victims, including "a pension program designed to address the wrongs suffered by Holocaust victims deported from France and a specific program for orphans." *Id.* at Preamble. It also recognizes that "the Government of the French Republic remains committed to providing compensation for the wrongs suffered by Holocaust victims deported from France through such measures to individuals who are eligible under French programs." *Id.* The Agreement further reflects the two nations' shared desire to provide compensation for victims and their families in "an amicable, extra-judicial and non-contentious manner" and to secure "an enduring legal peace." *Id.* It recognizes that "France, having agreed to provide fair and equitable compensation to [certain Holocaust deportation victims] under this Agreement, should not be asked or expected to satisfy further claims in connection with deportations from France during the Second World War before any court or other body of the United States of America or elsewhere," and it notes "the Parties' intent that this Agreement should, to the greatest extent possible, secure for France an enduring legal peace regarding any claims or initiatives related to the deportation of Holocaust victims from France." *Id.*

The objectives and obligations set forth in the 2014 Executive Agreement underscore the continuing commitment of France to provide compensation for and resolve Holocaust-related claims, the United States' interest in seeking a resolution of such claims outside of judicial proceedings in the United States, as well as the recognition by both countries that the CIVS, the French deportation compensation programs, and the program for Americans created by the Agreement are the exclusive mechanisms through which Holocaust deportation claims against France can best be resolved.

E. Prior litigation against SNCF in U.S. courts

This is not the first lawsuit against SNCF in U.S. courts based on its conduct in deporting Holocaust victims from France during World War II. In 2006, a group of Holocaust survivors and heirs, including nationals of the United States, France, and other countries, filed suit on behalf of themselves and a putative class against France, SNCF, and a French national bank known as the Caisse des Dépôts et Consignations (CDC). See *Freund v. Repub. of France*, (S.D.N.Y. 06-cv-1637). The Freund suit focused its claims on alleged takings of personal property from individuals while in holding or transit camps and during the deportations. Plaintiffs alleged that confiscated property had been sold and that all of the proceeds from such sales were held by the CDC, and plaintiffs asserted that the court had subject matter jurisdiction under the [Foreign Sovereign Immunity Act's or] FSIA's "takings" exception to immunity, 28 U.S.C. 1605(a)(3). *Freund v. Repub. of France*, (S.D.N.Y. 06-cv-1637), Compl. ¶¶ 9, 20, 22, 57. The district court dismissed the case for lack of jurisdiction under the FSIA and found that, "even if jurisdiction were proper, the case presents serious justiciability issues that make abstention appropriate." *Freund v. Repub. of France*, 592 F. Supp. 2d 540, 545 (S.D.N.Y. 2008). ... The court further explained that, even if it had jurisdiction, abstention would be appropriate based on principles of international comity, because eligible plaintiffs had an adequate and alternative forum in France through the CIVS and exceptional circumstances were present warranting abstention. *Id.* at 579-81. The Second Circuit affirmed this dismissal on sovereign immunity grounds, noting that the complaint contained "no specific allegation that SNCF itself currently possesses the stolen property or any derivative property," and in fact "the complaint itself runs counter to the possibility that the stolen property (or any derivative property) remains lodged with SNCF," because it alleged that CDC, not SNCF, received funds from sales and auctions of the property in question. *Freund v. Société Nationale des Chemins de Fer Français*, 391 F. App'x 939, 941 (2d Cir. 2010).

F. The instant litigation

The instant action before the Court, like the Freund action, asserts claims against SNCF for alleged takings of personal property from deportees during World War II. ...

DISCUSSION

The United States supports dismissal of this action on four bases: (A) forum non conveniens grounds, (B) principles of international comity, (C) failure to exhaust domestic remedies, and (D) lack of subject matter jurisdiction under the FSIA. In the judgment of the United States, each basis constitutes an independent and valid justification for dismissing the present lawsuit.

A. The United States supports dismissal of Plaintiffs' claims based on *forum non conveniens* grounds because the CIVS constitutes an available alternative forum

Plaintiffs have available to them an alternative forum in which to adjudicate their claims, and the public and private interests in their claims weigh in favor of utilizing that forum. For this

reason, the United States supports dismissal of Plaintiffs' claims on *forum non conveniens* grounds. A district court has discretion to dismiss a case on these grounds where an alternative forum has jurisdiction to hear the case, and where the court "determines that there are strong reasons for believing [the case] should be litigated in the courts of another, normally a foreign, jurisdiction." *Fischer v. Magyar*, 777 F.3d 847, 852 (7th Cir. 2015), cert denied sub nom *Fischer v. Magyar Ilamyasutak Z.R.T.*, 135 S. Ct. 2817 (2015) (citation omitted). In undertaking this analysis, courts consider factors pertaining to the private interests of the litigants, such as the ease of access to sources of proof, the availability and costs of obtaining witnesses, and "all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981). Courts also consider factors related to the public interest, including "administrative difficulties flowing from court congestion," the "local interest in having localized controversies decided at home," and "the avoidance of unnecessary problems in conflict of laws or in the application of foreign law." *Id.* The focus of the inquiry "is the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." *Fischer*, 777 F.3d at 866. Where an alternative forum would have jurisdiction over the case, the district court may dismiss on *forum non conveniens* grounds "if trial in the plaintiff's chosen forum would be more oppressive to the defendant than it would be convenient to the plaintiff or if the forum otherwise creates administrative and legal problems that render it inappropriate." *Id.* (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.*, 549 U.S. 422, 429 (2007)).

Although a defendant invoking *forum non conveniens* ordinarily "bears a heavy burden in opposing" a plaintiff's chosen forum, that burden "applies with less force" where the plaintiff's choice is not his or her home forum. ...

The CIVS program created by the French Government constitutes an adequate forum for the Plaintiffs to adjudicate the claims they have asserted in this litigation. Claims brought in the CIVS are evaluated under relaxed standards of proof and paid expeditiously. See Eizenstat Decl. ¶ 20. Claimants are permitted to have representatives assist them, and are also assisted by the French Government if they live outside France and by victims' organizations. *Id.* ¶¶ 19-20. Claimants are also entitled to appeal adverse decisions. *Id.* ¶ 22. In addition, the CIVS issues regular public reports as part of its commitment to operate in a transparent manner. *Id.* ¶ 23. The CIVS has thus been able to make speedy, dignified payments to many deserving victims and is designed to provide comprehensive relief to a broader class of victims than would be possible in United States judicial proceedings. *Id.* ¶ 31. For all of these reasons, the CIVS provides Holocaust victims and their families, such as the Plaintiffs here, with an adequate remedy for takings claims brought against SNCF. See *Freund*, 592 F. Supp. 2d at 579-80.

The CIVS, moreover, constitutes an available forum for Plaintiffs' claims because it "permits eligible Plaintiffs who were victimized by French anti-Semitic legislation to file claims relating to material spoliations based on actions by SNCF." See *id.* at 580. Moreover, CIVS Chairman Michel Jeannoutot has clearly represented that the CIVS will exercise jurisdiction over the claims brought by Plaintiffs in this lawsuit, stating that "if items of the relatives of the [P]laintiffs were seized during the boarding of deportation trains or on these trains in French territory, the CIVS is willing and competent to entertain these claims," including claims pertaining to "spoliations during arrests, transfers and internment," and will "recommend compensation to which the claimant may be entitled." Supp. Decl. of Michel Jeannoutot, ECF No. 56-1, ¶ 10. Such representations are sufficient to establish the CIVS as an available alternative forum here. See *Freund*, 592 F. Supp. 2d at 580 (relying on representations from

CIVS Chairman to conclude that the CIVS is available to hear spoliation claims against SNCF). In these circumstances, the commitment of France to process the very claims at issue in this case supports dismissal on *forum non conveniens* grounds.

The public and private interests in this case also weigh in favor of Plaintiffs' adjudicating their claims in the CIVS. With respect to the private interest, the conduct that forms the basis of Plaintiffs' claims occurred overseas, and the majority of the evidence and witnesses is thus also likely to be located abroad. See *Fischer*, 777 F.3d at 870 (concluding that private interest weighed in favor of adjudicating claims in Hungary based in part on the fact that "Hungary is where much of the evidence and surviving witnesses are located" (citation omitted)); *Freund*, 592 F. Supp. 2d at 581 (noting the "undeniably strong connection" between claims against SNCF and France). SNCF is a French-owned railway, and two of the three named plaintiffs are citizens and residents of France; as French citizens, their preference to litigate in the United States is entitled to less weight. See *Sinochem*, 549 U.S. at 425. As for the public interest, France "has invested a substantial amount of time, efforts, and money in the CIVS process and looks to that system as the exclusive means of adjudicating Holocaust-related claims." *Freund*, 592 F. Supp. 2d at 580-81 (further noting that "the French government has made it clear that it believes France should be the sole forum for the adjudication of spoliation claims [brought against SNCF]"). More recently, France affirmed that it "remains committed to providing compensation for the wrongs suffered by Holocaust victims deported from France through such measures to individuals who are eligible under French programs." See 2014 Executive Agreement at Preamble. As set forth above, the United States consistently has supported France's efforts to provide a redress process and compensation for victims in a manner that serves the vital interest of compensating Holocaust victims more quickly and efficiently than the litigation process. See Eizenstat Decl. ¶¶ 36, 38. Given the weight of both the public and private interests in favor of adjudicating Plaintiffs' claims in France, dismissal of this case based on *forum non conveniens* grounds is warranted.

B. Principles of international comity support dismissal of Plaintiffs' suit

Similar considerations militate in favor of dismissal based on principles of international comity. "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." *Mujica v. AirScan Inc.*, 771 F.3d 580, 597 (9th Cir. 2014) (citation omitted). International comity seeks to maintain our relations with foreign governments by discouraging a U.S. court from second guessing a foreign government's judicial or administrative resolution of a dispute, or by otherwise sitting in judgment of the official acts of a foreign government. See generally *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). As such, comity "may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *Mujica*, 771 F.3d at 599 (citation omitted); see also *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) (describing comity as "an abstention doctrine: A federal court has jurisdiction but defers to the judgment of the alternative forum").

Comity principles may be applied prospectively where, as here, there is no parallel action pending in the foreign state but the interests of the United States, the foreign government, and the international community all weigh in favor of U.S. courts abstaining from exercising jurisdiction. See *Ungaro-Benages*, 379 F.3d at 1238. In so doing, "courts evaluate several factors, including

the strength of the United States' interest in using a foreign forum, the strength of the foreign government's interests, and the adequacy of the alternative forum." *Id.* Multiple courts have relied on comity to dismiss Holocaust-era claims brought against foreign sovereigns in U.S. courts, including the similar claims advanced against SNCF in *Freund*. See, e.g., *Ungaro-Benages*, 379 F.3d at 1238-41 (affirming dismissal of Holocaust-related expropriation claims against German banks in light of the United States and Germany's shared interest in having claims resolved using claims process established by the two countries via international agreement); *Freund*, 592 F. Supp. 2d at 580-82 (concluding that, for spoliation claims brought against SNCF, "the circumstances of this case justify abstention based on comity principles" and having plaintiffs pursue their domestic remedies in France).

Principles of comity similarly favor dismissal of Plaintiffs' claims in this case. For the reasons discussed in the preceding section, the United States has determined that the CIVS is an adequate alternative forum in which Plaintiffs should bring their claims. See *Ungaro-Benages*, 379 F.3d at 1238-39 ("Our determination of the adequacy of the alternative forum is informed by *forum non conveniens* analysis."). The interests of the United States and France also weigh in favor of dismissal. As a general matter, the United States consistently has maintained "that foreign courts generally should resolve disputes arising in foreign countries, where such courts reasonably have jurisdiction and are capable of resolving them fairly." *Mujica*, 771 F.3d at 609 (citation and internal brackets omitted). More specifically, the United States consistently has supported French efforts to establish a comprehensive system of broad-ranging administrative fora, including the CIVS, in which to adjudicate the claims of Holocaust victims and their families. And most recently, the 2014 Executive Agreement entered into by France and the United States further demonstrates the countries' intent to secure an "enduring legal peace" for claims related to the deportation of Holocaust victims from France. See 2014 Executive Agreement, at Preamble. In that document, the French Republic agreed to pay the United States \$60 million, which the United States would use to provide compensation to certain Holocaust victims "not covered" by existing French programs. See 2014 Executive Agreement, at art. 4(2), (3). The French Republic also expressed its continued "commit[ment] to provid[e] compensation for the wrongs suffered by Holocaust victims deported from France through [administrative] measures to individuals who are eligible under French programs." *Id.* at Preamble. The 2014 Executive Agreement thus reflects France's willingness to consider claims such as those asserted in this case in the CIVS and the United States and France's joint understanding that parties who are eligible to assert claims through programs established by France should seek relief in the French administrative fora rather than in U.S. courts.

The United States' interest in having Plaintiffs avail themselves of the available administrative forum is especially strong in this case, where all or most of the parties to the dispute are French and the conduct giving rise to the claim occurred in France. See *Mujica*, 771 F.3d at 603 (considering the location of the conduct in question, the nationality of the parties, and the foreign policy interests of the United States as part of the comity analysis). Accordingly, comity supports requiring Plaintiffs to pursue their claims in the CIVS, which was established by the French government, with the support of the United States, "to address exactly these types of claims from the Nazi era." See *Ungaro-Benages*, 379 F.3d at 1240-41.

C. Plaintiffs should be required to exhaust the remedies available to them in France

For similar reasons, Plaintiffs should be required to pursue the remedies available to them in France before proceeding with litigation in U.S. courts. Although the FSIA itself does not require exhaustion, a district court retains the authority to require plaintiffs to exhaust their

domestic remedies as a prudential matter. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (observing that exhaustion of domestic remedies, including pursuing claims in international claims tribunals, is one principle “limiting the availability of relief in the federal courts for violations of customary international law,” which should be considered “in an appropriate case”). Indeed, “international law favors giving a state accused of taking property in violation of international law an opportunity to redress by its own means, within the framework of its own legal system before the same alleged taking may be aired in foreign courts.” *Fischer*, 777 F.3d at 855. Accordingly, “[s]o long as [P]laintiffs might get a fair shake in a domestic forum, international law expects [P]laintiffs at least to attempt to seek a remedy there first.” *Id.* at 858.

Plaintiffs have not pursued the claims at issue in this case in the CIVS, which the French Government has made clear is an available forum for adjudication of their takings claims, as noted above. Nor have Plaintiffs “show[n] convincingly that such remedies are clearly a sham or inadequate or that their application is unreasonably prolonged.” See *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 681 (7th Cir. 2012). Instead, it has been established that the CIVS would exercise jurisdiction over Plaintiffs’ claims if they were brought in that forum. See Supp. Jeannoutot Decl. ¶ 10. Given the United States’ longstanding and recently renewed support for resolving Holocaust-era claims involving France exclusively through the existing mechanisms described above, France “should first have the opportunity to address [Plaintiffs’ claims], by its own means and under its own legal system, before a U.S. court steps in to resolve claims against a part of the [French] national government for these actions taken in [France] so long ago.” See *Abelesz*, 692 F.3d at 682.

D. The takings exception to the FSIA is not a basis for jurisdiction in this case

Dismissal is also warranted for lack of subject matter jurisdiction under the FSIA. That statute provides the sole and exclusive framework for obtaining and enforcing judgments against a foreign state in U.S. courts. *Argentine Repub. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). Under the FSIA, a foreign sovereign and its agencies and instrumentalities are immune from suit in the United States unless a specific statutory exception applies. 28 U.S.C. § 1604; *Samantar v. Yousuf*, 560 U.S. 305, 313-14 (2010).

Plaintiffs contend that the Court has jurisdiction over this case because SNCF is not immune under the takings exception in the statute. That exception states that a foreign state, or its agencies or instrumentalities, will not enjoy immunity where

rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3). In other words, “the expropriation exception defeats sovereign immunity where (1) rights in property are in issue; (2) the property was taken; (3) the taking was in violation of international law; and (4) at least one of the two nexus requirements is satisfied.” *Abelesz*, 692 F.3d at 671 (citing *Zappia Middle E. Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000)).

In this case, Plaintiffs have failed to establish the fourth element of the exception, the nexus requirement. The FSIA sets forth two possible nexus requirements: (1) that the taken “property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state,” or (2) that the taken “property or property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.” 28 U.S.C. § 1605(a)(3). Plaintiffs here have not alleged that property taken from the deportees, or any property exchanged for that property, is present in the United States, so only the second nexus requirement is at issue. Yet Plaintiffs have not properly plead that requirement, as they have failed to properly allege that they or their family members had specific property that was taken by government authorities and that SNCF still owns or operates any such property or property exchanged for such property.

While the Seventh Circuit has taken the position that the pleading standard for the elements of the takings exception is not “demanding,” it has made clear that a complaint asserting such claims, which are analogous to claims for conversion of property, must allege the date and place of the conversion as well as a description of the property. See *Abelesz*, 692 F.3d at 687 (describing § 1605(a)(3) pleading standard as requiring an allegation that “[o]n date, at place, the defendant converted to the defendant’s own use property owned by the plaintiff. The property consisted of describe.” (quoting Form 15 from the Federal Rules of Civil Procedure)); see also *Crist v. Repub. of Turkey*, 995 F. Supp. 5, 11 (D.D.C. 1998) (holding that a complaint must include allegations about “the location and description of the allegedly dispossessed property” in order to satisfy § 1605(a)(3)). The complaint must also contain an “allegation of the value of the property.” *Id.* Here, Plaintiffs’ allegations fall short of meeting this standard. Plaintiffs define “property” to mean “any and all personal property, including cash, securities, silver, gold, jewelry, artwork, musical instruments, clothing, and equipment that was illegally, improperly, and coercively taken from the ownership or control of an individual during [a] [d]eportation.” Compl. ¶ 3. Plaintiffs also make categorical assertions about all Holocaust deportees, alleging that, in general, SNCF confiscated their property and either converted it for the railway’s own benefit or “turned it over to the Nazis in exchange for other [p]roperty.” *Id.* ¶ 10.

Here, Plaintiffs make no allegations about the property that was purportedly taken from their family members by governmental authorities. The most specific allegation is that they “believe” that their relatives, like all deportees, had property with them when they boarded the train and that such property was taken. ... But while these allegations may be based on sincerely held beliefs, the pleading standard for purposes of a takings claim in this Court requires more, including information about the location and date of the alleged takings, a description of what property was purportedly taken from Plaintiffs’ relatives, and an estimate of the value of the property. See *Abelesz*, 692 F.3d at 687. Absent this information about the property that was allegedly taken in the first instance, it is not possible to conclude that SNCF still retains such property or any property exchanged for such property. This being the case, Plaintiffs have not met the pleading standard for the § 1605(a)(3) nexus requirement.

* * * *

D. NICARAGUA CLAIMS

On August 5, 2015, the United States government announced that it had lifted certain statutory restrictions on bilateral assistance and support for international loans to Nicaragua that had been imposed due to unresolved property claims against the government of Nicaragua. See press release on the Spanish language website of the U.S. Embassy in Nicaragua, available at http://spanish.nicaragua.usembassy.gov/pr_150805_restricciones_seccion_527.html. Section 527 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, prohibits U.S. assistance and support to any country in which U.S. citizens have not been provided an adequate remedy for outstanding claims against the government for confiscated property. The statutory prohibition on assistance and support had been applied to Nicaragua since the law's adoption, but Nicaragua had received assistance and support through an annual waiver exercised by the Secretary of State through a delegation of authority from the President.

Section 527 also provided for a registration period through August 2005 when property claims could be registered with the U.S. Embassy. A total of 3,166 claims were registered at the U.S. Embassy. Between July 2014 and July 2015, 30 property claims belonging to 16 U.S. citizens were resolved, including the remaining claims registered at the U.S. Embassy that fell under Section 527.

The United States government congratulated the Nicaraguan government on its diligence in settling remaining claims in 2015. Nicaragua will no longer require an annual waiver under Section 527 in order to receive U.S. government assistance and support.

E. IRAQ CLAIMS

1. Claims Under the October 7, 2014 Referral

The Foreign Claims Settlement Commission ("FCSC") has received 269 claims under the 2014 referral: 268 in Category A and 1 in Category C. No decisions have yet been issued. See <http://www.justice.gov/fcsc/current-programs>. For background on the 2014 referral, see *Digest 2014* at 315-16.

2. Claims Under the November 14, 2012 Referral

The FCSC received 28 claims under the 2012 referral and finished issuing final decisions on all claims in 2015. The FCSC has awarded \$14,500,000 under this referral. The FCSC completed the claims adjudication program under this referral in early 2016. See <http://www.justice.gov/fcsc/current-programs> and <https://www.justice.gov/fcsc/final-opinions-and-orders-5#s3>. Some of the key Commission decisions on the Iraq claims under the 2012 referral are discussed below.

a. Claim No. IRQ-I-023, Decision No. IRQ-I-021 (2015) (Final Decision)

Claim No. IRQ-I-023 alleged sexual assault of the claimant by Iraqi officials, and was originally denied for failure to satisfy the burden of proof. On objection, both the claimant and his brother provided live testimony, and the Commission ultimately withdrew its denial and issued an award. The final decision describes the lower evidentiary burden in sexual assault claims, and cites several international law sources that discuss the reluctance of sexual assault and rape victims to report or discuss their experience. The original proposed decision was reversed largely based on the supplementation of live testimony (with opportunity to cross-examine) to support the written declarations that had previously been the only evidence in support of the claim. Excerpts follow from the final decision (with footnotes omitted).

* * * *

Sexual Assault Analysis: With this new evidence, Claimant has met his burden of proving the factual allegations of his claim. As the Commission has previously noted, claims of sexual assault present unique evidentiary problems. See Claim No. IRQ-I-009, Decision No. IRQ-I-004, at 10-11 (Proposed Decision) (2014). For one, the victim will often be the only witness to the incident other than the perpetrator(s). *Y. v. Slovenia*, App. No. 41107/10 (Eur. Ct. H.R. May 28, 2015) (Yudkivska, J., partly dissenting), available at <http://hudoc.echr.coe.int/eng?i=001-154728>. In many cases, there may be no contemporaneous medical evidence, either because the victim was too ashamed to seek medical treatment or, as was the case during the Iraqi occupation of Kuwait, because medical treatment was not available in the immediate aftermath of the assault. See U.N. Comp. Comm’n Governing Council, *Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category “B” Claims)* (UNCC Serious Personal Injury or Death Report), at 35, 37, U.N. Doc. S/AC.26/1994/1 (May 26, 1994). Not surprisingly, victims of sexual assault are often very reluctant to share the details of their experience. *Report of the Panel of Experts Appointed to Assist the United Nations Compensation Commission in Matters Concerning Compensation for Mental Pain and Anguish*, attached as Annex VI to the UNCC’s *Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individual Claims for Damages up to US\$100,000 (Category “C” Claims)* (“UNCC Mental Pain and Anguish Report”), S/AC.26/1994/3 at 262 (Dec. 21, 1994); Special Rapporteur of the Commission on Human Rights, *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation* (“Kälin Report”), ¶ 111, U.N. Doc. E/CN.4/1992/26 (Jan. 16, 1992) (by Walter Kälin); U.N. High Commissioner for Human Rights, *Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“Istanbul Protocol”), at 21, U.N. Doc. HR/P/PT/8/Rev.1 (Aug. 9, 1999). Indeed, some victims of sexual assault may not have shared their experience with their own spouse, let alone other family members. Office of the Prosecutor, Int’l Criminal Tribunal for Rwanda, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict*

Regions 22, 38, 44 (2014) (“ICTR Best Practices Manual”); UNCC Mental Pain and Anguish Report, *supra*, at 262.

Social and cultural factors must also be considered when assessing claims of sexual assault. For instance, in some cultures or societies, discussion of sexual matters is considered taboo. See Istanbul Protocol, *supra*, para. 149; ICTR Best Practices Manual, *supra*, para. 115. In some cases, especially for males, being the victim of a sexual assault may engender severe social stigma. See ICTR Best Practices Manual, *supra*, para. 39, 114. Such individuals “may feel irredeemably stigmatized and tainted in [their] moral, religious, social or psychological integrity.” Istanbul Protocol, *supra*, para. 149.

In light of these considerations, the Commission reiterates that the “evidentiary burden for a sexual assault claim has generally been quite low.” Claim No. IRQ-I-009, *supra*, at 10. The use of a standard of evidence that relies primarily on the victim’s testimony is further justified in this program by the fact that, as the Commission has previously noted, Iraqi forces are known to have engaged in widespread rape during the occupation of Kuwait, the very period during which all of the claimants in this program were held hostage. See Claim No. IRQ-I-009, *supra*, at 11 (citing Kälin Report, *supra*, at 28-31; UNCC Serious Personal Injury or Death Report, *supra*, at 36-37); *Interim Report to the Secretary-General by the United Nations Mission Led by Mr. Abdulrahim A. Farah, Former Under-Secretary-General, Assessing the Losses of Life Incurred During the Iraqi Occupation of Kuwait, as Well as Iraqi Practices Against the Civilian Population in Kuwait*, at 8 (1991), transmitted by Letter from the Secretary-General, U.N. Doc. S/22536 (Apr. 29, 1991). Although Claimant was not in occupied Kuwait and we do not know whether the Iraqi guards in the hospital were connected in any way with the Iraqi occupying forces, the facts Claimant and his brother recount here are consistent with the well-documented history of Saddam Hussein’s regime persecuting Shiite Muslims, a group to which Claimant belonged. See U.S. Dep’t of State, *Iraq – Country Report on Human Rights Practices* (Feb. 23, 2000), <http://www.state.gov/j/drl/rls/hrrpt/1999/410.htm>.

Nevertheless, in its Proposed Decision, the Commission found insufficient evidentiary support for Claimants’ allegations, noting that only two of the declarations submitted in support of the claim made reference to any sexual assault—Claimant’s Supplemental Declaration and his brother’s Declaration—and that both of these were sworn only in 2013. In this respect, the Commission noted that where a claim relies heavily on written statements, certain factors must be considered in determining how much weight to place on such statements. See Proposed Decision, *supra*, at 13-14. These include the length of time between the incident and the statement, whether the declarant is a party interested in the outcome of the proceedings or has a special relationship with the Claimant, and whether there has been an opportunity for cross-examination. *Id.* (internal citations omitted). At the time of the Proposed Decision, all of these factors weighed against the Commission relying heavily on those two declarations. For one, they were sworn 23 years after the alleged incident. *Id.* at 14. Moreover, the one declaration not from Claimant himself was from his brother, clearly a person with a special relationship to the Claimant. *Id.* Finally, at that point in the proceedings, the Commission had not subjected either declarant to any questioning. *Id.* Under these circumstances, the Commission concluded that these two declarations were insufficient to meet Claimant’s evidentiary burden.

During the oral hearing, the Commission had the opportunity to hear live testimony from both Claimant and his brother, and to subject them to direct questioning. Both witnesses provided sincere, credible testimony, and offered a detailed account of what happened to Claimant while in Iraq ([name redacted] presenting the story as told to him by his brother). The

details in these accounts were consistent with each other and were not contradicted by any of the other declarations, such as Claimant's 2004 declaration, the 2013 declaration from Claimant's wife, and the 2013 declaration from the imam. Both witnesses answered the Commission's questions during the hearing in a forthright manner. This oral testimony thus helps buttress the declarations of Claimant and his brother. *See id.* (noting that where there has been an opportunity for cross-examination, "live, compelling testimony by the claimant can do much to support a claim." (citing Claim No. LIB-I-007, Decision No. LIB-I-024 (2011) (Final Decision))).

There is also other circumstantial evidence in support of the claim that can now be viewed in light of the oral testimony. For instance, Claimant's wife stated in her declaration that Claimant returned from the hospital "in something of a state of shock" and that he "threw his clothes into the garbage and told [her] not to touch them." She stated that he "did not want to talk about anything . . . [,] had great difficulty sleeping[,] and . . . would frequently wake up to horrifying nightmares that would cause him to scream out loud." This behavior allegedly continued after they returned home, and Claimant was prescribed Xanax to calm his anxiety. [Name redacted] also indicates that Claimant refused to speak about his hostage experience or seek counseling and that he became socially withdrawn. For his part, Mr. Abidi, the imam, echoed the assertion that Claimant had become withdrawn after his experience in Iraq, and that when he counseled him in 1995, the trauma was apparent. Mr. Abidi added that when Claimant spoke about his experience in Iraq, "he did so in very general terms – stating only that he had been abused and insulted by the Iraqi authorities on account of his Shi'ite faith."

While none of these observations are conclusive proof that Claimant was raped in Iraq, they are consistent with his claim, as they provide some evidence that he suffered the shame and psychological trauma that is commonly associated with sexual assault. Such trauma may include post-traumatic stress disorder (PTSD), ICTR Best Practices Manual, *supra*, para. 69; Istanbul Protocol, *supra*, paras. 231, 277, and indeed, Claimant's physician diagnosed him with PTSD in 2007—apparently attributed to his experience in Iraq—long before the commencement of this claims program.

In adjudicating claims of sexual assault such as this, the Commission must balance the need for substantiating evidence with the understandable reluctance of victims to discuss incidents of rape or even to seek medical assistance. *Cf. Partial Award: Western Front, Aerial Bombardment and Related Claims - Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, 126 R.I.A.A. 291, 323* (Eritrea-Ethiopia Claims Commission 2005) ("It is the task of the Commission . . . to balance the obvious difficulties posed by third-party and interview testimony against the natural inclination of victims (and even witnesses) not to speak publicly about rape."). Nothing, of course, diminishes the requirement that Claimant "have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity . . . of [his] claim." 45 C.F.R. § 509.5(b) (2014). Nevertheless, the Commission concludes that, in light of the lower evidentiary hurdle for sexual assault claims, and considering the fact that Claimant has presented compelling and credible testimonial evidence—evidence that the Commission was able to test through direct questioning— Claimant has proven to the Commission's satisfaction that he was the victim of a sexual assault.

Claimant has therefore demonstrated that he suffered a "serious personal injury" that was "knowingly inflicted" by Iraq. The Commission further finds that given the nature of the specific acts committed by Iraq giving rise to Claimant's injury, the severity of his serious personal injury constitutes a "special circumstance warranting additional compensation." *See* Claim No. IRQ-I-003, Decision No. IRQ-I-006 (Proposed Decision), at 11.

* * * *

b. Claim No. IRQ-I-024, Decision No. IRQ-I-012 (2015) (Final Decision)

Claim No. IRQ-I-024 alleged mock execution. Claimant testified that she, along with other hostages, was lined up at a bridge and held at gunpoint. The Final Decision, excerpted below, affirms the proposed decision denying the claim, discussing the standard for mock executions and concluding that claimant had not, in fact, been the victim of such an act.

* * * *

To be eligible for compensation under the 2012 Referral, the claimant’s injury must have arisen from one of the four acts specifically mentioned in the Referral—*i.e.*, sexual assault, coercive interrogation, mock execution, or aggravated physical assault—or from some other discrete act, separate from the hostage experience itself, that is of a similar type or that rises to a similar level of brutality or cruelty as the four enumerated acts. Proposed Decision, *supra*, at 6 (quoting Claim No. IRQ-I-005, Decision No. IRQ-I-001 (2014) at 7 (Proposed Decision)). The Proposed Decision reviewed relevant cases before international tribunals and concluded that a “mock execution” was defined as “a simulated or feigned execution whereby a perpetrator commits an act or acts that sufficiently mimic an actual execution so as to trick or deceive the victim into holding a reasonable (but ultimately false) belief that his or her death is imminent.” *Id.* at 13 (internal citation omitted).

Claimant argues that the soldiers’ actions at the bridge satisfy the Commission’s definition of a mock execution, or were at least comparable in brutality to a mock execution. Claimant points in particular to the following: the hostages’ Arabic-speaking U.S. embassy escort was no longer with them; the Iraqi officer at the bridge “was strikingly more menacing in his appearance and conduct than the soldiers at other checkpoints,” calling to mind a Gestapo agent, and “shouted threateningly in Arabic”; the soldiers “brandished automatic weapons hanging at their waists . . . and waved, gestured, and pointed [them] to direct and control the hostages’ movement[.]”; the commands for the hostages to leave their vehicles and line up at the bridge “mimicked the assembling of victims to be executed by a firing squad[.]” as did the demand that the hostages remain still and not move; and the soldiers were also lined up across from the line of hostages, such that Claimant argues they “were positioned to act as [a] firing squad” Claimant contends that there was no apparent reason for this behavior other than to act out a mock execution. She argues that this is further evidenced by the soldiers’ act of laughing at the hostages when they returned to their cars and insisting they say “thank you” as they drove away.

We turn first to the question of whether these alleged facts, viewed in context, constitute a “mock execution,” as that term is used in international law and the 2012 Referral. As noted above, a mock execution must “trick or deceive the victim into holding a reasonable (but ultimately false) belief that his or her death is imminent,” and this feeling must be precipitated by an “act or acts that sufficiently mimic an actual execution” This definition contains both

subjective and objective elements. Claimant must establish both that she believed her death was imminent, the subjective aspect of the definition, and that, from an objective standpoint, the acts of the Iraqi officials “sufficiently mimic an actual execution” so as to reasonably instill that belief. *Cf., e.g., Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment, ¶ 56 (Int’l Crim. Trib. for the Former Yugoslavia June 25, 1999) (“In the prosecution of an accused for a criminal offence, the subjective element must be tempered by objective factors; otherwise, unfairness to the accused would result because his/her culpability would depend not on the gravity of the act but wholly on the sensitivity of the victim.”); *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 162 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002) (in applying “reasonable person” standard to determine when an act constitutes a crime, Trial Chamber properly analyzed the victim’s “purely subjective evaluation of the act” as well as “objective criteria”).

First, we find that Claimant actually and sincerely believed that she was about to be executed under the circumstances, thereby satisfying the subjective aspect of the definition. ...

The crucial question, however, involves the objective aspect of the definition: did the soldiers’ actions at the bridge, viewed together and in context, objectively manifest the type of “concrete . . . steps to act out an execution” that are required for a finding of mock execution? *See Proposed Decision, supra*, at 14. The Proposed Decision listed several examples of such conduct: the “cocking of a pistol, the firing of blanks, the placement of the gun directly on the victim’s body, or (in the case of a mock lynching) the placing of a rope around the victim’s neck.” *Id.* at 13. These types of concrete acts are what distinguish a mock execution from a *threat* of execution, whether explicit or implicit.

Even assuming all the facts as Claimant describes them (facts that, we should emphasize, Claimant very credibly recounted), they do not make out a “mock execution,” as that term has been used in international law and as the State Department used it in the 2012 Referral: the Iraqi officials simply did not perform a concrete act or a series of concrete acts that sufficiently mimicked an actual execution. In the context of this Iraq Claims Program, where the claimants were all hostages, the phrase “mock execution” cannot encompass all conduct that caused a victim to fear that she is about to be killed. All of the claimants in this program, including this Claimant, have already received compensation from the State Department for having been held hostage, and that compensation encompassed all of the “physical, mental, and emotional injuries generally associated with” having been held hostage or unlawfully detained. The threat that a hostage could be killed instantly and at any time is a fear generally associated with being held hostage, even if not every American hostage in Iraq at the time necessarily experienced such a threat. The presence of Iraqi officials with deadly weapons in post- invasion Kuwait and Iraq was ubiquitous. Under such circumstances, a definition of “mock execution” requiring merely that the victim reasonably fear that she could be killed would result in the finding of innumerable “mock executions.” Stated differently, in a program aimed at providing *additional* compensation for *some* claimants when all eligible claimants were hostages of an authoritarian regime in a time of war and when Iraqi officials with deadly weapons were ubiquitous, a definition of “mock execution” that included all serious threats of death would sweep too broadly.

Claimant argues that the Commission should adopt a flexible definition of the term “mock execution” that would encompass the acts committed by the Iraqi soldiers at the Turkish border. Claimant does not, however, propose an alternative standard that would meaningfully distinguish instances of mock execution from the threat of death that generally accompanies being held hostage. Without such a distinction, particularly in the context of a program for

additional compensation for a subset of a group of claimants who were all hostages, a flexible standard of the sort proposed by the Claimant would introduce far too much subjectivity. Given the wide variety of circumstances in which hostages face threats of death, such an approach would be unworkable, particularly in the context of this program.

In sum, the Iraqi officials' actions at the border crossing did not constitute a "mock execution," because there was no "concrete act that mimic[ked] an actual execution" While the soldiers brandished weapons, they did not fire their guns, either with blanks or live ammunition, and the officer did not direct the soldiers to fire.

Without such actions, or some similar act or omission by the Iraqi soldiers, the circumstances Claimant describes are too similar in nature to many typical hostage-taking scenarios in which captives are held under armed guard. *See, e.g.*, Claim No. LIB-II-003, Decision No. LIB-II-016 (2011) (hostage-taking involving passengers on hijacked plane, who, among other things, were forced to hold hands up in the air while the hijackers threatened them with automatic weapons and grenades); *Finogenov v. Russia*, 2011-VI Eur. Ct. H.R. 365, 374, 377 (2011) (hostage-taking involving more than nine hundred victims held for three days under gunpoint in a booby-trapped theatre with eighteen suicide bombers positioned among the hostages, and during which several hostages were in fact killed during the rescue operation); *Wyatt v. Syrian Arab Republic*, 908 F.Supp.2d 216, 220-21 (D.D.C. 2012) (hostage-taking in which gunmen captured hostages while "yelling and screaming and pointing their weapons" at them, "pushing [them] around and roughing [them] up[,]'" and then marched them miles through the wilderness before detaining them for three weeks, a period during which the victims "feared for their lives throughout"; on one occasion, "the gunmen lined the captives up in a row and pointed guns at them as though they were going to execute them[]" so as "to prevent them from attempting to escape"); ... Regrettably, the desperate fear engendered by explicit or implicit threats of death is inherent in many hostage experiences. Claimant has already received compensation from the State Department for injuries generally associated with having been held hostage. *See* 2012 Referral, *supra*, n.3. Under these circumstances, the Commission concludes that Claimant was not subjected to a mock execution meriting additional compensation for a "serious personal injury" as that phrase is used in the 2012 Referral.

III. Act Similar in Brutality or Cruelty to Mock Execution

Claimant also argues that she is entitled to additional compensation in this program because she "suffered injuries as the result of actions comparable in brutality and cruelty to a mock execution[.]" Although this argument is intertwined with Claimant's argument that the Iraqi officials' actions constituted a mock execution *per se*, we can think of it as a distinct argument: in this program, we have held that claimants may be awarded additional compensation for injuries from acts of brutality comparable to the Referral's four enumerated acts (sexual assault, coercive interrogation, mock execution, or aggravated physical assault), even if the act was not one of those four.

In previous claims, however, we have awarded compensation for injuries caused by acts other than the Referral's four enumerated acts only when the Iraqi act was factually distinct from these four acts. For example, we awarded compensation to a claimant who suffered injuries because Iraq denied him access to vital medication. We also awarded compensation in two claims where the claimants were subjected to prolonged solitary confinement in near-total darkness and in appalling conditions, placed on a starvation diet, and forced to witness and listen to other persons being physically tortured. By contrast, we have never awarded compensation when the act in question, although factually similar to an enumerated act, does not satisfy the

definition of that act as set forth by the Commission. Such acts, by definition, are not comparable in seriousness to one of those acts, as required by the Commission’s standard: Given the Referral’s explicit listing of specific acts in the context of a program designed to provide a subset of a group of hostages “additional compensation” for “special circumstances,” this approach best comports with the Referral’s language and purpose. The Commission thus finds that Claimant’s injuries were not caused by an act “comparable in brutality and cruelty to a mock execution” and, therefore, do not qualify as “serious personal injuries,” as that term is used in the 2012 Referral.

* * * *

c. Claim No. IRQ-I-026, Decision No. IRQ-I-025 (2015) (Final Decision)

The claimant in Claim No. IRQ-I-026 received an award in the proposed decision based on her claim of sexual assault. However, she objected to the amount of the award (\$1 million), claiming her injuries were more severe than those of others who received the same amount. The Commission’s final decision includes a discussion of the degree to which it could analyze in depth the psychological harm among the various claimants in this claims program.

* * * *

We are not persuaded by Claimant’s comparative arguments. In determining compensation, our task is to determine where on the continuum from zero to \$1.5 million Claimant’s injuries fall, based on the severity of those injuries relative to all other successful claimants in this program, ... using the factors we have previously articulated, and taking into account the fact that we are making awards in this program in broad categories, *see* Claim No. IRQ-I-022, Decision No. IRQ-I-008, at 9 (2015) (Final Decision). The Proposed Decision awarded Claimant \$1 million based on the injuries she suffered as a result of the sexual assault, injuries supported by various medical records and the Commission’s own presumption of long-term emotional injury. In at least one other claim of sexual assault in this program, we made the same presumption and also awarded \$1 million. ... In contrast, the only claimants in this program to have been awarded \$1.5 million—indeed, the only claimants to have been awarded more than Claimant—all suffered weeks of subhuman conditions, repeated merciless beatings, and brutal interrogations. *See* Claim No. IRQ-I-001, Decision No. IRQ-I-005 (2014); Claim No. IRQ-I-002, Decision No. IRQ-I-007 (2014); Claim No. IRQ-I-022, *supra*; Claim No. IRQ-I-018, Decision No. IRQ-I-009 (2015). Thus, to show that she is entitled to \$1.5 million, Claimant would have to show that the injuries Iraq inflicted on her are comparable to what it inflicted on those four other claimants.

Claimant has failed to do this. Rather than compare her experience to the most seriously injured claimants in the program, Claimant focuses on others who have received \$1 million awards. She argues that the severity of her emotional injuries is greater than those of the mock-execution and other sexual-assault victims because she has been unable to pursue her career as a performing artist, causing her substantial loss of income and forcing her to live in extreme poverty: according to Claimant, she lost \$200,000 per year in income and was “unemployed for

the past 23 years and forced to spend extended periods of time living on public assistance.” Starting from that premise, she argues that the Commission should raise her award from \$1 million to \$1.5 million.

The problem with Claimant’s argument is that it calls for a fine-grained comparative assessment of the precise severity of each individual claimant’s psychological injuries. We simply cannot engage in such an inquiry in this program. As we noted in this program’s very first claim, to “do an individualized determination of how ‘serious’ every claimant’s [post-traumatic stress disorder] was” would force us to engage in “an unworkable analysis.” Claim No. IRQ-I-005, Decision No. IRQ-I-001, at 12. This concern is part of what led us to decide to make awards in this program in broad categories. *See* Claim No. IRQ-I-022, Decision No. IRQ-I-008, *supra*, at 9. Indeed, for two salient reasons, this claim illustrates exactly why it is important that we not make distinctions based on details about the severity of a claimant’s psychological injuries.

First, Claimant’s allegations raise especially difficult questions about causation, questions that are inherently difficult to assess, especially in the context of this Commission’s non-adversarial process. Claimant argues that the sexual assault led to emotional injuries that destroyed her performing career. But it is extremely difficult to know what could have caused her career to decline without extensive evidence about her career, her life, and any other possible psychological causes—evidence that would of course have to date back more than two decades. Moreover, it is difficult to know whether she could have pursued any other livelihood, whether comparably lucrative or not, without detailed evidence that this Commission simply cannot acquire. Indeed, Claimant has provided very little information about the effects of these injuries on her career in the years from 1993 to 2005 and has not submitted any evidence of treatment during that time. ...

This problem is not unique to adjudicating this particular claim. Claimant’s suggested approach to determining compensation would require the Commission to undertake this sort of impractical causation analysis in each and every claim. For instance, the Commission would have to determine how much of any given claimant’s financial losses resulted from psychological injuries due to the sexual assault, as opposed to the hostage experience in general. The Commission would also have to determine how much of a claimant’s financial losses can be attributed to the psychological effects of the sexual assault as opposed to any other factors that might affect a claimant’s professional standing. Here, one would have to consider, for example the possibility of numerous other factors that could lead to the decline of a career in a highly volatile industry. The Commission simply cannot undertake such an analysis in a way that is fair to all claimants across all professions and stations in life. In a non-adversarial setting, the most the Commission can reasonably do is to find (or to presume) that a claimant suffered severe mental and emotional injuries as a result of her sexual assault and that these injuries have undermined her ability to make a living. Moreover, even if we were inclined to inquire into the causal connection in this claim, Claimant’s evidence—including the dearth of evidence about the 12-year period from 1993 to 2005—would be insufficient to establish Iraq’s liability for all of Claimant’s mental-health troubles and career woes.

Second, this program’s humanitarian purpose would not be well-served by awarding greater compensation to individuals whose financial losses from psychological injury are greater simply by virtue of their career path and relative financial success. Indeed, such an approach, in the context of a claims program such as this, would conflict with fundamental notions of justice, and more importantly, equity, which this Commission is required to apply. An approach that awards one claimant more than another on the basis of either pre-injury income or the amount of

income said to have been lost due to psychological injury would require treating claimants who were subjected to the exact same Iraqi act differently. Under Claimant's theory, she would receive more than someone else who had been subjected to the same rape simply because she suffered a greater change in her income from the years before the rape to the years after.

She supports this theory by noting that "the extent of the impairment of the health and earning capacity of the claimant" is one of the factors the Commission is to take into account. On that point, she is correct. But, by having us determine the financial losses of each individual claimant based on his or her career and likely future earnings, Claimant's approach would have us consider not just "the extent of *impairment* of the . . . earning capacity of the claimant[,]" Claim No. IRQ-I-001, *supra*, at 21-22 (citing I Marjorie M. Whiteman, *Damages in International Law* 628 (1937) (emphasis added), but also to quantitatively assess the *actual earning capacity itself*. The extent of impairment is not the same as the extent of the actual earning capacity: assessing the former does not require different victims of the same act to receive different compensation awards based on different earnings capacities, whereas assessing the latter would.

Nothing in our previous decisions in this or in other claims programs favors such an approach. Indeed, other claims programs for personal-injury compensation for violations of international law have eschewed making distinctions of this kind, including in the context of Iraq's invasion of Kuwait, the precise situation under which Claimant brings her claim. Even if we were to conclude that she had established the facts necessary to show that the rape caused her \$200,000 in lost annual income, taking facts of this sort into account would require us to award more to her than to a low-wage rape victim. Treating victims differently when they are essentially alike from the perspective of the injury Iraq inflicted upon them would, in the context of this program, conflict with the notion of "equity," as we interpret that term in our statutory mandate.

Even if we viewed Claimant's argument as not premised on the idea that we need to do a detailed accounting of income losses but instead on the notion that the demise of her career and lengthy period of unemployment provide evidence of how great her psychological injuries were, we would not be inclined to countenance different award amounts based on different alleged levels of psychological injury from the same Iraqi act. In a non-adversarial proceeding with extraordinarily permissive rules of evidence, distinguishing between claimants on the basis of different alleged levels of psychological injury is also fraught with difficulties. In fact, these sorts of difficulties are exactly why we require claimants to prove a specific Iraqi act of sufficient brutality in order to show a "serious personal injury" in this program. *See* Claim No. IRQ-I-005, Decision No. IRQ- I-001, at 11-12 (2014) (Final Decision).

Finally, Claimant is not entitled to greater compensation because of the physical pain and suffering she endured. Again, Claimant seeks to create fine-grained distinctions in this program. In essence, Claimant argues that she suffered all the psychological harm that the mock-execution victims suffered *plus more* (i.e., the physical harm caused by the rape). But in this program, the Commission is making awards in broad categories. . . . We will thus not parse the details of the physical and emotional injuries that any given individual claimant suffered in order to determine compensation. By saying this, we are not saying that the sum total of Claimant's injuries is *identical* to those of the mock-execution victims, only that the act Iraq committed and the scope of the injuries Claimant suffered place her injuries in the same broad category as those of the mock- execution victims in this program.

Claimant has established that she was brutally raped, and as we noted in the Proposed Decision, we presume that she suffered long-term emotional harm, a presumption that her medical records and affidavits support. Except for the four claimants who were subjected to weeks of brutal interrogations, beatings, threats, and the like, Claimant's award of \$1 million is the highest in this program. To the extent that the precise gradation of Claimant's emotional and physical harm might be higher or lower than others who suffered similar attacks or might depend on Claimant's particular career choice or financial status before or after the incident, we decline to increase or decrease the award from that amount. Of course, as we have noted in other claims in this program, we recognize that no amount of money can truly "compensate" Claimant in the literal sense of that word. She was brutally raped, and we have no illusions that money can in any sense make her whole. All we conclude is that, in the context of this program, her award should be \$1 million.

* * * *

3. UN Compensation Commission

On October 28, 2015 Ambassador Pamela Hamamoto, Permanent Representative of the United States of America to the United Nations and Other International Organizations in Geneva, delivered remarks at the opening of the 80th Governing Council Session of the UN Compensation Commission ("UNCC"). For background on the UNCC, see *Digest 2013* at 249-50. As stated by Ambassador Hamamoto, the United States supported a Governing Council decision as requested by Iraq to extend the suspension of its payment obligations to the Compensation Fund until January 1, 2017, to free Iraqi resources for the crucial struggle against ISIL. Ambassador Hamamoto's remarks are excerpted below and available at <https://geneva.usmission.gov/2015/10/28/ambassador-hamamoto-uncc-a-model-for-post-conflict-reconstruction-and-reconciliation/>.

* * * *

Today's discussion will be largely driven by the difficult situation that Iraq faces. I want to say to our Iraqi colleagues: As you struggle against ISIL—our common enemy—you have the full sympathy, support, and solidarity of the United States.

In light of Iraq's extraordinarily difficult security circumstances and unusual budgetary challenges, last December this Council took the unusual step to postpone Iraq's payment requirement until January 1, 2016. At today's meeting we will decide what to do after that date.

Given the concurring views of the two parties—that is, Iraq's request for a further postponement by one additional year, and Kuwait's supportive response to that request—the United States will favor a Governing Council decision today to extend the postponement for an additional year, until January 1, 2017. This postponement would free Iraqi resources for the crucial struggle in which it is engaged.

At the same time, we believe it is imperative to have a clear plan leading to completion of the UNCC's mandate in a reasonable time, and to maintain the UNCC's positive reputation. These considerations also influence the Governing Council's decision today.

Thus, the Governing Council will continue its planning for the prompt and orderly wind-down of the UNCC. The staff level—now reduced from a high of 257 people to a minimal level of only four—indicates that this task is being addressed, as does the large volume of archiving and other concluding operations that they have completed.

While circumstances have delayed the UNCC’s anticipated completion of its task, we still hope for this agency to finish its mandate within a few years, and then to close its doors. Once this happens, we expect that the UNCC’s performance will stand as a UN success story that serves not only to discourage illegal acts of aggression, but also to showcase a positive example of post-conflict recovery and reconciliation.

* * * *

F. LIBYA CLAIMS

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 February 12, 2016, the FCSC has issued final decisions on 29 claims and proposed decisions on an additional 12 claims. It has received an additional 54 claims for which no decision has been issued. The total value of awards as of February 12, 2016 is \$32.2 million. See <http://www.justice.gov/fcsc/current-programs>. The following discussion focuses on some of the noteworthy opinions under the third Libya referral.

a. *Claim No. LIB-III-021, Decision No. LIB-III-016 (2015) (Proposed Decision)*

Claim No. LIB-III-021 was the Commission’s first decision under the “special circumstances” category of the Third Libya Referral. Claimant’s legs were blown off during a terrorist attack at Lod Airport in Tel Aviv, Israel, on May 30, 1972. The Commission’s decision on this claim establishes the standard for determining which claims are compensable under this particular referral and the criteria to be considered when determining appropriate compensation. Excerpts follow from the Commission’s proposed decision.*

* * * *

In light of the evidence detailed above, Claimant has proven that the severity of her physical injuries is a special circumstance warranting additional compensation under this claims program.

Nature and Extent of Injury: The Claimant’s injuries are horrific and were life-altering. She lost both of her legs and has been unable to walk normally since the attack, more than 40 years ago. More than just the losing of her legs, she also had to experience the terror of the moment. As a news account put it shortly after the attack, she “felt something hit her feet[,] . . . saw a grenade rolling away[,] . . . and buried her face in her arms as the grenade went off.” She

* Editor’s Note: the claimant objected to the amount awarded, and in 2016, the Commission issued a final decision raising the compensation from \$4 million to \$5 million.

further stated, “‘I never lost consciousness.’ . . . ‘When I looked, I had no feet.’” She also had to witness the carnage and violence of the attack around her, as friends and fellow passengers suffered gruesome injuries right in front of her eyes, some dying on the spot.

Impact on Claimant’s Major Life Functioning and Activities: Claimant’s physical injuries have also had a substantial impact on her ability to perform major life functions. For one, her mobility is severely impaired. She lost both of her legs and has had to use a cane or a wheelchair to move about for the last four decades. At times, the pain of wearing the prostheses becomes so much that she simply hobbles around on her knees while at home. Moreover, she has never been able to find employment and had to drop out of university because it lacked facilities to accommodate her disability. In short, the terrorist attack has permanently disabled Claimant, severely limiting her freedom of movement and preventing her from undertaking numerous major life functions and activities.

Disfigurement: Claimant’s injuries have left her terribly disfigured. She lost both legs below the knees. Moreover, she has extensive scarring. These injuries can never be completely hidden: she wears prostheses on both legs, walks with a limp, and requires a cane or wheelchair. Considering all these factors together, the Commission concludes that the severity of Claimant’s injuries rises to the level of a special circumstance warranting additional compensation under Category D. Accordingly, she is entitled to compensation as set forth below.

* * * *

Having concluded that the present claim is compensable, the Commission must next determine the appropriate amount of compensation. As the Commission has previously stated in this program, assessing the value of intangible, non-economic damages is particularly difficult and cannot be done using a precise, mathematical formula. Assessing the *relative* value of such claims, as Category D of the November 2013 Referral contemplates, is almost as difficult. Moreover, neither Claimant nor the Commission’s independent research has uncovered any relevant international-law precedent, except for the Commission’s own decisions under Category D of the 2009 Referral program.

Those 2009 Referral decisions do, however, apply with equal force here: For one, the relevant language from Category D of the November 2013 Referral (at issue in this claim) is identical to that of Category D of the January 2009 Referral; moreover, both programs arise out of the same Claims Settlement Agreement. It thus makes sense to treat claims for additional compensation for especially severe physical injuries the same way in both programs.

Under Category D of the 2009 Referral, the Commission held that,

in determining the appropriate level of compensation . . . , it will consider, in addition to the recommendation contained in the January Referral for Category D, such factors as the severity of the initial injury, the number of days claimant was hospitalized as a result of his or her physical injuries (including all relevant periods of hospitalization in the years since the incident), the number and type of any subsequent surgical procedures, the degree of permanent impairment, taking into account any disability ratings, if available, and the nature and extent of disfigurement to the claimant’s outward appearance.

See Claim No. LIB-II-118, Decision No. LIB-II-152, at 14. The Commission adopts this same standard of compensation for claims under Category D of the November 2013 Referral.

Severity of Initial Injury: Claimant's physical injuries are among the worst in any of the Commission's Libya claims programs. Her legs were blown off by exploding grenades in the midst of horrific violence and bloodshed. This alone would suffice for a significant award in this program.

Hospitalizations/Subsequent Surgeries: The attack and her initial injuries were of course only the beginning of Claimant's ordeal. She spent two months in the hospital in Israel, where she underwent numerous surgeries, including skin grafts and suturing, and then spent more than six months at the Rehabilitation Center in Puerto Rico, where she struggled to find comfortable prostheses. In the years that followed, she continued her treatment, at one point spending three and a half months at a rehabilitation center in New York and on at least two other occasions undergoing surgery to remove shrapnel remaining in her legs. As late as 1992, x-rays revealed that she still had shrapnel in her lower body. In sum, she has been hospitalized for significant periods of time and has undergone numerous surgical procedures over the years.

Permanent Impairment/Disfigurement: Claimant has been seriously and permanently impaired, and her outward appearance retains conspicuous physical disfigurements to this day. Her physical injuries have resulted in the Israeli National Insurance Institute giving her a permanent disability finding of 100%, and Dr. Llompart giving her at least 56% (20% whole person with regard to the right leg; 36% with regard to the left leg). While we have no details about how these percentages were determined, there is no question that she is permanently disabled to a substantial extent. She has serious mobility problems that affect all aspects of her life, and she has been unable to work for the past four decades. She has also been severely disfigured: both of her legs were lost in the terrorist attack, and she now has to wear prostheses, requiring her to use a cane and/or wheelchair to get around.

In light of these facts, and in consideration of the factors listed above, the Commission holds that \$4,000,000.00 is an appropriate amount of compensation in this claim. Moreover, she is not entitled to interest: the Commission has previously held in all of its physical-injury awards under the Libya Claims Settlement Act programs (including those in the nearly identical 2009 Referral Category D claims), that compensable claims are not entitled to interest as part of the awards. That principle applies equally here. Accordingly, the Commission determines that the Claimant is entitled to an award of \$4,000,000.00 and that this amount constitutes the entirety of the compensation that the Claimant is entitled to in the present claim.

* * * *

b. Claim No. LIB-III-030, Decision No. LIB-III-021 (2015) (Proposed Decision)

The Commission denied Claim No. LIB-III-030, which was brought by the fiancé of a victim of a terrorist attack for mental pain and anguish he suffered. The Commission disallowed the claim because the claimant was not a "close relative" of the decedent, as required under the referral. The proposed decision, excerpted below, discusses relevant international law on the question, as well as the practice of the 9/11 Victims Compensation Fund.**

** Editor's Note: The claimant objected, and the Commission reaffirmed its denial in a final decision issued in February 2016.

* * * *

The 2013 Referral Letter also requires a Category E Claimant to be a “close relative” of a decedent. The Commission has previously held that the term “close relative” in this category of claims comprises those relatives who are immediate family to the decedent: spouses, children, parents, and siblings. Claim No. LIB-III-028, Decision No. LIB-III-014, *supra*, at 6-7. Claimant does not contend that he was the decedent’s spouse, child, parent or sibling. He argues, however, that he was her fiancé and that a fiancé should be considered within the degree of immediacy required to be considered a “close relative” for purposes of this program. In essence, he argues either that “fiancé” should be added to the list of close relatives or, put in slightly different terms, that, as decedent’s fiancé, he was effectively close enough to being her spouse that he should count as a “close relative” for purposes of this program. To support his claim, Claimant has submitted evidence to establish that he was in fact decedent’s fiancé. That evidence consists of his own affidavit as well as affidavits from decedent’s family members attesting to Claimant’s close relationship with the decedent, to the emotional harm he suffered as the result of decedent’s death, and that Claimant and decedent planned to get married.

In deciding claims, the Commission is directed to apply, in the following order, “the provisions of the applicable claims agreement” and “the applicable principles of international law, justice and equity.” 22 U.S.C. § 1623(a)(2) (2012). The “applicable claims agreement” here is the Libyan Claims Settlement Agreement, but it contains nothing relevant on the question of who qualifies as a “close relative” of a decedent. Therefore, pursuant to the ICSA, the Commission must turn to “the applicable principles of international law, justice and equity” to define the term “close relative.” In the trio of “international law, justice and equity,” the Commission turns first to international law to determine whether a fiancé constitutes a “close relative” within the meaning of the 2013 Referral.

In previous decisions interpreting the term “close relative,” including in this very category of claims, the Commission has consistently held that the term applies to those relatives who are immediate family to the decedent: “spouses, children, parents[,] and siblings.” *See* Claim No. LIB-III-028, Decision No. LIB-III-014, *supra*, at 6-7; *see also, e.g.*, Claim No. LIB-II-044, Decision No. LIB-II-001, at 6 (2010). If we were simply to apply this interpretation literally, Claimant would of course fail to satisfy the standard of a “close relative”: he is not a spouse, child, parent, or sibling. However, in its first decision interpreting the term in one of the earlier Libyan claims programs, the Commission made clear that its holding was “for the limited purpose only of the unique parameters of Category B of this claims program, and without setting precedent for other categories or other claims programs.” Claim No. LIB-II-044, Decision No. LIB-II-001, at 6. We did extend this interpretation to this very category of claims in this very claims program (i.e., Category E of this 2013 Referral), but that was in the context of a claim from a decedent’s sister. Since the Commission has not previously had to face the question of whether to expand the definition of “close relative” to include fiancés in any other mental-pain-and-anguish claim, we turn now to that question.

We hold that the term “close relative” for the purposes of Category E of the 2013 Referral does not encompass a fiancé, absent documentation of a legally recognized relationship. Two factors are of importance here. First, the sparse international-law authority we have found provides no support for expanding the definition to include fiancés. Second, in the specific

context of adjudication before this Commission, which is non-adversarial, it is vital that eligibility for awards be tied, where possible, to objective and verifiable criteria. The category of fiancé is too open-ended to include within the definition of “close relative,” particularly in the context of the facts of this claim. We emphasize, however, as we did in claims addressing the interpretation of “close relative” in an earlier Libyan claims program, that this holding is “for the limited purpose only of the unique parameters ... of this claims program and without setting precedent for ... other claims programs.” *Id.*

First, our research has uncovered no compelling international-law authority defining “close relative” to include a fiancé in a program where claimants were able to file claims for additional compensation beyond the wrongful-death compensation paid to the decedent’s estate. Nor have we identified any compelling international-law authority permitting fiancés to recover for mental pain and anguish. For example, in claims before the United Nations Compensation Commission (“UNCC”), the UNCC determined that only spouses, children, and parents were eligible for compensation for wrongful death. *Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category “B” Claims)*, S/AC.26/1994/1 (May 26, 1994); *Report and Recommendations Made by the Panel of Commissioners Concerning Part One the First Installment of Individual Claims for Damages Up To US \$100,000 (Category “C” Claims)*, S/AC.26/1994/3 (Dec. 21, 1994), at pages 16-18; *Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Installment of Individual Claims for Damages Above US \$100,000 (Category “D” Claims)*, S/AC.26/1998/1 (Feb. 3, 1998), at page 42.

Our reading of the term “close relative” is also consistent with the practice of the 9/11 Victims Fund, which, although not a source of international-law jurisprudence *per se*, has informed the Commission’s decisions in previous Libya claims programs. Among the goals Congress had when establishing the 9/11 Victims Fund was to compensate the “relatives” of a deceased victim, a term that is, if anything, broader than the term “close relative” that we interpret here. Beyond the noneconomic damages awarded to the estate of all victims who died in the 9/11 attack, the Fund provided additional compensation to the decedents’ spouses and dependents. In determining who qualified as a victim’s spouse, the Fund limited recovery to “the person reported as spouse on the victim’s Federal tax return for the year prior to the year of the victim’s death.” Only “[m]arriage certificates, recent joint tax returns and other similar evidence were accepted as presumptive proof of marriage.” Fiancés were thus not entitled to the non-economic damages specially targeted for spouses and dependents.

Second, limiting claims to those with a legally recognized relationship that can be proven with objective and verifiable evidence is important for the functioning of a non-adversarial process such as the Commission’s. The categories within our current interpretation of “close relative” (*i.e.* spouses, children, parents and siblings) can all be verified with relatively straightforward evidence of the legal relationship. In contrast, expanding the definition to include fiancés, at least those who do not have documentation of a legally recognized relationship with the decedent, could require the Commission to inquire into intimate personal details of the decedent’s relationships without any means of verifying those details. Claimant argues that the Commission should adopt a “functional approach” to define who is a family member, citing Section 46 of the Restatement (Third) of Torts: Physical and Emotional Harm. We disagree. For one, this “functional approach” to defining “close relative” does not appear to have any support in international law. Furthermore, this “functional approach” would open the door to not only fiancés but also others who have purportedly “close” relationships with a decedent.

This would make the determination of who is a “close relative” subjective and less certain, thereby making the adjudication of claims programs more difficult, and potentially increasing the risk of exaggeration, fraud and abuse.

The evidence Claimant has submitted to support his claim illustrates the difficulty of relying on criteria that are not objectively verifiable with concrete documentation. In his Statement of Claim form, Claimant states that he was “in essence the [decedent’s] spouse” He offers no evidence of a formal, legally recognizable marital state, such as a marriage certificate, a joint tax return, or indicia of a common law marriage. The evidence Claimant submitted does suggest a close relationship between Claimant and the decedent and describes the pain Claimant suffered as a result of the decedent’s death. However, Claimant and the decedent, who were only 21 years old when the decedent was killed, did not cohabit, did not have children together, and did not own property together. Nor had they set a specific wedding date. Weighing various facts of this sort to determine how close Claimant and decedent were, in the absence of affirmative evidence of a marital or comparable status, would complicate the eligibility criteria for a category of claims that is better seen as delineating a fixed-sum recovery for a specific set of individuals related to decedent by law. In short, Claimant may well have been “close” to the decedent, but he was not her “close *relative*” within the meaning of that phrase in Category E of the 2013 Referral.

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Cross References

ILC, **Chapter 7.D.**

TRIA and the FSIA, **Chapter 10.A.4.**

Investment dispute resolution, **Chapter 11.B.**

Arbitration, **Chapter 15.C.1.**

CHAPTER 9

Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

A. DIPLOMATIC RELATIONS

1. Yemen

On February 10, 2015, in a press statement available at <http://www.state.gov/r/pa/prs/ps/2015/02/237374.htm>, the U.S. Department of State announced that it had suspended embassy operations in Sana'a, Yemen. Excerpts follow from the press statement.

* * * *

Due to the uncertain security situation in Sana'a, the Department of State has decided to suspend our embassy operations and our embassy staff have been temporarily relocated out of Sana'a. Recent unilateral actions disrupted the political transition process in Yemen, creating the risk that renewed violence would threaten Yemenis and the diplomatic community in Sana'a.

The United States remains firmly committed to supporting all Yemenis who continue to work toward a peaceful, prosperous, and unified Yemen. We will explore options for a return to Sana'a when the situation on the ground improves.

Our Ambassador and Embassy staff will continue to engage Yemenis and the international community to support Yemen's political transition process, consistent with the Gulf Cooperation Council Initiative, the outcomes of the National Dialogue Conference, UN Security Council resolutions and Yemeni law. We will also continue to protect the American people, and we will not hesitate to act in Yemen to do so.

Having worked bravely and tirelessly to bring about a political transition in Yemen, the Yemeni people have reason to expect to see this process resume with meaningful public timelines for finishing a new Yemeni constitution, holding a referendum on this constitution, and launching national elections.

We reiterate the call of the United Nations Security Council for immediate release of President Hadi, Prime Minister Bahah, and members of the Yemeni cabinet. An inclusive political process cannot resume with members of the country's leadership under house arrest.

The future of Yemen should be determined by the Yemeni people. All Yemenis have both a right and responsibility to participate in this process peacefully.

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2. Somalia

As discussed in *Digest 2013* at 251-55, the United States recognized the government of Somalia in 2013. On September 8, 2015, the Department of State announced the commencement of operations by the U.S. Mission to Somalia in a press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/09/246680.htm>. The press statement explains further:

The new mission reflects a continuation of U.S. efforts to normalize the U.S.-Somalia bilateral relationship since recognizing the Federal Government of Somalia on January 17, 2013. The United States Mission to Somalia is based within the United States Embassy in Nairobi, Kenya, and will be headed by a Chargé d'Affaires until the President appoints, and Senate confirms, the next U.S. Ambassador to Somalia. The launch of the U.S. Mission to Somalia is the next step towards reestablishing a diplomatic presence by the United States in Somalia as announced by Secretary Kerry on May 5 during his historic visit to Mogadishu. U.S. officials will continue to travel to Somalia to conduct official business as security conditions permit.

After confirmation by the Senate, the ambassador to Somalia would serve in the U.S. Embassy in Nairobi, Kenya until security conditions permit reopening the U.S. Embassy in Mogadishu. As referenced in the September 8, 2014 press statement quoted above, Secretary Kerry visited Mogadishu on May 5, 2015. His remarks in Mogadishu are excerpted below and available in full at <http://www.state.gov/secretary/remarks/2015/05/241902.htm>.

* * * *

...[M]ore than 20 years ago, the United States was forced to pull back from this country. And now we're returning in collaboration with our international community and with high hopes mixed, obviously, with ongoing concerns.

My brief visit confirms what diplomats have been telling me: The people here are both resilient and determined to reclaim their future from the terrorists and the militias who've been attempting to steal it. ...

So I'm here today because Somalia is making progress in its mission to turn things around. Three years have passed since a new provisional constitution was adopted and a parliament was sworn in. With help from AMISOM, the UN mission here, the United Nations has contributed significantly to this progress. Somali forces have pushed al-Shabaab out of major population centers. A determined international effort has put virtually all of Somalia's pirates out of business. New life has returned to the streets of Mogadishu, and fresh hope to the people of all the country. I want to acknowledge particularly the remarkable commitment and sacrifice of the nations and countries that make up a part of AMISOM, particularly Kenya, Burundi, Ethiopia, Uganda, Djibouti, and previously Sierra Leone. It is really a great statement about the leadership of African nations stepping up to deal with African problems.

The question now is how quickly and completely the next steps of governing will be taken. The Somali Government has put forward a blueprint for the country's development as a unified and federal state. It is working with the new regional administration to enhance stability and sow the seeds of prosperity in every part of Somalia. That includes finding the right balance of authority and responsibility between the national, the regional, and the local levels. And we look forward to seeing progress soon on an integration process between the regional forces into the Somali National Army so that we can broaden our security assistance to those forces.

The government is also working towards finalizing and holding democratic elections in 2016. The president, the prime minister, and the regional leaders affirmed to me today that they are committed to making progress on these issues and ensuring that there is a broad consensus on exactly how the constitutional review and the elections are going to proceed. And in addition, he also committed to me today that the mandate will not be extended beyond 2016, that the government will keep the schedule of Vision 2016 and avoid delays, that they will appoint the members of the national independent electoral commission and the boundaries and federation commission by next week. He committed that they will work with parliament to pass the political parties law by next month, and committed to move forward with the integration of the National Army. So I am confident that the leaders came together today from the regions and the federal government to affirm solidly their determination to work cooperatively with the international community and to move the reform process of governance of Somalia forward.

We all have a stake in what happens here in Somalia. The world cannot afford to have places on the map that are essentially ungoverned. We learned in 2001 what happens when that is the case, and we have seen on a continued basis with splinter groups how they are determined to try to do injury to innocent people and to whole nations by operating out of ungoverned spaces. And so Somalia's return to effective government is an historic opportunity for everybody to push back against extremism and to empower people in a whole country to be able to live the promise of their nation.

In recognition of the progress made and the promise to come, I'm pleased to announce that the United States will begin the process of establishing the premises for a diplomatic mission in Mogadishu. And while we do not yet have a fixed timeline for reopening the embassy, we are immediately beginning the process of upgrading our diplomatic representation. And I look forward, as does the President, to the day when both the United States and Somalia have full-fledged missions in each other's capital city again. And I look forward as well to the time when we can say, and all the world will be able to see and to measure, that this country is fully united, combining regional strengths with national purpose, able to welcome its refugees home, and secure in a new Somalia that occupies an honored place on the regional and global stage for generations to come.

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3. Cuba

As discussed in *Digest 2014* at 336, the United States announced at the end of 2014 that it would begin the process of restoring diplomatic relations with Cuba. In January 2015, representatives of the United States and Cuba initiated talks to re-establish diplomatic relations. The first round of talks was held in Havana. On February 27, the State Department hosted the second round of talks in Washington, DC. See notice to the press, available at <http://www.state.gov/r/pa/prs/ps/2015/02/237896.htm>. A third round was held in Havana and a fourth round in Washington. See special briefing on the ongoing discussions with Cuba, May 19, 2015, available at <http://www.state.gov/r/pa/prs/ps/2015/05/242613.htm>. Each round of talks was led by Assistant Secretary of State for Western Hemisphere Affairs Roberta S. Jacobson on behalf of the United States and by Josefina Vidal, General Director of the U.S. Division of the Ministry of Foreign Affairs, on behalf of Cuba. Additional discussions on reopening embassies occurred regularly along with other frequent communications during the first half of 2015 to determine how embassies would operate, including access to diplomatic facilities, travel of diplomats, and the level of staffing. See Background Briefing on Re-establishment of Diplomatic Relations With Cuba, a special briefing with a senior State Department official on July 1, 2015, available at <http://www.state.gov/r/pa/prs/ps/2015/07/244549.htm>.

On July 1, 2015, Secretary Kerry and President Obama announced that the governments of the United States and Cuba had reached an agreement to re-establish diplomatic relations and reopen embassies. An exchange of letters by the presidents of the two countries set diplomatic relations to resume on July 20, 2015. The letters from each president are available at www.state.gov/s/l/c8183.htm. The June 30, 2015 letter from President Obama to President Castro includes the following:

I am pleased to confirm, following high-level discussions between our two governments, and in accordance with international law and practice, that the United States of America and the Republic of Cuba have decided to re-establish diplomatic relations and permanent diplomatic missions in our respective countries on July 20, 2015. ...

In making this decision, the United States is encouraged by the reciprocal intention to develop respectful and cooperative relations between our two peoples and governments consistent with the Purposes and Principles enshrined in the Charter of the United Nations, including those related to sovereign equality of States, settlement of international disputes by peaceful means, respect for the territorial integrity and political independence of States, respect for equal rights and self-determination of peoples, non-interference in the internal affairs of States, and promotion and encouragement of respect for human rights and fundamental freedoms for all.

The United States and Cuba are each parties to the Vienna Convention on Diplomatic Relations, signed at Vienna on April 18, 1961, and the Vienna Convention on Consular Relations, signed at Vienna on April 24, 1963. I am pleased to confirm the understanding of the United States that these agreements will apply to diplomatic and consular relations between our two countries.

The July 1, 2015 letter from President Castro to President Obama (in Spanish) includes similar commitments to the UN Charter and the Vienna Conventions.

President Obama's July 1st remarks on the reestablishment of diplomatic relations with Cuba and the reopening of the U.S. Embassy in Havana are excerpted below. Daily Comp. Pres. Docs. 2015 DCPD No. 00474, pp. 1-3 (July 1, 2015).

* * * *

More than 54 years ago, at the height of the cold war, the United States closed its Embassy in Havana. Today I can announce that the United States has agreed to formally reestablish diplomatic relations with the Republic of Cuba and reopen Embassies in our respective countries. This is a historic step forward in our efforts to normalize relations with the Cuban Government and people and begin a new chapter with our neighbors in the Americas.

When the United States shuttered our Embassy in 1961, I don't think anyone expected that it would be more than half a century before it reopened. After all, our nations are separated by only 90 miles, and there are deep bonds of family and friendship between our people. But there have been very real, profound differences between our Governments, and sometimes, we allow ourselves to be trapped by a certain way of doing things.

For the United States, that meant clinging to a policy that was not working. Instead of supporting democracy and opportunity for the Cuban people, our efforts to isolate Cuba, despite good intentions, increasingly had the opposite effect: cementing the status quo and isolating the United States from our neighbors in this hemisphere. The progress that we mark today is yet another demonstration that we don't have to be imprisoned by the past. When something isn't working, we can and will change.

Last December, I announced that the United States and Cuba had decided to take steps to normalize our relationship. As part of that effort, President Raúl Castro and I directed our teams to negotiate the reestablishment of Embassies. Since then, our State Department has worked hard with their Cuban counterparts to achieve that goal. And later this summer, Secretary Kerry will travel to Havana formally to proudly raise the American flag over our Embassy once more.

This is not merely symbolic. With this change, we will be able to substantially increase our contacts with the Cuban people. We'll have more personnel at our Embassy, and our diplomats will have the ability to engage more broadly across the island. That will include the Cuban Government, civil society, and ordinary Cubans who are reaching for a better life.

On issues of common interest, like counterterrorism, disaster response, and development, we will find new ways to cooperate with Cuba. And I've been clear that we will also continue to have some very serious differences. That will include America's enduring support for universal

values like freedom of speech and assembly and the ability to access information. And we will not hesitate to speak out when we see actions that contradict those values.

However, I strongly believe that the best way for America to support our values is through engagement. That's why we've already taken steps to allow for greater travel, people-to-people, and commercial ties between the United States and Cuba. And we will continue to do so going forward.

* * * *

Americans and Cubans alike are ready to move forward. I believe it's time for Congress to do the same. And I've called on Congress to take steps to lift the embargo that prevents Americans from traveling or doing business in Cuba. We've already seen Members from both parties begin that work. After all, why should Washington stand in the way of our own people?

Yes, there are those who want to turn back the clock and double down on a policy of isolation. But it's long past time for us to realize that this approach doesn't work. It hasn't worked for 50 years. It shuts America out of Cuba's future, and it only makes life worse for the Cuban people.

So I'd ask Congress to listen to the Cuban people. Listen to the American people. Listen to the words of a proud Cuban American, Carlos Gutierrez, who recently came out against the policy of the past, saying, "I wonder if the Cubans who have to stand in line for the most basic necessities for hours in the hot Havana sun feel that this approach is helpful to them."

* * * *

In January of 1961, the year I was born, when President Eisenhower announced the termination of our relations with Cuba, he said: It is my hope and my conviction that it is "in the not-too-distant future it will be possible for the historic friendship between us once again to find its reflection in normal relations of every sort." Well, it took a while, but I believe that time has come. And a better future lies ahead.

* * * *

Secretary Kerry's July 1 remarks are excerpted below and available at <http://www.state.gov/secretary/remarks/2015/07/244542.htm>.

* * * *

Good afternoon, everybody. Thank you for your patience. In Washington a few moments ago, [President Obama announced](#) that we had reached an agreement to formally re-establish diplomatic relations with the Republic of Cuba and that we will reopen embassies in our respective countries.

Later this summer, as the President announced, I will travel to Cuba to personally take part in the formal reopening of our United States Embassy in Havana. This will mark the resumption of embassy operations after a period of 54 years. It will also be the first visit by a Secretary of State to Cuba since 1945. The reopening of our embassy, I will tell you, is an

important step on the road to restoring fully normal relations between the United States and Cuba. Coming a quarter of a century after the end of the Cold War, it recognizes the reality of the changed circumstances, and it will serve to meet a number of practical needs.

The United States and Cuba continue to have sharp differences over democracy, human rights, and related issues, but we also have identified areas for cooperation that include law enforcement, safe transportation, emergency response, environmental protection, telecommunications, and migration. The resumption of full embassy activities will help us engage the Cuban Government more often and at a higher level, and it will also allow our diplomats to interact more frequently, and frankly more broadly and effectively, with the Cuban people. In addition, we will better be able to assist Americans who travel to the island nation in order to visit family members or for other purposes.

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On July 6, 2015, the State Department issued a fact sheet on the re-establishment of diplomatic relations with Cuba. The fact sheet is excerpted below and available at <http://www.state.gov/r/pa/prs/ps/2015/07/244623.htm>.

* * * *

...The U.S. Department of State ... notified Congress of its intent to convert the U.S. Interests Section in Havana, Cuba to U.S. Embassy Havana, effective on [July 20, 2015]. These are important steps in implementing the new direction in U.S.-Cuba relations announced by President Obama on December 17, 2014.

On July 1, the U.S. and Cuban Interests Sections exchanged presidential letters declaring mutual intent to re-establish diplomatic relations and re-open embassies on July 20, 2015. President Obama affirmed that the two governments had agreed to develop “respectful and cooperative” relations based on international principles, including the promotion and encouragement of respect for human rights and fundamental freedoms for all.

The U.S. Embassy will continue to perform the existing functions of the U.S. Interests Section, including consular services, operation of a political and economic section, implementation of a public diplomacy program, and will continue to promote respect for human rights. The U.S. Embassy will allow the United States to more effectively promote our interests and values and increase engagement with the Cuban people.

The U.S. Embassy in Havana will operate like other embassies in restrictive societies around the world, and will operate in sync with our values and the President’s policy. Diplomats will be able to meet and exchange opinions with both government and nongovernment entities. Chief of Mission Jeffrey DeLaurentis will be the senior-most official in the new embassy and will serve as Charge d’Affaires ad interim.

Normalizing relations is a long, complex process that will require continued interaction and dialogue between our two governments, based on mutual respect. We will have areas of cooperation with the Cubans, and we will continue to have differences. Where we have differences, deeper engagement via diplomatic relations will allow us to articulate those differences clearly, directly, and when appropriate, publicly. Throughout our diplomatic

engagement, the United States will remain focused on empowering the Cuban people and supporting the emergence of a democratic, prosperous, and stable Cuba.

The embargo on Cuba is still in place and legislative action is required to lift it. Additionally, rules for travel to Cuba by U.S. citizens remain in effect. The U.S. Department of the Treasury's Office of Foreign Assets Control will continue to administer the regulations that provide general licenses for the 12 categories of authorized travel to Cuba.

The Administration has no plans to alter current migration policy, including the Cuban Adjustment Act. The United States continues to support safe, legal and orderly migration from Cuba to the United States and the full implementation of the existing migration accords with Cuba.

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In accordance with the July 1 announcement and the letters exchanged by the governments, on July 20, 2015 all of the employees of the U.S. Interests Section in Havana were re-accredited as employees of the U.S. Embassy. The chief of mission was upgraded to charge d'affaires, and the agreement of the two governments relating to conditions of operation for the embassies took effect, including greater freedom for U.S. diplomats to travel throughout Cuba. See background briefing available at <http://www.state.gov/r/pa/prs/ps/2015/07/245049.htm>.

Also on July 20, 2015, the agreement between the United States and Switzerland, under which the Swiss served as protecting power for the United States for more than 50 years, terminated as a result of the restoration of diplomatic relations between the United States and Cuba. The termination of the agreement was accomplished via an exchange of notes. The United States and Cuba also terminated the 1977 agreement relating to the establishment of interests sections of the United States and Cuba via an exchange of notes initiated by the United States on July 20, 2015. The notes are available at www.state.gov/s/l/c8183.htm.

On August 14, 2015, Secretary Kerry officiated at the ceremony raising the U.S. flag at the U.S. Embassy in Havana, Cuba. His remarks on the occasion are excerpted below and available at <http://www.state.gov/secretary/remarks/2015/08/246121.htm>.

* * * *

...[T]hank you for joining us at this truly historic moment as we prepare to raise the United States flag here at our embassy in Havana, symbolizing the re-establishment of diplomatic relations after 54 years. This is also the first time that a United States Secretary of State has been to Cuba since 1945.

* * * *

My friends, we are gathered here today because our leaders—President Obama and President Castro—made a courageous decision to stop being the prisoners of history and to focus

on the opportunities of today and tomorrow. This doesn't mean that we should or will forget the past; how could we, after all? At least for my generation, the images are indelible.

In 1959, Fidel Castro came to the United States and was greeted by enthusiastic crowds. Returning the next year for the UN General Assembly, he was embraced by then-Soviet Premier Nikita Khrushchev. In 1961, the Bay of Pigs tragedy unfolded with President Kennedy accepting responsibility. And in October 1962, the missile crisis arose—13 days that pushed us to the very threshold of nuclear war. I was a student then, and I can still remember the taut faces of our leaders, the grim map showing the movement of opposing ships, the approaching deadline, and that peculiar word—quarantine. We were unsettled and uncertain about the future because we didn't know when closing our eyes at night what we would find when we woke up.

In that frozen environment, diplomatic ties between Washington and this capital city were strained, then stretched thin, then severed. In late 1960, the U.S. ambassador left Havana. Early the following January, Cuba demanded a big cut in the size of our diplomatic mission, and President Eisenhower then decided he had no choice but to shut the embassy down.

Most of the U.S. staff departed quickly, but a few stayed behind to hand the keys over to our Swiss colleagues, who would serve diligently and honorably as our protecting power for more than 50 years. I just met with the Foreign Minister Didier Burkhalter, and we're grateful to Switzerland always for their service and their help.

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... U.S. policy is not the anvil on which Cuba's future will be forged. Decades of good intentions aside, the policies of the past have not led to a democratic transition in Cuba. It would be equally unrealistic to expect normalizing relations to have, in a short term, a transformational impact. After all, Cuba's future is for Cubans to shape. Responsibility for the nature and quality of governance and accountability rests, as it should, not with any outside entity; but solely within the citizens of this country.

But the leaders in Havana—and the Cuban people—should also know that the United States will always remain a champion of democratic principles and reforms. Like many other governments in and outside this hemisphere, we will continue to urge the Cuban Government to fulfill its obligations under the UN and inter-American human rights covenants—obligations shared by the United States and every other country in the Americas.

And indeed, we remain convinced the people of Cuba would be best served by genuine democracy, where people are free to choose their leaders, express their ideas, practice their faith; where the commitment to economic and social justice is realized more fully; where institutions are answerable to those they serve; and where civil society is independent and allowed to flourish.

Let me be clear: The establishment of normal diplomatic relations is not something that one government does as a favor to another; it is something that two countries do together when the citizens of both will benefit. And in this case, the reopening of our embassies is important on two levels: People-to-people and government-to-government.

First, we believe it's helpful for the people of our nations to learn more about each other, to meet each other. That is why we are encouraged that travel from the United States to Cuba has already increased by 35 percent since January and is continuing to go up. We are encouraged that more and more U.S. companies are exploring commercial ventures here that would create opportunities for Cuba's own rising number of entrepreneurs, and we are encouraged that U.S.

firms are interested in helping Cuba expand its telecommunications and internet links, and that the government here recently pledged to create dozens of new and more affordable Wi-Fi hotspots.

We also want to acknowledge the special role that the Cuban American community is playing in establishing a new relationship between our countries. And in fact, we have with us this morning representatives from that community, some of whom were born here and others who were born in the United States. With their strong ties of culture and family, they can contribute much to the spirit of bilateral cooperation and progress that we are seeking to create, just as they have contributed much to their communities in their adopted land.

The restoration of diplomatic ties will also make it easier for our governments to engage. After all, we are neighbors, and neighbors will always have much to discuss in such areas as civil aviation, migration policy, disaster preparedness, protecting marine environment, global climate change, and other tougher and more complicated issues. Having normal relations makes it easier for us to talk, and talk can deepen understanding even when we know full well we will not see eye to eye on everything.

We are all aware that notwithstanding President Obama's new policy, the overall U.S. embargo on trade with Cuba remains in place and can only be lifted by congressional action—a step that we strongly favor. . . . For now, the President has taken steps to ease restrictions on remittances, on exports and imports to help Cuban private entrepreneurs, on telecommunications, on family travel, but we want to go further. The goal of all of these changes is to help Cubans connect to the world and to improve their lives. And just as we are doing our part, we urge the Cuban Government to make it less difficult for their citizens to start businesses, to engage in trade, access information online. The embargo has always been something of a two-way street – both sides need to remove restrictions that have been holding Cubans back.

* * * *

Also on August 14, 2015, Secretary Kerry met in Havana with Cuban Foreign Minister Bruno Eduardo Rodriguez Parrilla. The two leaders addressed, and answered questions from, the press after their meeting. The transcript of their press availability is available at <http://www.state.gov/secretary/remarks/2015/08/246133.htm>.

On September 11, 2015, the United States and Cuba held the inaugural session of their bilateral commission. As described in a September 11, 2015 State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/09/246844.htm>, the talks provided an opportunity for the governments of the two countries to agree on “concrete steps to continue on the path toward normalized relations.” The media note explains further:

The group discussed a preliminary timeline through the end of this year for engagements on key topics including human rights, combating trafficking in persons, claims, migration, counter-narcotics, regulatory issues, environmental cooperation, civil aviation, telecommunications and the internet, and direct mail.

The bilateral commission met for the second time in November. See November 10, 2015 media note, available at <http://www.state.gov/r/pa/prs/ps/2015/11/249401.htm>. As described in the media note, the meeting “provided an opportunity to review progress on shared priorities, including regulatory issues, telecommunications, claims, environmental protection, human trafficking, human rights, migration, and law enforcement.”

B. STATUS ISSUES

1. Ukraine

The United States continued its support in 2015 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. For discussion of the U.S. support for attempts to maintain a cease-fire in eastern Ukraine, see Chapter 17. For U.S. statements on Ukraine at the Human Rights Council, see Chapter 6. And for discussion of targeted sanctions implemented by the United States in response to Russian actions in Ukraine, see Chapter 16.

On February 13, 2015, the Group of Seven (“G7”) leaders issued a joint statement on the situation in Ukraine. Daily Comp. Pres. Docs. 2015 DCPD No. 00101. The Joint Statement by the leaders of Canada, France, Germany, Italy, Japan, the United Kingdom, the United States, the President of the European Council and the President of the European Commission, welcomes the February 12, 2015 “Package of Measures for the Implementation of the Minsk Agreements,” and again condemns Russian occupation of Crimea.

After the International Atomic Energy Agency (“IAEA”) presented its draft annual report for 2014, the Russian delegation objected to the report’s identification of a facility in Sevastopol, Crimea as within the jurisdiction of Ukraine. On June 8, 2015, at the IAEA Board of Governors Meeting, Ambassador Laura Kennedy delivered the statement for the United States, which, excerpted below, included rejection of Russia’s assertions regarding facilities in Crimea. The United States also delivered a note verbale from its permanent mission in Vienna to the IAEA on June 10, 2015, repeating the points below and asking that the note verbale be circulated as an IAEA information circular (“INFCIRC”) and that the Secretariat also circulate as an INFCIRC its explanation, delivered by the IAEA Office of Legal Affairs on June 10, regarding the ongoing application of Ukraine’s safeguards agreement to Crimea. The Secretariat duly circulated the U.S. note verbale as INFCIRC/882, available at <https://www.iaea.org/sites/default/files/infcirc882.pdf>. The IAEA received and circulated similar communications from Ukraine, the United Kingdom, Germany, France,

Canada, Australia, and others. The annual report was adopted without any change to the annex that listed facilities in Crimea as being within Ukraine.

* * * *

Madam Chair, I take the floor again to reject the statement made by our Russian colleague. As in the case of the Safeguards Implementation Report (SIR), the Secretariat has acted completely correctly, and in accordance with international law and UNGA resolution 68/262. The IAEA did not take any action to recognize a change in Crimea's status despite Russian occupation and attempted illegal annexation. Ukraine's safeguards agreement continues to apply to Crimea, as an integral part of Ukraine's territory, and as it did throughout 2014. Specifically, the IAEA listed the Sevastopol Research Reaction as a Ukrainian facility.

We regret Russia's occupation and attempted annexation of Crimea. We continue to call for an end to Russia's occupation of Crimea, which would allow IAEA all appropriate access under Ukraine's safeguards agreement.

In accordance with UNGA resolution 68/262, and as the Secretariat has made clear, Ukraine's safeguards agreement continues to apply to Crimea, which is an integral part of Ukraine. It would be inappropriate, and contrary to international law and UNGA resolution 68/262, for the IAEA to undertake any activities in Crimea under Russia's safeguards agreements.

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On June 11, 2015, Ambassador Samantha Power, U.S. Permanent Representative to the UN, delivered remarks at the October Palace in Kyiv, Ukraine. Her remarks are excerpted below and available in full at <http://usun.state.gov/remarks/6562>.

* * * *

The message of the United States throughout this Moscow-manufactured conflict—and the message you heard from President Obama and other world leaders at last week's meeting of the G7—has never wavered: if Russia continues to disregard the sovereignty and territorial integrity of Ukraine; and if Russia continues to violate the rules upon which international peace and security rest—then the United States will continue to raise the costs on Russia. And we will continue to rally other countries to do the same, reminding them that their silence or inaction in the face of Russian aggression will not placate Moscow, it will only embolden it.

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Now, if the Maidan of 2013 and 2014 was about claiming your right to a genuinely democratic government, the task before you in 2015 and beyond is implementing the reforms

needed to achieve Ukraine's transformation. It is about moving from demanding change to actually making change. This is my second point: you are still living in the revolution, and delivering on its promise will require all the resilience, smarts, and compassion you can muster.

Given the powerful interests that benefited from the corrupt system, achieving a full transformation was always going to be an uphill battle. And that was before Russian troops occupied Crimea, something the Kremlin denied at the time, but has since admitted; and it was before Russia began training, arming, bankrolling, and fighting alongside its separatist proxies in eastern Ukraine, something the Kremlin continues to deny. Suddenly, the Ukrainian people faced a battle on two fronts: combating corruption and overhauling broken institutions on the inside; while simultaneously defending against aggression and destabilization from the outside.

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2. Guyana-Venezuela Boundary Dispute

On October 5, 2015, U.S. Ambassador to Guyana Perry Holloway addressed questions from the press about the boundary dispute between Venezuela and Guyana.

Ambassador Holloway answered, in part:

We do maintain our position, as we've been very clear in the past, that any efforts to address the boundary dispute should be through peaceful means and consistent with international law. ...It is important that all parties—both sides—should avoid any actions that would complicate the on-going efforts to reach a diplomatic solution. ... We were also pleased to learn that Presidents Granger and Maduro met at the UN, along with Secretary General Ban, and we encourage them to continue that dialogue. ...Now, you asked specifically about the 1899 arbitration? The land boundary between Guyana and Venezuela was decided by an arbitral award in 1899—that's a fact—and duly implemented by both parties. It was only several decades later that Venezuela stated its intention to challenge the validity of that award and the land boundary. We call on all parties to continue to respect the 1899 arbitral ruling and boundary unless or until a competent legal body decides otherwise or both parties agree on something else. ...

3. Central African Republic

On September 3, 2015, the United States commended the decision of the transitional constitutional court of the Central African Republic to uphold the elections ineligibility clause in the transitional national charter that precludes current and former senior transitional government members from running in the presidential and legislative elections scheduled for October and November 2015. The U.S. press statement is available at <http://www.state.gov/r/pa/prs/ps/2015/09/246617.htm>, and also includes the following:

We commend the court for its decision, which upholds the rule of law and provides a clear signal to the people of CAR that political authority in their country is bound by the tenets of the interim constitution, not arbitrary decisions. We call upon all members of the transitional government, past and future, to respect the court's ruling.

The United States further commends the constitutional court for its strong rulings in January and July in favor of including refugees in the elections, an important decision that seeks to ensure that the elections are representative and that CAR's future is inclusive of its entire population. We call upon the transitional government, including those in charge of elections preparations, to reinforce the spirit of the decision by redoubling efforts to organize and expand elections preparations.

4. Kosovo

On February 6, 2015, Ambassador David Pressman, Alternate Representative to the UN for Special Political Affairs, addressed a UN Security Council Meeting on UNMIK. His remarks are excerpted below and available at <http://usun.state.gov/remarks/6364>.

* * * *

Thank you, Mr. President, and thank you Special Representative Zarif for your briefing. We welcome Foreign Ministers Thaçi and Dačić back to the Council. I commend both countries for their continued dedication to the normalization of relations. We particularly welcome Kosovo's continuing integration into the community of states as demonstrated by its participation in regional meetings and fora in recent months and, specifically, we congratulate Kosovo on its recognition by the International Olympic Committee and look forward to seeing Kosovo's athletes competing under the Kosovo flag in Rio de Janeiro in 2016.

The United States welcomes the successful formation of a government in Kosovo in December 2014. Although this process took time, it represents the first democratic transition of political authority resulting from free and fair elections across the entirety of Kosovo's territory. This coalition government, and the process that led to its formation, demonstrated the resilience and vitality of Kosovo's democratic and political institutions. The United States appreciates the leadership of President Jahjaga in helping to facilitate the political dialogue that led to government formation in accordance with Kosovo's constitution.

The new government, which includes representatives of minority communities, has been tested over the last month by violent protests and by the separation from government service yesterday of the Minister for Communities and Returns. The importance of a fully representative, fully participatory and multi-ethnic government and parliament cannot be understated. With respect to the protests, let's be clear: All citizens have the democratic right to protest, but violence is illegal and it's unacceptable. We condemn all acts of vandalism to public and private

property and the intimidation of journalists and TV crews. All citizens of Kosovo should exercise their democratic rights and they should do so legally and responsibly.

We encourage the new government to move quickly to address the socio-economic challenges in the country. Economic growth and new employment opportunities will demonstrate to the citizens of Kosovo, regardless of ethnicity, that they have a prosperous and free future at home, stemming the tide of migration out of the country. We additionally encourage efforts by Kosovo to undertake those measures necessary to encourage the return of those displaced both internally and outside of Kosovo as a result of the conflict, including by adjudicating property claims and enforcing court decisions. We will continue to urge Serbia, Kosovo, and all states in the region to increase cooperation at their shared borders. Such cooperation will advance the rule of law, increase security, counter criminal activity, including smuggling and trafficking in persons.

We again condemn the actions of those who seek to oppose the work of building inclusive democracy in Kosovo by committing acts of violence or by sowing tensions, mistrust, and fear between communities. The use of violence against religious pilgrims, as we unfortunately saw in Gjakove/Djakovica on Orthodox Christmas, is clearly unacceptable. All sides must guarantee freedom of movement for local populations. To this end, KFOR and EULEX continue to exercise indispensable roles in facilitating a safe and secure environment.

The United States notes the visit of Prime Minister Vučić to Kosovo in January and the cooperation of Kosovo authorities to provide protection. This act was another step toward the normalization of relations. The EU-facilitated Kosovo-Serbia Dialogue and implementation of the April 2013 agreement continue to be critical elements of building a strong, inclusive and multi-ethnic democracy in Kosovo. We welcome the forthcoming high-level meetings in Brussels next week and hope that the session on Monday will lead to concrete progress that will directly benefit the citizens of both countries.

The United States commends Serbia and Kosovo for your work, as well, on combatting foreign terrorist fighters, as demonstrated by your attendance at the first ministerial-level plenary session of the counter-ISIL coalition in December in Brussels. Kosovo's dedication to this effort is also apparent in the recent work to arrest and prosecute foreign terrorist fighters in Kosovo and by the introduction of a law to criminalize participation in such activity.

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On October 27, 2015, the EU and Kosovo signed a Stabilization and Association Agreement ("SAA"), which was welcomed by the U.S. State Department in an October 28, 2015 press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/10/248938.htm>. The press statement calls the signing of the agreement a "major milestone on Kosovo's path toward Euro-Atlantic integration." The statement goes on to say:

We welcome this strong sign of Europe's continued commitment to Kosovo and congratulate the leadership and people of Kosovo for their hard work in achieving this goal. The SAA will bring tangible benefits to all in Kosovo, and we look forward to its rapid approval by the Kosovo Assembly.

5. Bosnia and Herzegovina

Ambassador Pressman delivered remarks at a UN Security Council Debate on Bosnia and Herzegovina on November 10, 2015. His remarks, excerpted below and available at <http://usun.state.gov/remarks/6970>, urged continued implementation of the Dayton Accords.

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High Representative Inzko, we again reiterate our strong support for your mandate under Dayton as the final authority regarding the interpretation of the civilian implementation of the Peace Agreement. The United States joins members of this Council and the EU Foreign Affairs Council in our continued support for the EUFOR mandate, and would also like to commend the continuing work of NATO through NATO Headquarters Sarajevo.

The United States fully backs the EUFOR ALTHEA mission, and we are pleased that today the Security Council has adopted a resolution that renews all authorities—each and every one—and carries forward all prior Council actions on EUFOR, the Office of the High Representative, and NATO. We know that many in Bosnia and Herzegovina depend on the Dayton institutions and the Peace Agreement to ensure that their rights are protected. The presence of EUFOR, as well as of the Office of the High Representative and NATO, provide reassurances that this trust is well founded and has the backing of the international community.

We look forward to the day when Bosnia and Herzegovina meets the objectives and conditions established by the Peace Implementation Council for the closure of the Office of the High Representative, but that day has not arrived. Again, that day has not come, and the Security Council has reaffirmed that today. We encourage Bosnia and Herzegovina's leaders, and all members of the international community, to support the actions and reforms necessary to reach that milestone.

As the High Representative has noted, the adoption of the reform agenda in Bosnia and Herzegovina is a good step toward that future, and it must not be allowed to falter. The United States strongly supports the EU's initiative to advance quickly these important economic and social reforms, and we also continue to support Euro-Atlantic integration, as it is a cornerstone for security and stability in a previously troubled region.

This year, we marked 20 years since some 8,000 people were slaughtered in the mountains of eastern Bosnia and Herzegovina. Those who perpetrated that genocide must be held accountable. And we continue to be disturbed by statements made by some political leaders and groups that deny a genocide ever took place.

But let's be very clear, the escalating and divisive rhetoric coming out of Republika Srpska is very troubling, and in particular from Republika Srpska President Dodik, and it threatens both Dayton and the stability of Bosnia and Herzegovina. In recent months, words and rhetoric have regrettably turned into action, with the passage in the Republika Srpska National Assembly of a referendum law directly challenging the Office of the High Representative and state level institutions.

As the High Representative warned the Security Council in his September letter and again in his briefing to us just this morning, this proposed referendum may represent the most serious challenge to the Peace Agreement in the last 20 years; it threatens to disrupt the

achievements of the international community and the people of Bosnia and Herzegovina since the end of the war. This referendum is dangerous, it is anti-Dayton, and it must not go forward. We hope constructive dialogue, including through the Structured Dialogue on Justice, will prevail, but no one should harbor any doubt as to the United States' commitment and dedication to both Dayton and Bosnia and Herzegovina—a Bosnia and Herzegovina that is whole and at peace.

Bosnia and Herzegovina is at a critical juncture. Twenty years after the signing of the Dayton Agreement, Bosnia and Herzegovina has transitioned from war to peace. But we all know that peace is fragile, and peace must constantly be nurtured by all who participate in the democratic sphere.

Mr. President, two paths lay before the country—one of stagnation and division, and one of prosperity and greater integration with Europe. The international community must support Bosnia and Herzegovina as it pursues the reforms necessary for a successful and stable future.

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6. Georgia

On March 17, 2015, the Department of State issued a press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/03/239383.htm>, on the intended signing of an agreement between the *de facto* leaders in Georgia's South Ossetia region and the Russian Federation. As mentioned in the press statement, the Russian Federation purported to enter into a similar agreement with the breakaway region of Abkhazia in 2014. See *Digest 2014* at 130.

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The United States' position on South Ossetia and Abkhazia remains clear: these regions are integral parts of Georgia, and we continue to support Georgia's independence, its sovereignty, and its territorial integrity.

The United States does not recognize the legitimacy of any so-called "treaty" between the *de facto* leaders of Georgia's breakaway region of South Ossetia and the Russian Federation. Neither this agreement nor the one signed between Russia and the *de facto* leaders in Abkhazia in November 2014 constitutes a valid international agreement.

Russia should fulfill all of its obligations under the 2008 ceasefire agreement, withdraw its forces to pre-conflict positions, reverse its recognition of the Georgian regions of South Ossetia and Abkhazia as independent states, and provide free access for humanitarian assistance to these regions.

We continue to support the Geneva International Discussions as a means to achieving concrete progress on security and humanitarian issues that continue to impact the communities on the ground in Georgia. In this regard, we are concerned by reports that the signing of this so-called agreement may coincide with the current round of Geneva Discussions on the conflict in Georgia. The United States calls on all participants to seize the opportunity to make progress in this and future rounds.

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7. Libya

The United States participated in and supported a UN-sponsored effort in 2015 to broker a political resolution in Libya to create a “Government of National Accord” and foster peace and stability.* On February 6, 2015, the Governments of France, Germany, Italy, Spain, the United Kingdom, and the United States issued a joint statement on Libya, excerpted below and available as a State Department media note at <http://www.state.gov/r/pa/prs/ps/2015/02/237282.htm>.

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The governments of France, Germany, Italy, Spain, the United Kingdom, and the United States strongly condemn all acts of violence within Libya, including the February 3 attack carried out by forces operating under the Alshuruq Operation in the Oil Crescent area. These attacks undermine the efforts of Libyans who are working to bring peace and stability to the country through the UN-led negotiations. We share the UN’s assessment that these attacks constituted a major break in the public pledges made by the main commanders to refrain from actions that could harm the political process. There can be no military solution to Libya’s problems.

We call on all Libyan parties to participate constructively in the UN-led dialogue in order to reach rapidly a sustainable ceasefire and a national unity government. We are encouraged by the progress made in that direction so far and call on all concerned parties to strengthen their effort for this process, which is crucial to Libya’s future.

The only people who ultimately benefit from continued fighting over Libya’s oil terminals and cities are terrorists. We are concerned by the growing presence of terrorist organizations in Libya, and by the attacks on the Corinthia last week and on the Mabrook oil field earlier this week.

We remain deeply concerned about the economic impact of the political and security crisis on Libya’s future prosperity. In light of low oil production and prices, Libya faces a budget deficit that has the potential to consume all of its financial assets if the situation does not stabilize. These challenges can only be addressed through political dialogue that can facilitate ways to address this crisis and protect those independent government institutions whose role is to safeguard Libya’s resources for the good of all Libyans.

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* Editor’s note: In 2014, the U.S. Embassy in Tripoli, Libya suspended operations due to ongoing fighting and security risks around the embassy. Core embassy staff, including the Ambassador, relocated to the U.S. Embassy in Malta. In 2015, the Ambassador and core embassy staff relocated to the U.S. Embassy in Tunisia.

The same six governments issued another joint statement on Libya on February 17, 2015, which is available at <http://www.state.gov/r/pa/prs/ps/2015/02/237550.htm>, and excerpted below.

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The governments of France, Italy, Germany, Spain, the United Kingdom and the United States strongly condemn all acts of terrorism in Libya. The heinous murder of twenty-one Egyptian citizens in Libya by ISIL-affiliated terrorists once again underscores the urgent need for a political resolution to the conflict in Libya, the continuation of which only benefits terrorist groups, including ISIL. Terrorism affects all Libyans, and no one faction can confront alone the challenges facing Libya. The United Nations-led process to establish a national unity government provides the best hope for Libyans to address the terrorist threat and to confront the violence and instability that impedes Libya's political transition and development. The international community is prepared to fully support a unity government in addressing Libya's current challenges.

Special Representative to the Secretary General Bernardino Leon will convene meetings in the coming days to build further Libyan support for a national unity government. We commend those parties that have so far participated in the talks and note the statements of support by the House of Representatives and Misratan Municipal Council and others for this process. We strongly encourage all parties, including individuals associated with the former General National Congress (GNC), to seize this opportunity to join the UN process in the coming days in a constructive spirit of reconciliation if they hope to shape Libya's political future. The urgency of the terrorist threat demands swift progress in the political process, based on clear timelines.

Those who seek to impede this process and Libya's democratic transition, four years after the revolution, will not be allowed to condemn Libya to chaos and extremism. They will be held by accountable by the Libyan people and the international community for their actions.

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The foreign ministers of the six governments issued a joint statement on Libya on April 12, 2015, at the resumption of the political dialogue brokered by the UN. The April 12 statement, which is available at <http://www.state.gov/r/pa/prs/ps/2015/04/240598.htm>, appears below.

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Foreign Ministers Fabius, Steinmeier, Gentiloni, García-Margallo, Secretary of State for Foreign and Commonwealth Affairs Hammond, and Secretary of State Kerry welcome the resumption of the Libyan political dialogue under the auspices of Special Representative of the Secretary-General (SRSG) Bernardino Leon in Morocco April 15 and the next meeting of the political parties in Algeria April 13. We strongly urge all participants to the dialogue to negotiate in good

faith and use this opportunity to finalize agreements on the formation of a National Unity Government and make arrangements for an unconditional ceasefire. Only through compromise can Libya move toward a more secure, stable, and prosperous future.

We urge all parties to stop the fighting and expect Libya's leaders to fully support SRSG Bernardino Leon and to engage in the UN-facilitated political dialogue. In particular, we call for the immediate cessation of airstrikes and ground offensives. Such provocations undermine the UN talks and threaten chances for reconciliation. We reaffirm that those who threaten the peace, stability or security of Libya, or undermine the successful completion of its political transition may be designated by the UN sanctions committee. Now is the time for all groups in Libya to move forward in a spirit of compromise. Further delay in reaching a political agreement only deepens the schisms in Libyan society and emboldens those who seek to profit from the ongoing conflict.

The growing threat of terrorism in Libya is of grave concern to the international community. Extremists use the lack of order to their advantage, causing further suffering and bloodshed both inside and outside Libya. We urge the parties to the UN-facilitated dialogue to come together and form a united front both to confront terrorists and to address the root of the problem in a coherent manner, including by offering a vision of a peaceful, stable, and prosperous Libya and by providing essential services to the Libyan people. The international community is prepared to fully support a unity government in addressing Libya's challenges.

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Senior officials of the Governments of China, France, Germany, Italy, the Russian Federation, Spain, the United Kingdom, the United States of America as well as of the European Union met on June 10, 2015 in Berlin with the Libyan delegates to the UN-led Political Dialogue and the Special Representative of the UN Secretary-General (SRSG), Bernardino León. The June 10, 2015 joint communiqué resulting from the meeting is excerpted below and available at <http://www.state.gov/r/pa/prs/ps/2015/06/243331.htm>.

* * * *

The Libyan people deserve peace, stability and prosperity. Yet, Libya is facing new threats to the sovereignty and the integrity of the country:

- Fratricidal armed conflicts lead to severe suffering of the civilian population, to a deteriorating humanitarian situation, to a high incidence of violations of human rights and humanitarian law, to the displacement of large numbers of persons, to the depletion of state resources, and to the imminent risk of Libya's economic and financial breakdown.
- Terrorist groups, as designated by the UN Security Council, are seeking to take root in a divided Libya and threaten the security of the whole region
- War and instability in Libya and other regions are contributing to ever-increasing numbers of refugees, preyed upon by criminal networks, including human traffickers and migrant smugglers who prosper on the back of Libyan division, at the expense of peace

and security in and the economic potential of the country and lead to continuing loss of migrants' lives at sea.

In the face of these threats, all participants to the meeting renewed their strong commitment to the sovereignty, independence, territorial integrity and national unity of Libya, while recalling the UNSC statement of 23 July 2014 and the UNSC resolutions 2174 (2014), 2213 (2015), 2214 (2015).

The Governments and the EU expressed their unequivocal support for the Libyan political dialogue led by SRSF León and to his proposals to reach a compromise. They praised the continued commitment of the Libyan negotiators to the UNSMIL dialogue process and clearly articulated their conviction that an inclusive political settlement is the only sustainable solution to Libya's political crisis. They reiterated that Libya's challenges can be best and most sustainably addressed by a unified Libya in partnership with the international community.

The Governments and the EU paid tribute to the dedication and the efforts of all participants of the Political Dialogue and of the other tracks of the peace process. They welcomed the broad support that the political process enjoys among the Libyan people, and of the manifold contributions of Libyan civil society to the process. They praised in particular the important initiatives undertaken by a number of municipalities to forge local ceasefires, exchange prisoners, release prison inmates, and allow for the return of internally displaced persons.

The Governments and the EU called on the Libyan leaders to grasp the opportunity to reconvene on an urgent basis under UN auspices in good faith so as to agree now on a Political Agreement which provides for a general ceasefire, for inclusive political institutions, including a Government of National Accord (GNA), and for interim security arrangements. They urged all Libyan parties to overcome the remaining obstacles to an agreement, to create a conducive environment for a lasting and inclusive solution to the current conflicts, to immediately cease all hostilities and to prevent all actions that may disturb the political process. At the same time, they underlined their resolve to elaborate appropriate measures against those who threaten Libya's peace, stability or security, or obstruct or undermine the successful completion of its political transition.

The Governments and the EU reiterated their firm commitment to work with a united and peaceful Libya in a spirit of partnership. They reaffirmed that an inclusive Libyan Government of National Accord would create the conditions for partnerships in many areas, and that the international community stands ready to provide significant support to a GNA in agreed areas of cooperation, including, upon request by the GNA and under its primary responsibility, contributing to interim security arrangements, support in the fight against terrorism and organized crime, and working together on irregular migration in a manner that respects Libyan sovereignty and the rights of the affected persons while at the same time undertaking firm efforts to strengthen Libya's institutions and help foster Libya's social and economic recovery.

The senior officials also met with representatives of Algeria, Chad, Egypt, Morocco, Niger, Sudan and Tunisia and welcomed their efforts and support for the process led by Bernardino León. They also welcomed similar efforts by the African Union and others.

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The six governments (France, Germany, Italy, Spain, the United Kingdom, and the United States) issued another joint statement on June 30, 2015, which follows, and is available at <http://www.state.gov/r/pa/prs/ps/2015/06/244516.htm>.

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The Governments of France, Germany, Italy, Spain, the United Kingdom, and the United States, express our deep concern about the ongoing violence within Libya, and the expansion of terrorism in Libya. We recognize that the Libyan people want peace and stability.

We welcome the recent round of talks of the UN political dialogue in Skhirat, Morocco. We reiterate our full support to the UN Special Representative of the Secretary General (SRSG) Bernardino León. We urge all Libyan parties to sign in the coming days the political agreement presented by the UN. We consider this document a thoughtful, well-balanced basis for agreement that meets the urgent expectations of Libyan people and secures the unity of Libya. We reiterate that there is no military solution to this crisis and we underline that the economic and humanitarian situation is worsening every day. We stand ready to support the implementation of this agreement in order to help ensure that a Government of National Accord and all the new institutions function effectively.

We welcome the peace initiatives developing in parts of Libya, particularly in the West, including local-level ceasefires, prisoner exchanges, and the return of internally displaced persons. These are important developments, and a powerful example of the determination of the Libyan people to find peaceful solutions to the ongoing insecurity. Alongside the UN process, these initiatives need the support of all Libyans throughout that country. We strongly condemn all attempts to undermine UN process or local peace initiatives, in particular through the threat of violence.

We call on all Libyan decision makers to show in this crucial moment responsibility, leadership and courage. The international community stands ready to provide significant humanitarian, economic and security assistance to a united Libya as soon as the new government is agreed. Equally, the international community stands ready to hold accountable through sanctions those who threaten Libya's peace, stability and security.

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On September 22, 2015 Secretary of State John Kerry issued a press statement on the finalization of the Libyan political dialogue. The press statement, available at <http://www.state.gov/secretary/remarks/2015/09/247191.htm>, follows:

Last night, after almost a year of intensive negotiations, Special Representative of the UN Secretary General Bernardino Leon presented the final text of the proposed Libya political framework to establish a new Government of National

Accord in Libya. The final document represents the intense efforts of all Libyan parties to reach a solution that is durable, inclusive, and representative.

I urge all parties to come together quickly after the Eid holiday to approve this final text and to agree on the names of the leaders of the new government as soon as possible.

An urgent need exists for Libya, and its friends and partners in the international community, to address its critical humanitarian, economic, and security challenges. The new Government of National Accord will give Libyans the chance to unify their country and begin the hard work of restoring peace and security for the benefit of all Libyans.

A larger group of governments, represented by their foreign ministers, agreed to a joint statement on Libya issued on October 19, 2015. The October 19 joint statement urges the Libyan parties to approve the agreement brokered by the UN through the Libyan Political Dialogue. The joint statement appears below and is also available at <http://www.state.gov/r/pa/prs/ps/2015/10/248330.htm>.

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The Foreign Ministers of Algeria, France, Germany, Italy, Morocco, Qatar, Spain, Tunisia, Turkey, the United Arab Emirates, the United Kingdom, and the United States, and the EU High Representative for Foreign Affairs call upon all parties to the Libyan Political Dialogue to immediately approve the political agreement brokered by UN Special Representative Leon following the meetings of the parties in Skhirat and Geneva.

The parties to the dialogue face a stark choice. They can delay approval of the text and annexes beyond October 20 or attempt to make further amendments, and put at risk the stability of the country. To secure Libya's future, we urge the Libyan parties to immediately approve the hard fought political compromise set forth in the political agreement, which will provide a period of stability to the country until a new constitution can be agreed. New elections can then be held which will finally give Libya a fully representative, inclusive, and democratic parliament whose legitimacy is acknowledged across the country and the world.

The Libyan people have made it clear that they want an end to instability in their country, instability which has led to the loss of lives, allowed terrorism to grow, and severely damaged the economy of the country. The international community stands ready to support the Libyan people and the leaders they choose.

The international community looks forward to working with the Government of National Accord, at their request, in supporting the fight against terrorism, particularly ISIL and Ansar Al-Sharia, and in helping Libya face up to its many challenges.

We urge all participants in the dialogue to seize the opportunity to end this instability by approving, and faithfully implementing, the political agreement without introducing further amendments.

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The group of governments joined together again on November 27 to issue a statement welcoming support for formation of a Government of National Accord. The November 27, 2015 joint statement appears below and is available at <http://www.state.gov/r/pa/prs/ps/2015/11/250130.htm>.

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The Governments of Algeria, France, Germany, Italy, Morocco, Spain, Tunisia, the United Arab Emirates, the United Kingdom and the United States welcome the statement of support for a Government of National Accord in Libya signed by the majority of House of Representatives (HoR) members on November 24 and note that a majority of General National Congress (GNC) members in Tripoli also stand firmly in support of a Government of National Accord.

We strongly encourage all parties to form a Government of National Accord. Only a Government of National Accord can begin the difficult work of establishing effective, legitimate governance, restoring stability, and preserving the unity of the country, as expected by all Libyans.

We commend the courage of these HoR and GNC members who face intimidation by hardliners on both sides seeking to frustrate progress towards a GNA. We admire their determination to build a united Libya which will be able to combat instability, extremism and terrorism. We remind those attempting to impede progress that they will be held to account by the Libyan people and by the international community for their actions.

The Governments of Algeria, France, Germany, Italy, Morocco, Spain, Tunisia, the United Arab Emirates, the United Kingdom and the United States confirm our full support for the UN process led by Special Representative of the Secretary General Martin Kobler as he works to facilitate Libya's political transition.

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On December 13, 2015, Italy and the United States co-chaired a ministerial meeting on Libya in Rome. The Libya Joint Communique resulting from the meeting (the "Rome Communique") was joined by Algeria, China, Egypt, France, Germany, Italy, Jordan, Morocco, Russia, Qatar, Saudi Arabia, Spain, Tunisia, Turkey, the United Arab Emirates, the United Kingdom, the United States, the European Union, the United Nations, the League of Arab States, and the African Union. The December 13, 2015 Libya Joint Communique follows and is also available as a State Department media note at <http://www.state.gov/r/pa/prs/ps/2015/12/250593.htm>.

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We affirm our full support for the Libyan people in maintaining the unity of Libya and its institutions that function for the benefit of the whole Country. A Government of National Accord based in the capital Tripoli is urgently needed to provide Libya the means to maintain

governance, promote stability and economic development. We stand with all Libyans who have demanded the swift formation of a Government of National Accord based upon the Skhirat Agreement, including representatives of the majority members of the House of Representatives and General National Congress, Independents, Municipalities, political parties, and civil society who convened in Tunis on December 10-11. We welcome the announcement that the Libya political dialogue members will sign the political agreement in Skhirat on December 16. We encourage all political actors to sign this final agreement on December 16 and call on all Libyans to unite behind the Libya Political Agreement and the Government of National Accord.

We reiterate our strong commitment to Libya's sovereignty, territorial integrity, and social cohesion, and reject any foreign interference in Libya. We stand behind the Libyan people's efforts to transform Libya into a secure, democratic, prosperous and unified state, where all its people can be reconciled, State authority and the rule of law are restored.

We commend the efforts by the neighboring countries, the African Union, the League of Arab States, and the European Union to contribute to achieving these goals.

A Government of National Accord is essential to address, in partnership with the international community, the country's critical humanitarian, economic, and security challenges, including ISIL and other extremist groups and criminal organizations engaged in all forms of smuggling and trafficking, including in human beings. We convey our sympathy to the families of those who lost their lives during the conflict in Libya. We express our determination, working together with the Government of National Accord, to defeat ISIL affiliates in Libya and eliminate the threat they pose to Libyan and international security. We reiterate our full support for the implementation of UNSCR 2213 and other relevant Resolutions to address threats to Libya's peace, security, and stability. Those responsible for violence and those who obstruct and undermine Libya's democratic transition must be held strictly accountable.

We fully recognize and support the Libya Political Agreement and the institutions validated by it, and pledge our support for a Government of National Accord as the sole legitimate government of Libya. We will cease official contacts with individuals claiming to be part of institutions which are not validated by the Libya Political Agreement. We stand by Libya's national economic institutions, including the Central Bank of Libya (CBL), National Oil Company (NOC), and the Libyan Investment Authority (LIA), which must function under the stewardship of a Government of National Accord charged with preserving and protecting Libya's resources for the sole benefit of all its people.

We stand ready to support the implementation of the political agreement and underline our firm commitment to providing the Government of National Accord with full political backing and technical, economic, security and counter-terrorism assistance, as requested.

We call on all parties to accept an immediate, comprehensive ceasefire in all parts of Libya. We reaffirm our pledges of humanitarian assistance to Libyans in need. Safe passage of humanitarian assistance should be enabled to address the humanitarian crisis, particularly in Benghazi.

We fully support the efforts of Special Representative of the United Nations Secretary-General Martin Kobler to facilitate the Libyan Dialogue Process and appreciate the work of the United Nations Support Mission in Libya in this regard.

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On December 17, 2015, the year-long UN-brokered dialogue finally concluded in Morocco with the signing of the Libyan Political Agreement, mapping a transition to a unified Libyan Government of National Accord. Secretary Kerry's press statement welcoming the signing of the Agreement is available at <http://www.state.gov/secretary/remarks/2015/12/250760.htm>, and includes the following:

All Libyans have a role to play as the political transition continues. I urge all Libyans to support this final agreement and to unite behind the Government of National Accord.

Libya needs this unified government to address its critical humanitarian, economic, and security challenges. As we made clear at the December 13 meeting in Rome that I co-chaired with Italian Foreign Minister Gentiloni, the United States and the international community are ready to support the implementation of the Political Agreement and to provide full backing for the unified government, as well as technical, economic, security, and counterterrorism assistance.

On December 23, 2015, Ambassador Power provided the U.S. explanation of vote at the adoption of UN Security Council Resolution 2259 on Libya. As Ambassador Power says in her remarks, excerpted below and available at <http://usun.state.gov/remarks/7074>, the resolution approves the agreed plan for a political transition in Libya.

* * * *

Today's unanimous vote welcomes an important and historic step taken by the Libyan people. Over the last year, with the tireless facilitation and support of the UN Support Mission in Libya, a broad array of members of the Libyan Political Dialogue have worked together to build an inclusive and representative government to lead the country forward in its transition. This diverse group included members of the House of Representatives and the General National Congress, women, civil society members, leaders of municipalities and political parties, and independents. Through today's resolution, the Council affirms their courageous efforts, and welcomes the signing of the Libyan Political Agreement in Skhirat, Morocco, on December 17th.

With this resolution, the Council sends a clear message that the Government of National Accord will become the sole legitimate government of Libya, as set forth in the agreement. The United States urges all Libyans to unite behind the Libyan Political Agreement, and to take advantage of the opportunity presented by the formation of the GNA by working together toward peace, stability, and the rule of law. As Special Representative Kobler has noted, "the door will remain open to those who wish to join on the road to peace." For those who reject the path set forward by the Libyan Political Agreement—who seek to undermine the Libyan people's hope for peace—the United States will seek to work with the international community to hold them accountable.

After so much turmoil, this agreement offers Libya a chance, a chance to reclaim the opportunities first made possible by the February 17th, 2011, revolution. We all know that the new GNA will have no shortage of challenges in the days ahead—but the Libyan people will not face them alone. The United States and other Member States will work closely with the GNA and its leadership to ensure the full implementation of the Libyan Political Agreement, and to provide support to the GNA as it begins to serve and protect the Libyan people. As the GNA works to improve security, we will work closely with it to defeat ISIL affiliates in Libya and eliminate the threat they pose to all of our collective security.

Through this resolution, we recognize the Libyan people’s enormous accomplishment in forging this agreement. We look forward to working together to see it through and we thank Special Representative Kobler and the UNSMIL team for their heroic dedication to the mission, and to all of the Libyans from all parts of the country who worked tirelessly to make this agreement possible.

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C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION

On June 8, 2015 the U.S. Supreme Court issued its second opinion in the *Zivotofsky* case. *Zivotofsky v. Secretary of State*, No. 13-628. In 2012, the Supreme Court held that the case did not present a nonjusticiable political question and remanded it to the D.C. Circuit Court of Appeals. The Supreme Court directed the court of appeals to determine the constitutionality of a law requiring the Department of State to record “Israel” as the place of birth in the U.S. passport of a U.S. citizen born in Jerusalem upon request of that citizen. The Supreme Court’s 2015 opinion affirms the court of appeals decision that the law is unconstitutional because it infringes on the executive branch’s exclusive recognition power. For prior developments in the case, see *Digest 2006* at 530-47, *Digest 2007* at 437-43, *Digest 2008* at 447-54, *Digest 2009* at 303-10, *Digest 2011* at 278-82, *Digest 2012* at 283-86, *Digest 2013* at 259-69, and *Digest 2014* at 354-68. Excerpts follow from the opinion of the U.S. Supreme Court.

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A delicate subject lies in the background of this case. That subject is Jerusalem. Questions touching upon the history of the ancient city and its present legal and international status are among the most difficult and complex in international affairs. In our constitutional system these matters are committed to the Legislature and the Executive, not the Judiciary. As a result, in this opinion the Court does no more, and must do no more, than note the existence of international debate and tensions respecting Jerusalem. Those matters are for Congress and the President to discuss and consider as they seek to shape the Nation’s foreign policies.

The Court addresses two questions to resolve the interbranch dispute now before it. First, it must determine whether the President has the exclusive power to grant formal recognition to a foreign sovereign. Second, if he has that power, the Court must determine whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the

earlier recognition. The statement in question here is a congressional mandate that allows a United States citizen born in Jerusalem to direct the President and Secretary of State, when issuing his passport, to state that his place of birth is “Israel.”

I

A

* * * *

In 2002, Congress passed the Act at issue here, the Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1350. Section 214 of the Act is titled “United States Policy with Respect to Jerusalem as the Capital of Israel.” *Id.*, at 1365. The subsection that lies at the heart of this case, §214(d), addresses passports. That subsection seeks to override the FAM by allowing citizens born in Jerusalem to list their place of birth as “Israel.” Titled “Record of Place of Birth as Israel for Passport Purposes,” §214(d) states “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.” *Id.*, at 1366.

When he signed the Act into law, President George W. Bush issued a statement declaring his position that §214 would, “if construed as mandatory rather than advisory, impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.” Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 30, 2002, p. 1698 (2005). The President concluded, “U. S. policy regarding Jerusalem has not changed.” *Ibid.*

* * * *

II

In considering claims of Presidential power this Court refers to Justice Jackson’s familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635–638 (1952) (concurring opinion). The framework divides exercises of Presidential power into three categories: First, when “the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Id.*, at 635. Second, “in absence of either a congressional grant or denial of authority” there is a “zone of twilight in which he and Congress may have concurrent authority,” and where “congressional inertia, indifference or quiescence may” invite the exercise of executive power. *Id.*, at 637. Finally, when “the President takes measures incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Ibid.* To succeed in this third category, the President’s asserted power must be both “exclusive” and “conclusive” on the issue. *Id.*, at 637–638.

In this case the Secretary contends that §214(d) infringes on the President’s exclusive recognition power by “requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns.” Brief for Respondent 48. In so doing the Secretary acknowledges the President’s power is “at its lowest ebb.” *Youngstown*, 343

U. S., at 637. Because the President's refusal to implement §214(d) falls into Justice Jackson's third category, his claim must be "scrutinized with caution," and he may rely solely on powers the Constitution grants to him alone. *Id.*, at 638.

To determine whether the President possesses the exclusive power of recognition the Court examines the Constitution's text and structure, as well as precedent and history bearing on the question.

A

Recognition is a "formal acknowledgement" that a particular "entity possesses the qualifications for statehood" or "that a particular regime is the effective government of a state." Restatement (Third) of Foreign Relations Law of the United States §203, Comment *a*, p. 84 (1986). It may also involve the determination of a state's territorial bounds. See 2 M. Whiteman, Digest of International Law §1, p. 1 (1963) (Whiteman) ("[S]tates may recognize or decline to recognize territory as belonging to, or under the sovereignty of, or having been acquired or lost by, other states"). Recognition is often effected by an express "written or oral declaration." 1 J. Moore, Digest of International Law §27, p. 73 (1906) (Moore). It may also be implied—for example, by concluding a bilateral treaty or by sending or receiving diplomatic agents. *Ibid.*; I. Brownlie, Principles of Public International Law 93 (7th ed. 2008) (Brownlie).

Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts, see *Guaranty Trust Co. v. United States*, 304 U. S. 126, 137 (1938), and may benefit from sovereign immunity when they are sued, see *National City Bank of N. Y. v. Republic of China*, 348 U. S. 356, 358–359 (1955). The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine. See *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302–303 (1918). Recognition at international law, furthermore, is a precondition of regular diplomatic relations. 1 Moore §27, at 72. Recognition is thus "useful, even necessary," to the existence of a state. *Ibid.*

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term "recognition," either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President "shall receive Ambassadors and other public Ministers." Art. II, §3. As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention. See Reinstein, Recognition: A Case Study on the Original Understanding of Executive Power, 45 U. Rich. L. Rev. 801, 860–862 (2011). In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was "more a matter of dignity than of authority," a ministerial duty largely "without consequence." The Federalist No. 69, p. 420 (C. Rossiter ed. 1961).

At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. See E. de Vattel, The Law of Nations §78, p. 461 (1758) (J. Chitty ed. 1853) ("[E]very state, truly possessed of sovereignty, has a right to send ambassadors" and "to contest their right in this instance" is equivalent to "contesting their sovereign dignity"); see also 2 C. van Bynkershoek, On Questions of Public Law 156–157 (1737) (T. Frank ed. 1930) ("Among writers on public law it is usually agreed that only a sovereign power has a right to send ambassadors"); 2 H. Grotius, On the Law of War and Peace 440–441 (1625) (F. Kelsey ed. 1925) (discussing the duty to admit ambassadors of sovereign powers). It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.

This in fact occurred early in the Nation's history when President Washington recognized the French Revolutionary Government by receiving its ambassador. See A. Hamilton, *Pacificus* No. 1, in *The Letters of Pacificus and Helvidius* 5, 13–14 (1845) (reprint 1976) (President “acknowledged the republic of France, by the reception of its minister”). After this incident the import of the Reception Clause became clear—causing Hamilton to change his earlier view. He wrote that the Reception Clause “includes th[e power] of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognised, or not.” See *id.*, at 12; see also 3 J. Story, *Commentaries on the Constitution of the United States* §1560, p. 416 (1833) (“If the executive receives an ambassador, or other minister, as the representative of a new nation . . . it is an acknowledgment of the sovereign authority *de facto* of such new nation, or party”). As a result, the Reception Clause provides support, although not the sole authority, for the President's power to recognize other nations.

The inference that the President exercises the recognition power is further supported by his additional Article II powers. It is for the President, “by and with the Advice and Consent of the Senate,” to “make Treaties, provided two thirds of the Senators present concur.” Art. II, §2, cl. 2. In addition, “he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors” as well as “other public Ministers and Consuls.” *Ibid.*

As a matter of constitutional structure, these additional powers give the President control over recognition decisions. At international law, recognition may be effected by different means, but each means is dependent upon Presidential power. In addition to receiving an ambassador, recognition may occur on “the conclusion of a bilateral treaty,” or the “formal initiation of diplomatic relations,” including the dispatch of an ambassador. Brownlie 93; see also 1 Moore §27, at 73. The President has the sole power to negotiate treaties, see *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 319 (1936), and the Senate may not conclude or ratify a treaty without Presidential action. The President, too, nominates the Nation's ambassadors and dispatches other diplomatic agents. Congress may not send an ambassador without his involvement. Beyond that, the President himself has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the “executive Power” shall be vested in the President, provides further support for the President's action here. Art. II, §1, cl. 1.

The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is exclusive. The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest that it is. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.

Recognition is a topic on which the Nation must “speak . . . with one voice.” *American Ins. Assn. v. Garamendi*, 539 U. S. 396, 424 (2003) (quoting *Crosby v. National Foreign Trade*

Council, 530 U. S. 363, 381 (2000)). That voice must be the President's. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch." The Federalist No. 70, p. 424 (A. Hamilton). The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. See, e.g., *United States v. Pink*, 315 U. S. 203, 229 (1942). He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. 1 Oppenheim's International Law §50, p. 169 (R. Jennings & A. Watts eds., 9th ed. 1992) (act of recognition must "leave no doubt as to the intention to grant it"). These qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President's Article II powers.

As described in more detail below, the President since the founding has exercised this unilateral power to recognize new states—and the Court has endorsed the practice. See *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 410 (1964); *Pink*, *supra*, at 229; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 420 (1839). Texts and treatises on international law treat the President's word as the final word on recognition. See, e.g., Restatement (Third) of Foreign Relations Law §204, at 89 ("Under the Constitution of the United States the President has exclusive authority to recognize or not to recognize a foreign state or government"); see also L. Henkin, *Foreign Affairs and the U. S. Constitution* 43 (2d ed. 1996) ("It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize a foreign government"). In light of this authority all six judges who considered this case in the Court of Appeals agreed that the President holds the exclusive recognition power. See 725 F. 3d, at 214 ("[W]e conclude that the President exclusively holds the power to determine whether to recognize a foreign sovereign"); *Zivotofsky*, 571 F. 3d, at 1231 ("That this power belongs solely to the President has been clear from the earliest days of the Republic"); *id.*, at 1240 (Edwards, J., concurring) ("The Executive has exclusive and unreviewable authority to recognize foreign sovereigns").

It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "declare War," "grant Letters of Marque and Reprisal," and "make Rules for the Government and Regulation of the land and naval Forces." U. S. Const., Art. I, §8. In addition, the President cannot make a treaty or appoint an ambassador without the approval of the Senate. Art. II, §2, cl. 2. The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds. Art. I, §8, cl. 1. Under basic separation-of-powers principles, it is for the Congress to enact the laws, including "all Laws which shall be necessary and proper for carrying into Execution" the powers of the Federal Government. §8, cl. 18.

In foreign affairs, as in the domestic realm, the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown*, 343 U. S., at 635 (Jackson, J., concurring). Although the President alone effects the formal act of recognition, Congress' powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If

Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.

In practice, then, the President's recognition determination is just one part of a political process that may require Congress to make laws. The President's exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds. Albeit limited, the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.

A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. All this, of course, underscores that Congress has an important role in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts. In this way ambition counters ambition, ensuring that the democratic will of the people is observed and respected in foreign affairs as in the domestic realm. See *The Federalist* No. 51, p. 322 (J. Madison).

B

No single precedent resolves the question whether the President has exclusive recognition authority and, if so, how far that power extends. In part that is because, until today, the political branches have resolved their disputes over questions of recognition. The relevant cases, though providing important instruction, address the division of recognition power between the Federal Government and the States, see, e.g., *Pink*, 315 U. S. 203, or between the courts and the political branches, see, e.g., *Banco Nacional de Cuba*, 376 U. S., at 410—not between the President and Congress. As the parties acknowledge, some isolated statements in those cases lend support to the position that Congress has a role in the recognition process. In the end, however, a fair reading of the cases shows that the President's role in the recognition process is both central and exclusive.

* * * *

The Secretary now urges the Court to define the executive power over foreign relations in even broader terms. He contends that under the Court's precedent the President has "exclusive authority to conduct diplomatic relations," along with "the bulk of foreign-affairs powers." Brief for Respondent 18, 16. In support of his submission that the President has broad, undefined powers over foreign affairs, the Secretary quotes *United States v. Curtiss-Wright Export Corp.*, which described the President as "the sole organ of the federal government in the field of international relations." 299 U. S., at 320. This Court declines to acknowledge that unbounded power. A formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate—and that he consequently controls his statements on matters of recognition—presents different issues and is unnecessary to the resolution of this case.

The *Curtiss-Wright* case does not extend so far as the Secretary suggests. In *Curtiss-Wright*, the Court considered whether a congressional delegation of power to the President was constitutional. Congress had passed a joint resolution giving the President the discretion to prohibit arms sales to certain militant powers in South America. The resolution provided

criminal penalties for violation of those orders. *Id.*, at 311–312. The Court held that the delegation was constitutional, reasoning that Congress may grant the President substantial authority and discretion in the field of foreign affairs. *Id.*, at 315–329. Describing why such broad delegation may be appropriate, the opinion stated:

“In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, ‘The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.’ [10 Annals of Cong.] 613.” *Id.*, at 319.

This description of the President’s exclusive power was not necessary to the holding of *Curtiss-Wright*—which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination. Indeed, *Curtiss-Wright* did not hold that the President is free from Congress’ lawmaking power in the field of international relations. The President does have a unique role in communicating with foreign governments, as then-Congressman John Marshall acknowledged. See 10 Annals of Cong. 613 (1800) (cited in *Curtiss-Wright*, *supra*, at 319). But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation’s course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. See, e.g., *Medellín v. Texas*, 552 U. S. 491, 523–532 (2008); *Youngstown*, 343 U. S., at 589; *Little v. Barreme*, 2 Cranch 170, 177–179 (1804); Glennon, Two Views of Presidential Foreign Affairs Power: *Little v. Barreme* or *Curtiss-Wright*? 13 Yale J. Int’l L. 5, 19–20 (1988); cf. *Dames & Moore v. Regan*, 453 U. S. 654, 680–681 (1981). It is not for the President alone to determine the whole content of the Nation’s foreign policy.

That said, judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context of recognition in discussions and negotiations with foreign nations. Recognition is an act with immediate and powerful significance for international relations, so the President’s position must be clear. Congress cannot require him to contradict his own statement regarding a determination of formal recognition.

Zivotofsky’s contrary arguments are unconvincing. The decisions he relies upon are largely inapposite. This Court’s cases do not hold that the recognition power is shared. *Jones v. United States*, 137 U. S. 202 (1890), and *Boumediene v. Bush*, 553 U. S. 723 (2008), each addressed the status of territories controlled or acquired by the United States—not whether a province ought to be recognized as part of a foreign country. See also *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948) (“[D]etermination of [American] sovereignty over an area is for the legislative and executive departments”). And no one disputes that Congress has a role in determining the status of United States territories. See U. S. Const., Art. IV, §3, cl. 2 (Congress may “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”). Other cases describing a shared power address the recognition of Indian tribes—which is, similarly, a distinct issue from the recognition of foreign

countries. See *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831).

To be sure, the Court has mentioned both of the political branches in discussing international recognition, but it has done so primarily in affirming that the Judiciary is not responsible for recognizing foreign nations. See *Oetjen*, 246 U. S., at 302 (“ ‘Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges’ ” (quoting *Jones*, *supra*, at 212)); *United States v. Palmer*, 3 Wheat. 610, 643 (1818) (“[T]he courts of the union must view [a] newly constituted government as it is viewed by the legislative and executive departments of the government of the United States”). This is consistent with the fact that Congress, in the ordinary course, does support the President’s recognition policy, for instance by confirming an ambassador to the recognized foreign government. Those cases do not cast doubt on the view that the Executive Branch determines whether the United States will recognize foreign states and governments and their territorial bounds.

C

Having examined the Constitution’s text and this Court’s precedent, it is appropriate to turn to accepted understandings and practice. In separation-of-powers cases this Court has often “put significant weight upon historical practice.” *NLRB v. Noel Canning*, 573 U. S. ___, ___ (2014) (slip op., at 6) (emphasis deleted). Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President’s alone. As Zivotofsky argues, certain historical incidents can be interpreted to support the position that recognition is a shared power. But the weight of historical evidence supports the opposite view, which is that the formal determination of recognition is a power to be exercised only by the President.

* * * *

III

As the power to recognize foreign states resides in the President alone, the question becomes whether §214(d) infringes on the Executive’s consistent decision to withhold recognition with respect to Jerusalem. See *Nixon v. Administrator of General Services*, 433 U. S. 425, 443 (1977) (action unlawful when it “prevents the Executive Branch from accomplishing its constitutionally assigned functions”).

Section 214(d) requires that, in a passport or consular report of birth abroad, “the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel” for a “United States citizen born in the city of Jerusalem.” 116 Stat. 1366. That is, §214(d) requires the President, through the Secretary, to identify citizens born in Jerusalem who so request as being born in Israel. But according to the President, those citizens were not born in Israel. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. In this way, §214(d) “directly contradicts” the “carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem.” 725 F. 3d, at 217, 216.

If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent’s statements. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position

inconsistent with his own, Congress could override the President's recognition determination. Under international law, recognition may be effected by "written or oral declaration of the recognizing state." 1 Moore §27, at 73. In addition an act of recognition must "leave no doubt as to the intention to grant it." 1 Oppenheim's International Law §50, at 169. Thus, if Congress could alter the President's statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power.

As Justice Jackson wrote in *Youngstown*, when a Presidential power is "exclusive," it "disabl[es] the Congress from acting upon the subject." 343 U. S., at 637–638 (concurring opinion). Here, the subject is quite narrow: The Executive's exclusive power extends no further than his formal recognition determination. But as to that determination, Congress may not enact a law that directly contradicts it. This is not to say Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision.

If Congress may not pass a law, speaking in its own voice, that effects formal recognition, then it follows that it may not force the President himself to contradict his earlier statement. That congressional command would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations.

Although the statement required by §214(d) would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State. See *Urtetiqui v. D'Arcy*, 9 Pet. 692, 699 (1835) (a passport "from its nature and object, is addressed to foreign powers" and "is to be considered . . . in the character of a political document"). As a result, it is unconstitutional. This is all the more clear in light of the longstanding treatment of a passport's place-of-birth section as an official executive statement implicating recognition. See 725 F. 3d, at 224 (Tatel, J., concurring). The Secretary's position on this point has been consistent: He will not place information in the place-of-birth section of a passport that contradicts the President's recognition policy. See 7 FAM §1383. If a citizen objects to the country listed as sovereign over his place of birth, then the Secretary will accommodate him by listing the city or town of birth rather than the country. See *id.*, §1383.6. But the Secretary will not list a sovereign that contradicts the President's recognition policy in a passport. Thus, the Secretary will not list "Israel" in a passport as the country containing Jerusalem.

The flaw in §214(d) is further underscored by the undoubted fact that that the purpose of the statute was to infringe on the recognition power—a power the Court now holds is the sole prerogative of the President. The statute is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." §214, 116 Stat. 1365. The House Conference Report proclaimed that §214 "contains four provisions related to the recognition of Jerusalem as Israel's capital." H. R. Conf. Rep. No. 107–671, p. 123 (2002). And, indeed, observers interpreted §214 as altering United States policy regarding Jerusalem—which led to protests across the region. See *supra*, at 4. From the face of §214, from the legislative history, and from its reception, it is clear that Congress wanted to express its displeasure with the President's policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do.

It is true, as Zivotofsky notes, that Congress has substantial authority over passports. See *Haig v. Agee*, 453 U. S. 280 (1981); *Zemel v. Rusk*, 381 U. S. 1 (1965); *Kent v. Dulles*, 357 U. S. 116 (1958). The Court does not question the power of Congress to enact passport legislation of

wide scope. In *Kent v. Dulles*, for example, the Court held that if a person's "liberty" to travel "is to be regulated" through a passport, "it must be pursuant to the law-making functions of the Congress." See *id.*, at 129. Later cases, such as *Zemel v. Rusk* and *Haig v. Agee*, also proceeded on the assumption that Congress must authorize the grounds on which passports may be approved or denied. See *Zemel, supra*, at 7–13; *Haig, supra*, at 289–306. This is consistent with the extensive lawmaking power the Constitution vests in Congress over the Nation's foreign affairs.

The problem with §214(d), however, lies in how Congress exercised its authority over passports. It was an improper act for Congress to "aggrandiz[e] its power at the expense of another branch" by requiring the President to contradict an earlier recognition determination in an official document issued by the Executive Branch. *Freytag v. Commissioner*, 501 U. S. 868, 878 (1991). To allow Congress to control the President's communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself. As a result, the statute is unconstitutional.

* * * *

Cross References

Somalia, **Chapter 1.C.1.d.**

Yemen, **Chapter 1.C.1.e.**

Evacuation of U.S. citizens in Yemen, **Chapter 2.A.2.**

Libya, **Chapter 3.C.1.f.**

U.S. objections to Palestinian Authority efforts to accede to treaties, **Chapter 4.A.1.**

Nationality of residents of Taiwan (Lin v. U.S.), **Chapter 5.C.3.**

Center for Biological Diversity v. Hagel, **Chapter 5.C.4.**

Cuba claims talks, **Chapter 8.A.**

Samantar: Relations with Somalia, **Chapter 10.B.2.**

Report on downing of Malaysia Airlines flight in Ukraine, **Chapter 11.A.5.**

Joint statement with Cuba, **Chapter 13.C.1.**

Cuba sanctions, **Chapter 16.A.3.**

Russia/Ukraine sanctions, **Chapter 16.A.5.**

Libya sanctions, **Chapter 16.A.8.i.**

Yemen sanctions, **Chapter 16.A.8.k.**

Middle East peace process, **Chapter 17.A.**

Ukraine, **Chapter 17.B.10**

Russia, **Chapter 19.B.6.c.**

Open Skies and CFE, **Chapter 19.C.6.**

CHAPTER 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs claims of immunity in civil actions against foreign states in U.S. courts. The FSIA’s various statutory exceptions to a foreign state’s immunity from the jurisdiction of U.S. courts, set forth at 28 U.S.C. §§ 1605(a)(1)–(6), 1605A, and 1607, have been 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 2015 in which the United States filed a statement of interest or participated as *amicus curiae*.

1. Jurisdiction and Venue under the FSIA in Actions to Enforce Arbitral Awards

On February 6, 2015, the United States submitted a letter brief as *amicus curiae* in a case in the U.S. Court of Appeals for the Second Circuit, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 13-4022 (2d. Cir.). *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V.* (“COMMISA”), a Mexican subsidiary of a U.S. corporation, sued in federal court to enforce an arbitral award against Pemex-Exploración y Producción (“PEP”), a subsidiary of the state-owned oil company of Mexico. The district court confirmed and increased the amount of the award, despite the fact that a Mexican court had nullified the award. Excerpts follow (with citations to the record omitted) from the sections of the U.S. brief discussing jurisdiction and venue under the FSIA. The sections of the brief discussing the district court’s errors in declining to recognize the nullification of the award and in

increasing the amount of the award are excerpted in Chapter 15. The letter brief is available in its entirety at <http://www.state.gov/s/l/c8183.htm>.

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I. The District Court’s Analysis of Personal Jurisdiction Was Flawed: The FSIA Incorporates Requirements That Meet Constitutional Standards, If Applicable

The district court held that it had personal jurisdiction over PEP on the theory that a foreign state instrumentality has no due process rights, and that PEP’s actions in connection with issuing debt instruments in the New York financial markets were sufficient to satisfy any applicable fairness or comity requirements. In the view of the United States, the district court’s analysis reflects a misunderstanding of the FSIA and erroneously relies on PEP’s connection to New York’s financial markets.

In holding that PEP lacks due process rights, the district court relied on *Frontera Res. Azerbaijan Corp. v. State Oil Company of the Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009), where this Court held that, because the jurisdictional requirements of the FSIA were met in an action against a foreign state and its state-owned corporation, the court did not need to engage in a separate due process inquiry. The Court reasoned that a foreign state is not a “person” within the meaning of the Due Process Clause, and that the same is true for a state-owned corporation so controlled by the state as to be its “agent” or “alter ego” under *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983). *Frontera*, 582 F.3d at 399–400. However, this Court explicitly declined to decide whether a state instrumentality that is juridically separate from the foreign state is entitled to due process protections, or what such protections would consist of in a case brought under the FSIA’s arbitration exception, 28 U.S.C. § 1605(a)(6). *Id.* at 401. *Compare GSS Grp. Ltd. v. Nat’l Port Auth.*, 680 F.3d 805, 817 (D.C. Cir. 2012) (holding that separate agencies and instrumentalities of a foreign state are entitled to due process protections, including a requirement of minimum contacts for personal jurisdiction); *First Inv. Corp. of Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 748–52 (5th Cir. 2012) (same).

This Court need not and should not reach the constitutional question whether a foreign state corporation has any due process rights, because exercising jurisdiction over PEP is consistent with due process. The FSIA’s jurisdictional provisions themselves incorporate a nexus requirement that should be sufficient to satisfy any constitutional standard that might apply. Moreover, even if a separate analysis were required, as discussed further below, it appears that the exercise of jurisdiction in this case would satisfy constitutional standards.

The FSIA “comprehensively regulat[es] the amenability of foreign nations to suit in the United States.” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). Section 1330(b) provides that personal jurisdiction “shall exist” over a foreign state or its agency or instrumentality if an exception to immunity in Section 1605 applies and service has been made under Section 1608. 28 U.S.C. § 1330(b). As the legislative history elaborates, “[t]he requirements of minimum jurisdictional contacts and adequate notice are embodied” in the FSIA. H.R. Rep. No. 94-1487, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612. Each of Section 1605’s exceptions to immunity “require[s] some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from

jurisdiction,” thereby “prescrib[ing] the necessary contacts which must exist before our courts can exercise personal jurisdiction.” *Id.*

Although the original version of the FSIA did not include Section 1605(a)(6)’s explicit exception to immunity for actions to confirm or enforce certain arbitral awards, which was added in 1988, there is no indication that Congress believed that such an exception would fail to satisfy minimum contacts requirements. The legislative history to the original FSIA suggests that an agreement “to arbitration in another country” could come within Section 1605(a)(1)’s exception to immunity for express or implied waivers of immunity. H.R. Rep. No. 94-1487, at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617. Prior to the addition of 1605(a)(6), actions to enforce foreign arbitral awards against foreign states were sometimes brought under 1605(a)(1) under an implied waiver theory. *See, e.g., Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311, 312 (D.D.C. 1980); *Iptrade Int’l, S.A. v. Fed. Republic of Nigeria*, 465 F. Supp. 824, 826 (D.D.C. 1978).

This Court should follow the lead of other courts of appeals in holding that it is unnecessary to decide whether a foreign state agency or instrumentality enjoys due process protections, because the nexus required under the FSIA for the exercise of jurisdiction satisfies the constitutional “minimum contacts” test. *See, e.g., Sachs v. Republic of Austria*, 737 F.3d 584, 598–99 (9th Cir. 2013) (en banc) (holding that FSIA exception to immunity for commercial activity carried out in the United States by the foreign state, which requires “substantial contact” with the United States, “sets a higher standard . . . than the minimum contacts standard for due process”); *see also Hanil Bank v. PT. Bank Negara Indonesia, (Persero)*, 148 F.3d 127, 134 (2d Cir. 1998) (holding that it was unnecessary to decide whether foreign state has due process rights because defendant’s conduct that satisfied commercial activity exception to immunity was also sufficient to satisfy due process requirements). The approach the United States advocates is also consistent with *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), where the Supreme Court declined to decide whether Argentina was entitled to due process protections, instead reasoning that Argentina possessed sufficient “minimum contacts” with the United States to satisfy any applicable constitutional standards. *Id.* at 619.

The assertion of personal jurisdiction over PEP in this enforcement proceeding comports with any applicable constitutional requirements. Section 1605(a)(6) permits a court to exercise jurisdiction over an action “to confirm an award made pursuant to such an agreement to arbitrate,” if the “award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.” PEP entered into contracts with COMMISA (a subsidiary of a U.S. corporation), which provided for arbitration of any dispute. PEP, an instrumentality of Mexico, knew or should have known when it entered into the contracts that both Mexico and the United States are parties to the Panama Convention and that, as a result, any Mexican arbitral award could be enforced in U.S. courts. *Cf. Seetransport Wiking Trader Schiffahrtsgesellschaft MbH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 578 (2d Cir. 1993) (“[W]hen a country becomes a signatory to the [New York] Convention, . . . the signatory State must have contemplated enforcement actions in other signatory States.”) Furthermore, PEP was aware that COMMISA was a subsidiary of a U.S. corporation, and that it was foreseeable that performance of the contract might take place in part in the United States, which it then did. In these circumstances, PEP should reasonably have anticipated being haled into court in the United States in an action to enforce an arbitral award. *See, e.g., S & Davis Int’l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1304–05 (11th Cir. 2000) (holding that foreign state ministry that entered into contract with U.S. corporation, requiring

foreign state to open a letter of credit in the United States and providing for arbitration of any dispute, could reasonably anticipate that the U.S. corporation would sue in U.S. court to enforce any resulting arbitral award).

Although it is unnecessary for the Court to reach this question, the nature of a proceeding to confirm and enforce a foreign arbitral award would also typically support the conclusion that the exercise of jurisdiction is constitutional—putting to the side the question whether this same conclusion would apply if the underlying award has been nullified. A confirmation proceeding under the Panama or New York Conventions is typically “summary,” with the district court doing “little more than giv[ing] the award the force of a court order.” *Zeiler v. Deutsch*, 500 F.3d 157, 169 (2d Cir. 2007). In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Supreme Court reasoned that, once a court with jurisdiction over a defendant has ruled “that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of a debt as an original matter.” *Id.* at 210 n.36. It seems appropriate to apply a similar rule in a confirmation proceeding—and the United States also agrees that a court can properly exercise quasi in rem jurisdiction in this context if the defendant has assets in the forum. *See, e.g., Frontera*, 582 F.3d at 398; *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123–26 (9th Cir. 2002). We note, however, that this case law is dependent on the context in which it arose—namely, proceedings to enforce arbitral awards—and that a foreign defendant should not be subject to general jurisdiction simply because the defendant owns property in the United States.

Finally, the United States urges this Court to make clear that a foreign entity’s involvement in U.S. financial markets is not itself a sufficient basis for a U.S. court to exercise personal jurisdiction over a dispute that is unrelated to such financing activities. “[T]he prevailing caselaw accords foreign corporations substantial latitude to list their securities on New York-based stock exchanges and to take the steps necessary to facilitate those listings (such as making SEC filings and designating a depository for their shares) without thereby subjecting themselves to New York jurisdiction for unrelated occurrences.” *Wiwa v. Royal Telcordia Tech. Inc. v. Telkon SA Ltd.*, 458 F.3d 172, 178 (3d Cir. 2006). *Dutch Petroleum Co.*, 226 F.3d 88, 97 (2d Cir. 2000) (citations omitted). This established principle is vital to the proper functioning of the U.S. financial markets. The district court’s reasoning that PEP’s guarantee of bonds issued in New York justified the court’s exercise of jurisdiction in this unrelated enforcement proceeding could have a harmful effect on foreign entities’ willingness to issue financing in the U.S. markets for fear of broadly subjecting themselves to jurisdiction here. The bond-issuing and guaranteeing activities that the district court emphasized, would, standing alone, be insufficient to satisfy the due process requirements for general personal jurisdiction, or the nexus requirements incorporated into the FSIA. As noted, the record refers to other contacts between PEP and the United States that more directly relate to the parties’ dealings, which illustrate that the exercise of personal jurisdiction under the FSIA should satisfy constitutional standards.

II. The Southern District of New York Was a Permissible Venue Under 28 U.S.C. § 1391(b)(3)

The district court held that venue was proper in the Southern District of New York, suggesting that PEP’s guarantee of debt instruments issued by its parent company in the New York financial markets constituted “doing business” within the meaning of 28 U.S.C. § 1391(f)(3). In the view of the United States, that conclusion was erroneous, but venue was proper in the district court under a distinct statutory provision, 28 U.S.C. § 1391(b)(3).

When the FSIA was originally enacted in 1976, it contained the provision now codified at 28 U.S.C. § 1391(f), which provides in relevant part for venue:

- (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;
- ...
- (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or
- (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

Congress amended the FSIA in 1988 to add an additional exception to immunity for enforcement of foreign arbitral awards, but did not enact any corresponding amendment to the venue provision.

The district court's suggestion that venue was proper under section 1391(f)(3) could subject foreign state agencies and instrumentalities to venue in any forum in which they had minor, unrelated commercial dealings. Foreign state agencies might reasonably object to being haled into a U.S. court in any type of lawsuit based on such dealings when another venue was more appropriate under 1391(f). Such an approach is also inconsistent with well-established case law holding that an entity is not "doing business" in New York for purposes of the venue statutes based solely on financing activities that are unrelated to the subject matter of the litigation. *See ... Wiwa*, 226 F.3d at 97. This Court therefore should not endorse the district court's expansive construction of "doing business" under Section 1391(f)(3).

Instead, the Court should hold that venue was proper under Section 1391(b)(3), which provides that, "if there is no district in which an action may otherwise be brought as provided in this section [section 1391]," venue is proper in any judicial district in which a defendant "is subject to the court's personal jurisdiction with respect to such action." In this action, venue does not lie under Section 1391(f)(1) or (f)(2), because the events giving rise to the claim did not occur in the Southern District of New York, nor is there property there that is the subject of the action. Similarly, venue does not lie under Section 1391(f)(3) because PEP is not licensed to do or doing business in the Southern District of New York. And Section 1391(f)(4) does not apply, because PEP is not a foreign state. Because the district court had personal jurisdiction over PEP, however, venue was proper under Section 1391(b)(3), which functions as a catch-all venue provision for the entire "section." _____

Because "Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other," venue statutes are to be construed to "avoid[] leaving such a gap." *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 710 n.8 (1972). There is no indication in the statutory text or legislative history that, in adopting the 1988 amendment adding the arbitration exception to immunity, Congress intended to leave a gap between its grant of subject matter jurisdiction to enforce arbitral awards against foreign state agencies or instrumentalities, and venue over such entities. The construction urged by the United States would, in cases in which none of the venues listed in Section 1391(f) applies, allow for enforcement of arbitral awards against a foreign state

corporation in any venue where jurisdiction can be exercised, without the need for an unduly loose standard for “doing business.”

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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.”

As discussed in *Digest 2014* at 373-77, the United States filed a brief recommending the Supreme Court deny the petition for certiorari in *OBB Personenverkehr AG v. Carol P. Sachs*, No. 13-1067, a case involving the application of the first clause of the commercial activity exception of the FSIA. Respondent Sachs had sued OBB Personenverkehr AG (“OBB”), an agency or instrumentality of Austria, after sustaining injuries while boarding an OBB train in Austria. She had purchased the Eurail pass she used to travel on OBB’s railway in the United States via a travel agency (“RPE”). The district court in California dismissed the case for lack of jurisdiction and a panel of the Court of Appeals for the Ninth Circuit affirmed. However, the Ninth Circuit Court of Appeals ultimately reversed after granting rehearing en banc. At the petition stage, the U.S. brief explained that the Court of Appeals had incorrectly analyzed whether Sachs’s claims were “based upon” commercial activity—i.e., the sale of the Eurail pass in the United States—but that further review was not warranted, noting the lack of clarity about the precise nature of Respondent’s claims and the prevalence of forum-selection clauses in form ticket contracts for travel. The Supreme Court decided to grant the petition and, on April 24, 2015, the United States filed an *amicus* brief in support of reversing the court of appeals. Excerpts follow (with footnotes omitted) from the April 24, 2015 U.S. *amicus* brief, which argues that the en banc court of appeals erred in concluding that the claim at issue in this case was “based upon” commercial activity in the United States within the meaning of the FSIA’s commercial activity exception. The *amicus* brief also explains that the Court of Appeals had correctly held that a foreign state can “carr[y] on” commercial activity in the United States by means of common law agents. The brief is available at <http://www.state.gov/s/l/c8183.htm>.

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A. The Court Of Appeals Correctly Held That A Foreign State May Carry On Commercial Activity In The United States Through An Agent Acting On Its Behalf

1. The FSIA's commercial-activity exception provides in relevant part that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2); see 28 U.S.C. 1603(e) (defining latter phrase as commercial activity "carried on by such state and having substantial contact with the United States"). The exception is designed to ensure that when a foreign state acts as an "every day participant[]" in the marketplace—in other words, when the state engages in commercial ventures of the sort that private parties undertake—plaintiffs may seek judicial resolution of any resulting "ordinary legal disputes." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-7 (1976) (*House Report*); *id.* at 17 (examples of disputes that would fall within exception include "business torts occurring in the United States"); see generally *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614- 615 (1992).

Private parties often engage in commercial activities with the assistance of agents acting on their behalf. Because an agent is subject to the direction and control of the principal, the agent is able to "act for or in place of" the principal on matters within the scope of the agency as if the principal itself were engaging in the act. *Black's Law Dictionary* 72 (9th ed. 2009) (*Black's*) (second meaning of "agent"); see *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392-393 (1982) (quoting 1 Restatement (Second) of Agency § 1(1) (1958)).

As a result, common-law agency principles are routinely applied in private commercial disputes. For purposes of both jurisdiction and liability, agency principles may provide a basis for attributing conduct to a principal who directed the activity at issue. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (explaining that acts of an agent may be imputed to the principal for purposes of exercising specific jurisdiction); see also 1 Restatement (Third) of Agency § 1.01 cmt. c (2006). Such attribution is particularly common when the principal is a corporation: because "the corporate personality * * * is a fiction," such an entity "can act only through its agents." *Daimler AG*, 134 S. Ct. at 759 n.13 (citations omitted); see, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 316-317 (1945).

Congress would have expected traditional agency-law principles to play a similar role in determining when a foreign state has undertaken commercial activities that subject it to suit. Foreign states, like private actors, often engage in commercial activities by employing entities under their control to enter into and execute transactions. See *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F. 2d 1094, 1105 (D.C. Cir. 1982) (discussing "the realities of modern commercial undertakings"), cert. denied, 464 U.S. 815 (1983). Indeed, like corporations, foreign states can act only through agents of one sort or another. See Pet. App. 23. When a foreign state uses agents to accomplish its commercial ends, the state is acting as an "every day participant[]" in the marketplace. *House Report* 7. And by virtue of the state's control over the agent, the state is effectively taking actions in the United States commercial market itself—that is, "carr[ying] on" commercial activity. 28 U.S.C. 1605(a)(2); see *The Random House Dictionary of the English Language* 319 (2d ed. 1987) (defining "carry on" as "to manage; conduct").

Applying agency-law principles to determine when a foreign state has "carried on" commercial activity thus furthers Congress's purpose of ensuring that foreign states are subject to suit when they act in a commercial manner. See *Maritime Int'l*, 693 F. 2d at 1105; see also

Saudi Arabia v. Nelson, 507 U.S. 349, 372-373 (1993) (Kennedy, J., concurring in part and dissenting in part) (attributing to Kingdom of Saudi Arabia actions of private entity that “acted as the [Kingdom’s] exclusive agent for recruiting employees” in the United States); U.S. Amicus Br. at 14 n.8, *Nelson*, *supra* (No. 91-522). If the acts of an agent were not attributed to a foreign state when assessing whether the requirements of Section 1605(a)(2) are met, then a state could conduct extensive commercial activities in the United States through its agents, and could reap significant benefits from those activities, without ever subjecting itself to suit in this country.

The *House Report*’s discussion of a different (but overlapping) prong of the commercial-activity exception, which denies immunity for “act[s] performed in the United States in connection with a commercial activity of the foreign state elsewhere,” 28 U.S.C. 1605(a)(2), reinforces the conclusion that Congress expected that foreign states could be subject to suit as a result of their agents’ acts. The *House Report* (at 19) explains that “a representation in the United States by an agent of a foreign state” could constitute an “act performed” by a foreign state.

Exercising jurisdiction over a foreign state that has “carried on” commercial activity through an agent is also consistent with international practice. Cf. 28 U.S.C. 1602 (referring to immunity “[u]nder international law”); *Bancec*, 462 U.S. at 623. The International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts provide that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” G.A. Res. 56/83, Pt. 1, ch. II, art. 8, U.N. Doc. A/RES/56/83, at 3 (Jan. 28, 2002). The United States expressed support for an earlier, materially similar draft article. State Responsibility: Comments and observations received from Governments, U.N. Doc. A/CN.4/488, at 41 (Mar. 25, 1998).

Thus, the use of common-law agency principles to make the “carried on” determination gives content to the FSIA’s plain text in a manner that is consistent with “articulated congressional policies” and “internationally recognized” legal doctrine. *Bancec*, 462 U.S. at 623, 630, 633-634; see *Dole Food Co. v. Patrickson*, 538 U.S. 468, 473-478 (2003) (relying on “elementary principles of corporate law” to construe 28 U.S.C. 1603(b)(2), which refers to ownership of majority of “shares or other ownership interest”); see generally *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991). All of the courts of appeals to have addressed the issue have agreed with that conclusion.

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B. The Court Of Appeals Erred In Holding That Respondent’s Claims Are “Based Upon” Commercial Activity In The United States

1. a. To establish jurisdiction over a foreign state under the relevant clause of Section 1605(a)(2), a plaintiff must show that “the action is based upon” the state’s commercial activity carried on in the United States. In *Nelson*, this Court held that the phrase “based upon” connotes “conduct that forms the ‘basis,’ or ‘foundation,’ for a claim.” 507 U.S. at 357. The Court explained that the phrase “is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case,” and it cited with approval a decision describing the inquiry as focusing on “the gravamen of the complaint.” *Ibid.* (quoting *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985)). The Court also cautioned that it “d[id] not mean to suggest that the first clause of [Section] 1605(a)(2) necessarily requires that

each and every element of a claim be commercial activity by a foreign state” carried on in the United States. *Id.* at 358 n.4.

The plaintiffs in *Nelson* were a husband and wife who sued Saudi Arabia and its state-owned hospital for intentional and negligent torts committed against the husband in Saudi Arabia, allegedly in retaliation for his reporting safety hazards at the hospital where he worked after being recruited and hired in the United States by the defendants. See 507 U.S. at 352-354. The Court held that the plaintiffs’ suit was “based upon” the tortious acts committed in Saudi Arabia and not upon recruiting and hiring “activities that preceded the[] [torts’] commission.” *Id.* at 358. It was not enough, the Court explained, that the recruiting and hiring activities were “connect[ed] with” or “led to the conduct that eventually injured the [plaintiffs].” *Ibid.* As the Court stated, the suit could not be “based upon” the defendants’ earlier activities because “those facts alone entitle the [plaintiffs] to nothing.” *Ibid.*

b. *Nelson* did not decide how to treat a claim that consists of both elements premised on commercial activity described in Section 1605(a)(2) and elements that fall outside that category. 507 U.S. at 358 n.4. Nevertheless, *Nelson*’s discussion of the meaning of “based upon” indicates the correct approach: one that looks to the “gravamen of the complaint.” *Id.* at 357 (citation omitted). That calls for an inquiry into whether commercial activity carried on in the United States is the gist or essence of a claim, and not simply an analysis of whether an essential fact or single element of the claim turns on the existence of such activity. See U.S. Amicus Br. at 15 & n.10, *Nelson* (No. 91- 522) (court should identify “fundamental ingredient” of the cause of action); *Black’s* 770 (defining “gravamen” as “substantial point or essence of a claim, grievance, or complaint”).

The “gravamen” approach is well supported by the text and purpose of Section 1605(a)(2). As relevant here, the phrase to “base upon” means “to use as a base or basis for,” and the noun “base” means “the fundamental part of something: basic principle.” *Webster’s Third New International Dictionary of the English Language* 180 (1976) (definition 2 of verb “base”; definition 3a of noun “base”); see *Webster’s New Twentieth Century Dictionary of the English Language* 154 (2d ed. 1969) (definition 2 of noun “base”: “the foundation or most important element”); 1 *The Oxford English Dictionary* 977 (2d ed. 1989) (*OED*) (definition 2.a. of noun “base”: “*fig[urative]* [f]undamental principle, foundation, groundwork”; sense II of noun “base”: “[t]he main or most important element or ingredient, looked upon as its fundamental part”); *Webster’s New International Dictionary of the English Language* 225 (2d ed. 1958) (definition 4.a of “base”: “[t]he main or chief ingredient of anything, viewed as its fundamental element or constituent”). *Nelson* relied on just such definitions to conclude that “based upon” in Section 1605(a)(2) refers to the “foundation” for a claim. 507 U.S. at 357 (citations omitted).

Although Section 1605(a)(2) asks what an “action” is “based upon,” a claim-by-claim analysis is warranted. See *Nelson*, 507 U.S. at 362-363; see also *Keene Corp. v. United States*, 508 U.S. 200, 210 (1993); 28 U.S.C. 1330. Under such an analysis, there may be situations in which the foreign state’s commercial conduct in the United States establishes a single element of or fact necessary to a claim, and that element or fact is so “[f]undamental” to the particular claim— amounting to its “most important” part, *OED* 977— that the commercial activity may be said to be the gravamen of the plaintiff’s demand for relief. But the plain meaning of “based upon” precludes the conclusion that the requirement is met whenever the commercial activity in question constitutes *any* element or necessary factual predicate of the plaintiff’s claim— even one that has little to do with the core wrong the plaintiff has allegedly suffered.

As *Nelson* explained, “[w]hat the natural meaning of the phrase ‘based upon’ suggests, the context confirms.” 507 U.S. at 357. The two clauses of Section 1605(a)(2) that immediately follow the clause at issue in this case refer to acts performed “in connection with a commercial activity of the foreign state.” 28 U.S.C. 1605(a)(2). Because “Congress manifestly understood there to be a difference between a suit ‘based upon’ commercial activity and one ‘based upon’ acts performed ‘in connection with’ such activity,” the phrase “based upon” must be read to “call[] for something more than a mere connection with, or relation to, commercial activity.” *Nelson*, 507 U.S. at 357-358; see *Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F. 3d 384, 390 (2d Cir. 2000), cert. denied, 532 U.S. 904 (2001). Looking at the gravamen of a claim gives “based upon” considerably more force than a requirement of a “mere connection” with the relevant commercial activity. But looking only at a single element or necessary fact to decide whether the relationship between the claim and the commercial activity is sufficiently close is essentially equivalent to requiring only a connection between the two—as the court of appeals here acknowledged. See Pet. App. 12 (under single-element test “commercial activity that occurs within the United States must be connected with the conduct that gives rise to the plaintiff’s cause of action”); *id.* at 33.

Finally, the purposes of the FSIA and the commercial-activity exception support a gravamen requirement. See 28 U.S.C. 1604. As this Court has recognized, that exception codifies the “restrictive” theory of sovereign immunity—a theory that makes a foreign state subject to suit for its commercial activities because engaging in those activities “do[es] not exercise powers peculiar to sovereigns,” but rather “only those powers that can also be exercised by private citizens.” *Weltover*, 504 U.S. at 614 (citation omitted); see *Nelson*, 507 U.S. at 363; 28 U.S.C. 1602. Were jurisdiction proper under the FSIA whenever a single fact necessary to make out a claim was linked to some commercial activity in this country, then the exception in Section 1605(a)(2) would enable suits in U.S. courts challenging activities that are best characterized as “state sovereign acts” rather than “state commercial and private acts.” *Weltover*, 504 U.S. at 613. The gravamen requirement, in contrast, ensures that the suit is indeed “based upon” alleged wrongdoing that centers on a commercial activity.

Even in situations in which all of the relevant activities of the foreign state are commercial ones, reading “based upon” to call for an examination of the gravamen of the claim ensures a meaningful linkage between the United States and an action over which U.S. courts may exercise jurisdiction. See 28 U.S.C. 1330, 1605. The commercial-activity exception supplies a territorial basis of jurisdiction. Accordingly, each of the exceptions in Section 1605(a) calls for a tie to the United States, so as to avoid inserting this Nation’s courts into disputes that are appropriately resolved elsewhere—an intrusion that may raise delicate questions of foreign relations when a foreign sovereign is the defendant. Cf. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-1665 (2013); see generally *Republic of Phil. v. Pimentel*, 553 U.S. 851, 865 (2008); *National City Bank v. Republic of China*, 348 U.S. 356, 362 (1955). Too broad an interpretation of “based upon” would attenuate that tie, avoiding a significant jurisdictional limitation imposed by Congress and creating a serious risk that courts would assume jurisdiction over cases in which all or virtually all of the acts or omissions that are the subject of the parties’ dispute took place abroad.

c. In ruling that the “based upon” requirement is satisfied whenever the relevant commercial activity constitutes a single element of a claim or a necessary fact in establishing that element, the Ninth Circuit made no attempt to examine the text or purpose of the FSIA. See Pet. App. 32-33. Rather, that ruling appears to be derived solely from an overreading of *Nelson*.

In the decision below (and the prior Ninth Circuit decisions on which the majority relied), the court of appeals focused on *Nelson*'s statement that "based upon" is "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under [its] theory of the case." 507 U.S. at 357; see Pet. App. 32-33. But *Nelson*'s reference to "elements" does not suggest approval of the single-element test the court below adopted—particularly in light of *Nelson*'s reservation of the issue of how to treat a case in which certain elements of a claim are based on qualifying commercial activity and other elements are not. See 507 U.S. at 358 n.4. In addition, as Chief Judge Kozinski explained in his en banc dissent, the suggestion in *Nelson* that "a claim *can* be based upon commercial activity even if proving that activity [will not] establish every element of the claim" cannot be transmuted into "an endorsement of the converse proposition—that a claim *is* based upon commercial activity so long as proving that activity will establish at least *one* element of the claim," no matter which one. Pet. App. 63.

The test adopted below not only departs from the text and purpose of the FSIA, but also would entail untoward consequences. Under that erroneous test, the scope of the commercial-activity exception would depend on the artfulness of a plaintiff's pleadings rather than on the nature of the sovereign's acts. If one claim permits qualifying commercial activity to be shoehorned into a single "element" of the claim while another does not, and both claims are based on the same underlying conduct, then the FSIA would—on the Ninth Circuit's view—permit the first claim to proceed while barring the second.

That approach would encourage the kind of gamesmanship that this Court disapproved in *Nelson*, which refused to give "jurisdictional significance" to a "feint of language" whereby "a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn." 507 U.S. at 363; cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 702 (2004) (criticizing "repackag[ing]" of claims to manipulate application of foreign-country exception to waiver of immunity in Federal Tort Claims Act). It would raise the possibility that the immunity analysis in very similar cases—even ones arising from essentially the same set of facts—would have different outcomes, creating uncertainty and a perception of unequal treatment in the "vast external realm." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936). And it would create the risk that the United States would be subject to similar arbitrary rules when foreign courts evaluate whether jurisdiction over a claim against this country is proper. See *Boos v. Barry*, 485 U.S. 312, 323 (1988) (highlighting "concept of reciprocity").

2. An examination of the claims asserted in this case makes clear that respondent's claims are not "based upon" commercial activity in the United States.

The complaint alleges that petitioner provided an unsafe boarding area and permitted unsafe boarding procedures in Innsbruck, as a result of which respondent fell and was injured while she was attempting to board a train to Prague. ... The complaint asserts claims of negligence; strict liability for defective railcars and platforms and a failure to warn of the defects; and a breach of implied warranties of merchantability and fitness relating to the railcars and the platform. ... The only commercial activity in the United States attributed to petitioner was RPE's sale of her Eurail pass. But all of the allegedly tortious conduct occurred in Austria, after respondent purchased the pass and traveled to Europe.

While RPE's sale of the Eurail pass to respondent in the United States enabled respondent to use the pass in Innsbruck, the sale of the pass is not the "gravamen," or foundation, of respondent's suit. Respondent does not allege that the sale of the Eurail pass was itself wrongful, and this is not a breach-of-contract action based on her purchase of it. Rather, respondent alleges that the sale was a link in the chain of events that led her to be injured in

Austria by petitioner's allegedly tortious activities in that country. As was true in *Nelson*, those alleged bad acts, "and not the * * * commercial activities that preceded their commission, form the basis for the [plaintiff's] suit." 507 U.S. at 358.

Assuming that California law applies (as the court below concluded, see Pet. App. 34), a detailed examination of the elements of respondent's claims confirms that common-sense conclusion. First, the negligence claim centers around activity that took place in Austria rather than in the United States: petitioner's alleged failure to take sufficient care with respect to the condition of the platform and the boarding procedures in Innsbruck, and the injury that respondent says resulted from that failure. ... The focus of tort claims is ordinarily on the breach of a duty of care and on the resulting injury, rather than on the circumstances giving rise to the duty in the first instance.

The court below said that the sale of the pass was necessary to establish an element of the claim, reasoning that petitioner owed respondent "a duty of care because her purchase of the Eurail pass established a common-carrier/passenger relationship." ... Even if that were correct, that would not shift the gravamen of the claim away from petitioner's allegedly negligent acts at a particular train station in Austria and the injury that is claimed to be the consequence of those acts. But it is wrong even as a matter of California law. Respondent need not show that petitioner owed her the duty of heightened care associated with the common carrier/ passenger relationship in order to prevail on a negligence claim; a rail carrier owes non-passengers a duty of ordinary care. See *Orr v. Pacific Sw. Airlines*, 257 Cal. Rptr. 18, 20-21 (Cal. Ct. App. 1989); *McGettigan v. Bay Area Rapid Transit Dist.*, 67 Cal. Rptr. 2d 516, 520, 522-524 (Cal. Ct. App. 1997). In addition, the pass itself did not create a common carrier/passenger relationship that gives rise to a heightened duty with respect to a tort claim. Under California law, that relationship is created when "one, intending in good faith to become a passenger, goes to the place designated as the site of departure at the appropriate time and the carrier takes some action indicating acceptance of the passenger as a traveler." *Orr*, 257 Cal. Rptr. at 21 (citation omitted); see *Grier v. Ferrant*, 144 P.2d 631, 633-634 (Cal. Dist. Ct. App. 1944) ("relationship is created when one offers to become a passenger, and is accepted as a passenger after he has placed himself under the control of the carrier"); see also 11A Cal. Jur. 3d *Carriers* § 143 (2007). Merely holding a ticket or a pass is neither sufficient, see *Orr*, 257 Cal. Rptr. at 21-22; see also *Simon v. Walt Disney World Co.*, 8 Cal. Rptr. 3d 459, 464-466 (Cal. Ct. App. 2004), review denied, Mar. 30, 2014, nor necessary, see *Grier*, 144 P.2d at 633; see also J.A. 15, 32, 40; see generally *Aschenbrenner v. United States Fid. & Guar. Co.*, 292 U.S. 80, 82-85 (1934).

Second, the strict-liability claims bear no relationship to the pass or its purchase. The complaint alleges that "the railcars and boarding platform were defective in their design" and should have been accompanied by warnings...; the gravamen of those claims is outside the United States, where the allegedly defective items were designed, sold, and used, ... and where any warnings about the items would have been provided. With respect to the defects, the court below confused the issue by apparently considering the sale of the pass to be a necessary element of a strict-liability claim. ... That was wrong as a matter of California law, under which strict liability for defective products exists regardless of whether the injured party is a purchaser, a lessee, or simply a bystander. See, e.g., *Price v. Shell Oil Co.*, 466 P.2d 722, 725-726 (Cal. 1970) (disagreeing with Restatement (Second) of Torts § 402A); *Elmore v. American Motors Corp.*, 451 P.2d 84, 88 (Cal. 1969). Moreover, to the extent that a sale of the allegedly defective product to *someone* is required in order for strict liability to attach, the sale of the pass would not qualify, since the pass is not the thing that is said to be defective. ... With respect to the need for a

warning, respondent has not alleged that the pass should have warned about the conditions on one specific platform in one particular city in Europe. If any warning was needed, it surely was one that should have been given in Innsbruck. ...

Last, the breach-of-implied-warranty claims are merely a way of restating the strict-liability claims in an attempt to make them sound in contract and thus link them to the pass. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963). Just as in *Nelson*, the Court should not permit respondent to invoke the commercial-activity exception through a “feint of language.” 507 U.S. at 363. Under California law, implied warranties of merchantability and fitness attach to contracts to sell or supply goods, not contracts to provide services, see *Link-Belt Co. v. Star Iron & Steel Co.*, 135 Cal. Rptr. 134, 142 (Cal. Ct. App. 1976)—and a ride on a train falls into the latter category. See, e.g., *Garcia v. Halsett*, 82 Cal. Rptr. 420, 422 (Cal. Ct. App. 1970) (defining “bailment”). Respondent is not truly complaining about a breach of any promise contained in her pass; she is complaining of distinct tortious actions allegedly taken by petitioner on an Austrian rail platform, and her claim is therefore not “based upon” commercial activity in the United States.

* * * *

On December 1, 2015, the Supreme Court issued its decision, agreeing with the U.S. position that an action is “based upon” the particular conduct that constitutes the “gravamen” of the suit, and that the Respondent’s suit was not “based upon” the sale of the Eurail pass for purposes of §1605(a)(2). The opinion explains that, “[a]ll of Respondent’s claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria,” and accordingly her claims fall outside of the FSIA’s commercial activity exception and are barred by sovereign immunity. In light of this holding, the Court declined to reach the question of whether the FSIA allows attribution of commercial activity to a foreign state through principles of agency. *OBB Personenverkehr AG v. Sachs*, 136 S.Ct. 390 (2015).

3. Service of Process

a. Harrison v. Sudan

On November 6, 2015, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit in *Harrison v. Sudan*. The U.S. brief supports Sudan’s petition for rehearing of a decision of a panel of the Second Circuit allowing service on a foreign sovereign via its embassy in the United States, explaining that such service is inconsistent with the FSIA’s service procedures, the legislative history of the statute, and the inviolability of diplomatic missions under the Vienna Convention on Diplomatic Relations (“VCDR”). Excerpts follow (with footnotes omitted) from the U.S. brief, which is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The panel incorrectly construed § 1608(a)(3) of the FSIA to permit service upon foreign states by allowing U.S. courts to enlist foreign diplomatic facilities in the U.S. as agents for delivery to those sovereigns' foreign ministers. That method of service contradicts the FSIA's text and history, and is inconsistent with the United States' international obligations.

The FSIA sets out the exclusive procedures for service of a summons and complaint on a foreign state and provides that, if service cannot be made by other methods, the papers may be served "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). The most natural understanding of that text is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work—*i.e.*, at the ministry of foreign affairs in the state's seat of government—not to some other location for forwarding. *See, e.g., Barot v. Embassy of Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (directing service to be sent to foreign minister in state's capital city).

The panel observed that § 1608(a)(3) does not expressly specify a place of delivery for service on a foreign minister, and assumed that mailing to the embassy "could reasonably be expected to result in delivery to the intended person." (Slip op. 13). But the FSIA's service provisions "can only be satisfied by strict compliance." *Magness v. Russian Fed'n*, 247 F.3d 609, 615 (5th Cir. 2001); *accord Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994). It is inconsistent with a rule of strict compliance to permit papers to be mailed to the foreign minister at a place other than the foreign ministry, even if the mailing is nominally addressed to that person, based on the assumption it will be forwarded.

The Court supported its conclusion by contrasting § 1608(a)(3)'s silence regarding the specific address for mailing with § 1608(a)(4)'s provision that papers be mailed to the U.S. Secretary of State "in Washington, [D.C.]," and inferring that Congress therefore did not intend to require mailing the foreign minister at any particular location. (Slip op. 12). But a separate contrast in the statute undermines that conclusion. For service on a foreign state agency or instrumentality, Congress expressly provided for service by delivery to an "officer, a managing or general agent, or to any other [authorized] agent." § 1608(b)(2). In contrast, for service on the foreign state itself, Congress omitted any reference to an officer or agent. *Id.* § 1608(a). That difference strongly suggests that Congress did not intend to allow service on a foreign state via delivery to any entity that could, by analogy, be considered the foreign state's officer or agent, including the state's embassy, even if only for purposes of forwarding papers to the foreign ministry.

The FSIA's legislative history makes clear that Congress did not intend for service to be made via direct delivery to an embassy, and spells out significant legal and policy concerns with such an approach. The panel acknowledged that the relevant House report explicitly stated that "[s]ervice on an embassy by mail would be precluded under this bill." (Slip op. 15-16 (quoting H.R. Rep. No. 94-1487, at 26 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6625)). The panel was persuaded that this language did not reflect Congress's intent to preclude service by delivery to a foreign minister "via or care of an embassy," as opposed to precluding service "on" the embassy if, for example, the suit is against the embassy. But suits against diplomatic missions are also suits against foreign states for purposes of the FSIA, *see Gray v. Permanent Mission of People's Republic of Congo*, 443 F. Supp. 816 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1044 (2d Cir.

1978), and there is no rationale for prohibiting service of papers at an embassy only in cases where the embassy is the named defendant.

Additional legislative history confirms that Congress was concerned about allowing foreign states to be served at their embassies. Early drafts of the FSIA provided for mailing papers to foreign ambassadors in the United States as the primary means of service on a foreign state. *See* S. 566, 93rd Cong. (1973); H.R. 3493, 93rd Cong. (1973). But, at the urging of the State Department, Congress removed any reference to ambassadors from the final service provisions, to “minimize potential irritants to relations with foreign states,” particularly in light of concerns about the inviolability of embassy premises under the VCDR. H.R. Rep. No. 94-1487, at 11, 26.

Indeed, the panel’s decision is contrary to the principle of mission inviolability and the United States’ treaty obligations. The VCDR provides that “the premises of the mission shall be inviolable.” 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 22. As this Court has correctly concluded in an analogous context, this principle must be construed broadly, and is violated by service of process—whether on the inviolable diplomat or mission for itself or “as agent of a foreign government.” *Tachiona v. United States*, 386 F.3d 205, 222, 224 (2d Cir. 2004); *accord Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) (“service through an embassy is expressly banned” by VCDR and “not authorized” by FSIA (emphasis added)); *see 767 Third Ave. Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 301 (2d Cir. 1993) (approvingly noting commentator’s view that “process servers may not even serve papers without entering at the door of a mission because that would ‘constitute an infringement of the respect due to the mission’ ”); Brownlie, *Principles of Public Int’l Law* 403 (8th ed. 2008) (“writs may not be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs.”). The intrusion on a foreign embassy is present whether it is the ultimate recipient or merely the conduit of a summons and complaint.

The panel’s contrary conclusion also improperly allows U.S. courts to treat the foreign embassy as a forwarding agent, diverting its resources to determine the significance of the transmission from the U.S. court, and to assess whether or how to respond. The panel assumed that the papers would be forwarded on to the foreign minister via diplomatic pouch, which is provided with certain protections under the VCDR to ensure the safe delivery of “diplomatic documents and articles intended for official use.” VCDR, art 27. But one sovereign cannot dictate the internal procedures of the embassy of another sovereign, and a foreign government may well object to a U.S. court instructing it to use its pouch to deliver items to its officials on behalf of a third party.

Finally, the United States has strong reciprocity interests at stake. The United States has long maintained that it may only be served through diplomatic channels or in accordance with an applicable international convention or other agreed-upon method. Thus, the United States consistently rejects attempted service via direct delivery to a U.S. embassy abroad. When a foreign court or litigant purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the United States does not consider itself to have been served properly and thus will not appear in the case or honor any judgment that may be entered. That position is consistent with international practice. *See* U.N. Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/ 59/508 (2004), art. 22 (requiring service through international convention, diplomatic channels, or agreed-upon method); European Convention on State Immunity, 1495 U.N.T.S. 181 (1972), art. 16 (service exclusively through diplomatic channels); U.K. State Immunity Act, 1978 c.33

(same). If the FSIA were interpreted to permit U.S. courts to serve papers through an embassy, it could make the United States vulnerable to similar treatment in foreign courts, contrary to the government's consistently asserted view of the law. *See, e.g., Medellín v. Texas*, 552 U.S. 491, 524 (2008) (U.S. interests including "ensuring the reciprocal observance of the Vienna Convention [on Consular Relations]" are "plainly compelling"); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1995) (FSIA's purposes include "according foreign sovereigns treatment in U.S. courts that is similar to the treatment the United States would prefer to receive in foreign courts").

* * * *

b. Salini v. Morocco

See Chapter 15 for discussion of and excerpts from the U.S. Statement of Interest in *Salini Construttori v. Kingdom of Morocco*, No. 14-2036, which relates to service of process pursuant to the FSIA.

4. Execution of Judgments against Foreign States and Other Post-Judgment Actions

a. Attempted attachment of property protected by the Vienna Convention

On January 23, 2015, the United States submitted a statement of interest in *Wyatt v. Syria*, No. 08-CV-502-RCL (D.D.C.). Plaintiffs sought to enforce a default judgment against the Syrian Arab Republic by attaching funds that the Embassy of Syria attempted to transfer from its diplomatic account at the Washington, D.C. branch of Abu Dhabi International Bank ("ADIB") to pay attorneys for legal services. The U.S. statement of interest, excerpted below, expresses the view that the funds may not be attached under either the Foreign Sovereign Immunities Act ("FSIA") or the Terrorism Risk Insurance Act ("TRIA") because of the protections such funds enjoy under the Vienna Convention on Diplomatic Relations ("VCDR"). The U.S. statement of interest is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The first question raised by the Court concerns whether the challenged funds are immune from attachment. As discussed in detail below, it is the United States' position that this question should be answered in the affirmative.

An applicable treaty, which is binding on federal courts to the same extent as a domestic statute, establishes the immunity of funds in Syria's Embassy bank accounts, including funds the mission attempts to transfer from such an account into a holding account in connection with the functions of the diplomatic mission. Although the FSIA serves as the exclusive basis for jurisdiction over foreign states in federal and state courts and also governs the execution of judgments obtained against foreign states, it is well-established that the FSIA does not displace the immunities provided by a treaty such as the VCDR. *See generally Cook v. United States*, 288

U.S. 102, 120 (1933) (“A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed.”). When it enacted the FSIA, Congress recognized that the United States had existing international legal obligations with respect to the protection of diplomatic and consular property. Congress therefore provided in Section 1609 of the statute that the provisions addressing the immunity from attachment and execution of a foreign state’s property were “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act.” 28 U.S.C. § 1609; see also H.R. Rep. No. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610 (noting that the FSIA is “not intended to affect either diplomatic or consular immunity”); *767 Third Avenue Assocs. v. Perm. Mission of the Republic of Zaire to the U.N.*, 988 F.2d 295, 298 (2d Cir. 1993) (“Because of this provision the diplomatic and consular immunities of foreign states recognized under various treaties remain unaltered by the Act.”).

At the time the FSIA was enacted, the United States had already entered into several international agreements establishing its obligations to protect the property of diplomatic and consular missions from interference. These include the VCDR—to which Syria is also a party, which obligates the United States to ensure that diplomatic missions are accorded the facilities they require for the performance of their diplomatic functions. Article 25 of the VCDR provides that “the receiving state shall accord full facilities for the performance and functions of the mission.” VCDR, art. 25, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502. Article 3 of the VCDR delineates the functions of a diplomatic mission, which include, among other things, “[p]rotecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law.”

Numerous courts interpreting Article 25 of the VCDR have recognized that bank accounts of diplomatic missions that are used for mission purposes are immune from attachment or execution, because a mission’s access to its funds in the receiving state is critical to the functioning of a mission. . . .

It is the view of the United States that the VCDR’s full facilities provision applies to protect from attachment funds under the circumstances here, where the mission attempted to transfer the funds from an embassy account to pay a legal fee, and the funds were then segregated into a separate holding account at the same bank. Funds intended to be used by diplomatic missions to pay for legal representation of the sending state in the courts of the receiving state are properly considered funds used in connection with the performance of the diplomatic functions of “[p]rotecting in the receiving State the interests of the sending State and of its nationals,” as contemplated by Article 3 of the VCDR. Indeed, the United States has a strong interest in ensuring that courts interpret the VCDR in a manner that protects funds used by a foreign government to pay for legal representation from attachment. That is because the United States routinely encourages foreign governments—through their embassies—to engage local counsel and to appear and defend when their government is sued in United States’ courts. The same is true with respect to the United States’ reciprocal interest in protecting from attachment funds it uses to pay for legal representation of the United States in foreign countries. Indeed, the United States has vigorously opposed efforts by private parties to attach its diplomatic accounts abroad, including by seeking to enlist the assistance of the government of the receiving state in such cases. See generally *Boos v. Barry*, 485 U.S. 312, 323 (1988) (respecting diplomatic immunity “ensures that similar protections will be accorded those that we send abroad to represent the United States”).

Nor should the location of the funds (in a separate holding account) change the VCDR analysis. The protections provided by the VCDR would be severely undercut if any funds segregated by a bank from an embassy bank account could be attached simply because the funds were no longer located in the mission account. The relevant question is whether the funds in the segregated bank account were being used in connection with the performance of the functions of the mission and accordingly protected by Article 25. Here, the Embassy of Syria attempted to transfer the funds in June 2013, almost nine months before the suspension of Syria's Embassy operations in the United States on March 31, 2014. Nor does the closure of the Embassy mean that the United States no longer has any obligation with respect to the funds. To the contrary, Article 45 of the VCDR makes clear the United States has an ongoing obligation under these circumstances to "respect and protect the premises of the mission, together with its property and archives." VCDR, art. 45 (emphasis added). This obligation extends to the protection of all property of the diplomatic mission, including its bank accounts, and therefore protects from attachment funds from such an account used to pay an outstanding expense of the mission in the host state.

* * * *

Plaintiffs do not dispute that the funds originated from a Syrian Embassy bank account, nor do they dispute the intended use of the funds as payment for Syria's attorneys for legal services. Moreover, as the this Court's October 28, 2014 Order recognizes, "[d]ocumentation submitted by proposed intervenors before the Court indicates that the funds constitute a blocked electronic funds transfer between the Embassy of Syria and an American attorney, W. Ramsey Clark, as payment for a legal fee." Oct. 28, 2014 Order, ECF No. 96; see also Affidavit of Ramsey Clark, attached as Ex. 2 to Mot. to Intervene in Garnishment Proceedings by W. Ramsey Clark and Lawrence M. Schilling Pursuant to Fed. R. Civ. P. 24, ECF No. 65-2, at ¶2 ("The \$150,000 is a payment of a legal fee for the provision of legal services by myself and Lawrence W. Schilling to the Syrian Arab Republic pursuant to Office of Foreign Assets Control ("OFAC") General License No. 2 issued pursuant to Executive Order 133582."); Letter from ADIB's Compliance Manager to the Embassy of Syria (June 24, 2013), attached as Ex. 1 to Mot. to Intervene in Garnishment Proceedings by W. Ramsey Clark and Lawrence M. Schilling Pursuant to Fed. R. Civ. P. 24, ECF No. 65-1 ("This letter will serve as a notice that on June 13, 2013, Abu Dhabi International Bank, N.V. blocked a \$150,000 wire transfer originated by the Embassy of Syria going to the final beneficiary of Ramsey Clark.").

As noted earlier, Section 1609 of the FSIA expressly provides that the statute's exceptions to immunity are subject to existing international agreements. As a result, where, as here, the VCDR governs the immunity of funds from attachment, the FSIA's exceptions to immunity from attachment discussed below, see *infra.*, Argument II, are simply "inapplicab[le] to an analysis of the validity of attachment. 767 *Third Avenue Assocs.*, 988 F.2d at 297. Thus, funds in a mission bank account that the Embassy intends to use in connection with the performance of mission functions, are immune under the "full facilities" provisions of the VCDR, even if the use of the funds may be considered commercial for other purposes. See VCDR, art. 25. Accordingly, courts have concluded that the fact that an embassy bank account includes funds used for "commercial" transactions that are incidental to or connected with the performance of the functions of the mission—*e.g.*, transactions to purchase goods and services from private entities—does not vitiate the entire account's protection from attachment under the

VCDR. *Liberian Eastern Timber Corp.*, 659 F. Supp. At 610; *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 257 n. 7 (5th Cir. 2002).

For the reasons identified above, the Court should conclude that the funds held in a segregated account by ADIB that the Embassy of Syria intends to use to pay for legal services rendered in connection with litigation in the United States are immune from attachment and execution under the VCDR.

II. THE SYRIAN EMBASSY FUNDS IN THE HOLDING ACCOUNT ARE NOT SUBJECT TO ATTACHMENT UNDER THE FSIA

Even if the funds at issue were not immune from attachment under the VCDR, plaintiffs have failed to establish that the requirements of the FSIA have been met. Pursuant to 28 U.S.C. § 1609, a foreign state's property in the United States is immune from attachment and execution unless a specific statutory exception applies. Furthermore, § 1610(c) of the FSIA prohibits attachment of or execution on a foreign state's property unless the court has issued an order determining such attachment or execution to be appropriate under the statute after a reasonable period of time following entry of the judgment (including service of a default judgment under § 1608(e), where required). See 28 U.S.C. § 1610(c); H.R. Rep. 94-1487, at 30 (explaining that allowing a judgment creditor to attach or execute on a foreign state's property simply by applying to the clerk or a local sheriff "would not afford sufficient protection to a foreign state"); *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."). Prior to issuing such an order of attachment, courts are required "to determine—sua sponte if necessary—whether an exception to immunity applies," a determination that must be made "regardless of whether the foreign state appears." *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785-86 (7th Cir. 2011); see also *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010) ("[C]ourts should proceed carefully in enforcement actions against foreign states and consider the issue of immunity from execution sua sponte."). The judgment creditor bears the burden of identifying the particular property to be executed against and proving that it falls within a statutory exception to immunity from execution. See, e.g., *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011).

Thus, the Court must ensure compliance with the FSIA's provisions governing the attachment of or execution on a foreign state's property. See, e.g., *Liberian E. Timber Corp.*, 659 F. Supp. at 608-10. Here, the writ of attachment at issue was signed by the deputy clerk of court; it was not issued pursuant to a court order determining that ADIB holds property subject to attachment under the FSIA. ... Nor have plaintiffs demonstrated that the funds at issue meet the substantive requirements for attachment of a foreign state's property under § 1610(a)(7) or § 1610(g), both of which require that the funds be used by the foreign state for commercial activity in the United States. See 28 U.S.C. § 1607(a)(7) (authorizing the attachment of property in the United States of a foreign state "used for a commercial activity in the United States" where the judgment relates to a claim for which the foreign state was not immune under § 1605A); *id.* § 1610(g) (authorizing in certain cases the attachment of property "as provided in this section," notwithstanding whether the property is property of the foreign state itself or one of its agencies or instrumentalities). Funds used in connection with the functions of a diplomatic mission, including funds intended to be used to pay for legal representation for the foreign state in litigation in U.S. courts, should not be considered property of a foreign state "used for

commercial activity” in the United States. . . . Because the writ of attachment was not issued in accordance with the FSIA’s requirements, it should be vacated.

III. THE FUNDS AT ISSUE ARE ALSO EXEMPT FROM ATTACHMENT UNDER TRIA

The challenged funds at issue in this case are also not attachable under TRIA. Section 201(a) of TRIA provides:

Notwithstanding any other provision of law . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which the a terrorist party is not immune under [28 U.S.C. § 1605A], the blocked assets of that terrorist party . . . shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has adjudged liable.

TRIA § 201(a). Plaintiffs may not use TRIA as a vehicle through which to attach the funds at issue for two separate reasons. First, TRIA does not authorize the attachment of assets protected by the VCDR and used exclusively for a diplomatic purpose. Second, TRIA does not authorize attachment of assets where, as here, OFAC has issued a specific license prior to the issuance of a final turnover order.

A. Assets that are protected by the VCDR and used exclusively for a diplomatic purpose are not attachable under TRIA

Under TRIA, “blocked assets” do not include assets “being used exclusively for diplomatic or consular purposes,” the “attachment . . . of which would result in a violation of an obligation of the United States under the [VCDR].” TRIA § 201(d)(2)(B)(ii), (d)(3). . . . As explained above, the challenged funds are protected by the VCDR, and their attachment would be inconsistent with the United States’ obligations under both Articles 25 and 45 of the treaty.

This Court’s decision in *Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 2d 53, 60-61 (D.D.C. 2003) is not to the contrary. In *Weinstein*, this Court held that funds lying dormant in an inactive checking account of an Iranian consulate—many years after diplomatic and consular relations were broken off between the United States and Iran—were subject to attachment under TRIA.

By contrast, unlike the assets at issue in *Weinstein*, here, the challenged funds are not simply excess funds in a long inactive mission account, but rather are intended to be used to pay an outstanding expense of the mission in the United States, payment for which Syria had initiated before its embassy functions were suspended. Indeed, the Court’s Order inviting the United States’ views expressly recognizes this fact. As noted above, the Syrian Embassy’s purpose in transferring the funds to pay its lawyers was in furtherance of a core function of the diplomatic mission within the meaning of Article 3 of the VCDR—to defend and represent Syria’s interests in the host state. Furthermore, OFAC’s regulations expressly authorize the provision of certain legal services rendered on behalf of Syria so long as a specific license is obtained prior to a lawyer’s receipt of a payment for such services. See 31 C.F.R. § 542.507. Consistent with this licensing policy, OFAC issued to Clark and Schilling a license to receive the funds in the ADIB account as payment for legal representation in connection with litigation against Syria in the United States. Under these circumstances, the Syrian Embassy funds in the holding account are “being used exclusively for a diplomatic purpose” and their attachment would “result in a violation of an obligation of the United States under the [VCDR].” TRIA § 201(d)(2)(B)(ii),

(d)(3). Because the funds in the account are not subject to attachment under TRIA, the Court should dissolve the writ of attachment.

B. Because OFAC issued a specific license authorizing the transfer of the challenged funds prior to the issuance of a final turnover order, the funds are not “blocked” and so are not attachable under TRIA

The Syrian Embassy funds in the holding account also are not subject to attachment under TRIA because they are not “blocked.” TRIA authorizes attachment and execution against “blocked assets” of a terrorist party. TRIA § 201(a). The statute defines the term “blocked assets” as “any asset seized or frozen by the United States” under specified statutory authority. *Id.* § 201(d)(2). Courts interpreting that statutory definition (including this Court) have held that assets whose transfer has been authorized pursuant to OFAC’s authority are not “seized or frozen” and thus do not constitute “blocked” assets within the meaning of the statute. ...

At the time the payment at issue was initiated, OFAC had issued a general license (“General License No. 2”) authorizing the provision of certain legal services by United States persons to the Government of Syria, subject to the requirement that receipt of payment for such services needed to be specifically licensed. This general license was later codified, with some modification to the payment provision, in OFAC’s regulations. See 31 C.F.R. § 542.507(a), (d). Because an attempt to make payment for legal services was initiated without a specific license, the transaction was prohibited and the funds were placed in a blocked account. Subsequently, however, and consistent with the licensing policy with respect to payments for generally authorized legal services, OFAC issued a specific license authorizing ADIB to transfer the funds to Syria’s counsel as payment for legal services rendered on behalf of Syria. That specific license permits the transfer of the assets at issue for this identified purpose. As such, the Syrian Embassy funds in the holding account are not “seized or frozen” and therefore are not “blocked” for purposes of TRIA. Accordingly, the funds are not attachable under TRIA.

* * * *

On March 18, 2015, the court issued its decision, agreeing with the United States that the plaintiffs could not attach the funds under either the FSIA or TRIA because they are immune. Excerpts follow (with footnotes omitted) from the court’s memorandum and order, which is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

A. Foreign Sovereign Immunities Act Section 1610

To pursue attachment of these funds under section 1610 of the FSIA, the plaintiffs must show that the property at issue is not covered by the VCDR. A few portions of the VCDR are relevant to plaintiffs’ pending motion for condemnation and recovery. Article 25 requires the United States to “accord full facilities for the performance of the functions of the mission.” Part 1(b) of Article 3 defines the functions of a diplomatic mission to include “protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law.” In the event that “diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled,” Article 45 confirms that the United States has

continuing obligations to “respect and protect the premises of the mission, together with its property and archives.”

The obligation to “accord full facilities” to a diplomatic mission includes the obligation to forbid the attachment, in satisfaction of a civil judgment, of bank accounts containing funds used for diplomatic purposes. *Liberian Eastern Timber Corp. v. Gov’t of Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987). To hold otherwise would put to foreign embassies the dilemma of either avoiding United States banks entirely or keeping money in this country subject to the threat of confiscation at any time. *Id.* This would be contrary to the VCDR’s stated purpose of “ensur[ing] the efficient performance of the functions of diplomatic missions.” *Id.* (quoting VCDR preamble).

In light of these authorities, the Court concludes that the funds at issue are protected from attachment under the VCDR. Undisputed documentation before the Court indicates that the Syrian Embassy attempted to transfer these funds from an account owned by the Embassy. W. Ramsey Clark has provided a sworn affidavit stating that this attempted transfer was initiated by the Syrian Embassy as payment of a legal fee arising out of Clark and Schilling’s provision of legal services to Syria in this country. The Embassy’s payment, therefore, fits squarely within Article 3’s expressly defined “functions of a diplomatic mission,” specifically “protecting in the receiving State the interests of the sending State and of its nationals.” Paying a legal fee arising out of litigation in the United States, incurred in Syria’s defense, is fundamentally an action intended to protect Syria’s interests in this country. As a result, the Court cannot order the attachment of this money because to do so would violate the United States’ obligation to accord full facilities for the performance of the functions of the Syrian diplomatic mission.

The suspension of Syrian Embassy operations as of March 18, 2014 does not abrogate the immunity attaching to the funds. Bureau of Near Eastern Affairs, U.S. Dep’t of State, U.S. Relations with Syria (Mar. 20, 2014), <http://www.state.gov/r/pa/ei/bgn/3580.htm> (confirming the suspension of Syrian Embassy operations). First, the attempted funds transfer was blocked on June 13, 2013, prior to the suspension of embassy operations. As of the date of transfer, then, the funds were property of the existing diplomatic mission, used for a diplomatic purpose. Second, article 45 of the VCDR requires the United States to continue to “respect and protect” the “property” of the Syrian diplomatic mission, despite the suspension of its operation. The money in the ADIB account is property of the Syrian Embassy and the United States must continue to protect it to the same extent it would if the Embassy were still functioning.

B. Terrorism Risk Insurance Act of 2002 Section 201

To prevail on their motion pursuant to section 201 of the TRIA, plaintiffs must show that the funds at issue are “blocked assets.” They are not, for two independent reasons.

First, the funds are excluded from the definition of blocked assets because they are property subject to the VCDR that is being used “exclusively” for “diplomatic . . . purposes.” For the reasons stated above, the funds at issue here are subject to the VCDR. Moreover, relevant to section 201, the Syrian Embassy’s payment of a legal fee incurred in representation of Syria in this country is a “diplomatic purpose” because the payment is in service of a diplomatic function, as defined by Article 3 of the VCDR. Uncontroverted sworn affidavits from Clark and Schilling indicate that the entirety of the funds in dispute are to be deposited to them as payment for the legal fee owed by Syria. Therefore, the funds are being used “exclusively” for a diplomatic purpose. The funds are specifically excluded from the TRIA’s coverage.

Second, the funds are not “frozen or seized” by the United States government at this time. A letter before the Court from the U.S. Department of the Treasury states that the OFAC has

reviewed the attempted transfer and determined that ADIB is “authorized to process the transfer in accordance with the original payment instructions.” ECF No. 103-1. The transaction is authorized under a specific license. *Id.* This specific license is pursuant to the general license provided by 31 C.F.R. § 542.507(a) and (d), which authorizes the provision of legal services to Syria in defined circumstances and states that payment for those services may be authorized pursuant to a specific license. Because the funds are subject to an OFAC license and may now be transferred without further OFAC intervention, they are no longer “frozen or seized” as required by the statute. Cf. *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 18 n.6 (D.D.C. 2011) (holding that payments made under a general license were merely “regulated” by OFAC, not “blocked”); *Bank of New York v. Rubin*, 484 F.3d 149, 150 (2d Cir. 2007) (holding that property subject to a general license from the OFAC was not “blocked” within the meaning of the TRIA).

Therefore, regardless of whether the funds were frozen or seized as of the date of service of the writ of attachment or the filing of plaintiffs’ motion for condemnation and recovery, the funds may not now be attached pursuant to section 201 because they are no longer frozen or seized. See *United States v. Holy Land Found. For Relief and Dev.*, 722 F.3d 677, 685 (5th Cir. 2013) (citing TRIA § 201) (holding that “[b]y its terms, § 201 does not provide for execution against assets that are not blocked,” i.e. not currently blocked). This conclusion aligns with the rule under section 1610 of the FSIA that property is only subject to attachment under that statute if it is present within the United States at the time the Court authorizes execution—not when the garnishee receives notice of the garnishment action against them. *FG Hemphshire Assocs. v. Republique du Congo*, 455 F.3d 575, 588–89 (5th Cir. 2006) (reasoning that the language of section 1610(a) does not permit attachment of “*property that was in the United States or property that has been in the United States*”) (emphasis in original). Similarly, the TRIA only speaks of assets that are now blocked. This interpretation of the statute has the common sense outcome of preventing the attachment of property under the TRIA that was blocked but that has since passed into other hands or out of the country.

* * * *

b. Restrictions on the Attachment of Property under the FSIA and TRIA

(1) Bennett v. Bank Melli

In *Bennett v. Bank Melli*, Nos. 13-15442, 13-16100 (9th Cir. 2015), the United States filed an *amicus* brief on October 23, 2015 in support of rehearing of a decision of a panel of the U.S. Court of Appeals for the Ninth Circuit concerning the proper interpretation of section 1610(g) of the FSIA and 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. Creditors holding judgments against Iran arising out of

several terrorist attacks invoked TRIA and/or section 1610(g) in an attempt to attach assets held by institutions in the U.S. that were owed to Bank Melli, an Iranian bank. The district court denied Bank Melli's motion to dismiss and a panel of the Ninth Circuit affirmed. Bank Melli sought both rehearing and rehearing en banc, and the Ninth Circuit invited the United States to submit an *amicus* brief on whether rehearing was warranted. The U.S. brief urges rehearing by the panel of the Ninth Circuit. Excerpts follow from the U.S. brief, which is available in full at <http://www.state.gov/s/l/c8183.htm>. For background on other attempts to execute on the judgment obtained by the *Bennett* judgment holders, see *Digest 2010* at 374-78.

* * * *

1.a. Under the FSIA's baseline rule, "the property in the United States of a foreign state [is] immune from attachment . . . except as provided" elsewhere in the FSIA. 28 U.S.C. § 1609. Section 1610 nonetheless permits attachment in various circumstances, which generally require a sufficient nexus to "commercial activity" by the foreign state or its instrumentality. *See id.* § 1610(a), (b), (d).

The plain text of section 1610(g) then provides special provisions for certain terrorism cases, but still makes clear that its specified property is "subject to attachment . . . *as provided in this section.*" 28 U.S.C. § 1610(g)(1) (emphasis added). The referenced "section" is section 1610, and thus section 1610(g) plainly incorporates by reference the other requirements for attaching foreign state property provided under section 1610. Accordingly, section 1610(g) is not a freestanding exception to immunity that can be invoked independent of the rest of section 1610.

Indeed, a broader understanding of section 1610(g) would violate the "cardinal principle of statutory construction" that a statute should be construed to avoid superfluity. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Both sections 1610(a)(7) and (b)(3), which specifically apply (*inter alia*) to terrorism-related judgments entered under 28 U.S.C. § 1605A, require some relation to commercial activity in the United States on the part of the foreign state's property, or by the foreign state's agency or instrumentality, as a condition of attachment of property in aid of execution. Section 1610(g), which also relates to a judgment under section 1605A, does not independently require that commercial nexus. Thus, reading section 1610(g) to be a freestanding immunity exception would render the restrictions in sections 1610(a)(7) and (b)(3) superfluous (in addition to rendering superfluous the "as provided in this section" language in section 1610(g)). That cannot be correct.

Nor is it the case that the government's interpretation deprives section 1610(g) of all meaning. What section 1610(g) adds is the special rule that certain plaintiffs with a judgment against a foreign state may pursue not only the assets of that state itself, but also "the property of an agency or instrumentality of" the 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). Accordingly, section 1610(g) overrides various legal principles that might otherwise require respect for an entity's separate juridical status. *See, e.g., First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 628-34 (1983) (creating a multi-factor

test for determining when a creditor can look to the assets of a separate juridical entity to satisfy a claim against a foreign sovereign under the FSIA). But that merely means that if a plaintiff covered by section 1610(g) wishes to attach the assets of a state agency or instrumentality, and the plaintiff can find an exception in section 1610 that would apply but for the fact that the plaintiff holds a judgment against the state itself—rather than an entity that would be considered legally distinct—the plaintiff would be able to proceed.

This Court's decision in *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010), is not to the contrary. In that case, which did not involve a proposed attachment under section 1610(g), this Court briefly stated in a footnote that section 1610(g) lets "judgment creditors . . . reach any U.S. property in which Iran has any interest." *Id.* at 1123 n.2. That footnote is dicta. *See, e.g., In re Magnacom Wireless, LLC*, 503 F.3d 984, 993-94 (9th Cir. 2007) ("[S]tatements made in passing, without analysis, are not binding precedent."). And it certainly does not purport to address whether section 1610(g) is a freestanding exception to immunity wholly divorced from section 1610's other requirements.

Notably, if the allegations in this case are true, this would appear to be just such a case where the plaintiffs need not rely on section 1610(g) as a freestanding immunity exception. Section 1610(b)(3) allows individuals to attach "any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States," if they are seeking to satisfy certain terrorism-related judgments under the now-in-force section 1605A or the previously-in-force section 1605(a)(7). 28 U.S.C. § 1610(b)(3). Taking the complaint's allegations as true (which of course the Court must at this procedural posture) the property at issue is located in the United States, is alleged to be property of an Iranian agency or instrumentality engaged in commercial activity in the United States (*i.e.*, an entity that has contracted with Visa, an American company, to perform commercial services for that company), and the judgments sought to be enforced are section 1605A judgments. If these facts are established, section 1610(b)(3) would apply but for the fact that the judgment is against Iran and the Bank would (possibly) be accorded juridical status separate from Iran itself. (It may also be the case that plaintiffs could be able to satisfy section 1610(a)(7) if the Bank's separate juridical status is disregarded, but that issue is more complicated and would require further analysis; as the United States has elsewhere explained, section 1610(a) requires that the property at issue must have been used for a commercial activity in the United States by the foreign state itself. *See Br. for the United States as Amicus Curiae*, at 14-21, *Rubin v. Islamic Republic of Iran*, No. 14-1935 (7th Cir., filed Nov. 3, 2014)).

b. Because this appears to be a case in which the assets *do* appear to meet the additional requirements set out in at least one of section 1610's other provisions (ignoring the separate juridical status issue), this case does not actually present the issue of whether section 1610(g) provides a freestanding exception to immunity. Accordingly, we understand any contrary language in the panel's opinion to be dicta that leaves open in this Circuit the distinct question of whether a plaintiff can proceed under section 1610(g), even after ignoring the separate juridical status of an agency or instrumentality, if the plaintiff still cannot meet any of the immunity exceptions in section 1610. We thus see no need in this case for rehearing en banc. Nor do we see the panel's decision as foreclosing in this Circuit the positions we took in our filings in *Rubin v. Islamic Republic of Iran*, No. 14-1935 (7th Cir.), *Ministry of Defense v. Frym*, No. 13-57182 (9th Cir.), and *Hegna v. Islamic Republic of Iran*, No. 11-1582 (2d Cir.), as all of those cases presented the question whether a plaintiff could invoke section 1610(g) without showing the

requisite relation to commercial activity in the United States (by the relevant actor) set out in either section 1610(a)(7) or section 1610(b)(3).

We note that some language on page 12 of the panel's opinion might be read as addressing more than the issue that was before the Court. Indeed, the plaintiffs in the *Rubin* case have already cited the panel's opinion (in a Rule 28(j) letter) for the proposition that section 1610(g) allows them to attach assets of the foreign state itself, to satisfy a judgment against that state, even if the assets would otherwise be outside the scope of section 1610(a)(7) because they had not been used in commercial activity. Those same plaintiffs are also parties to the pending *Frym* case in this Circuit. Thus, to avoid confusion, we urge the panel to amend its opinion to clarify the limitations of its holding.

2. Separately, we urge the panel to grant rehearing with regard to its discussion of California law.

a. The Bank contended, and this Court did not dispute, that both TRIA and section 1610(g) only reach assets that are actually owned by the terrorist state or its agency or instrumentality. That was the D.C. Circuit's express holding in *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 938-40 (D.C. Cir. 2013). TRIA authorizes attachment against "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a) (emphases added). Section 1610(g) similarly applies to the property "of" a foreign state or "of" its agency or instrumentality. 28 U.S.C. § 1610(g). The assets "of" an entity are not naturally understood to include all assets in which it has any interest of any nature whatsoever. Rather, the Supreme Court has repeatedly observed that the "use of the word 'of' denotes ownership." *Board of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011) (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); see also *id.* at 2196 (describing *Flores-Figueroa v. United States*, 556 U.S. 646, 648, 657 (2009), as treating the phrase "identification [papers] of another person" as meaning such items belonging to another person (brackets in original)); *Ellis v. United States*, 206 U.S. 246, 259 (1907) (interpreting the phrase "works of the United States" to mean "works belonging to the United States").

Applying that understanding of "of" to a disputed provision of patent law, the Court in *Stanford* concluded that "invention owned by the contractor" or "invention belonging to the contractor" are natural readings of the phrase "'invention of the contractor.'" 131 S. Ct. at 2196. In contrast, in *United States v. Rodgers*, 461 U.S. 677 (1983), the Court held that the IRS could execute against property in which a tax delinquent had only a partial interest when the relevant statute permitted execution with respect to "any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest." 26 U.S.C. § 7403(a) (emphases added); see also *Rodgers*, 461 U.S. at 692-94. The Court found it important that the statute explicitly applied not only to the property "of the delinquent," but also specifically referred to property in which the delinquent "has any right, title, or interest." See *Rodgers*, 461 U.S. at 692 (emphasis removed). TRIA and section 1610(g) omit that additional phrase; the former only applies to the blocked assets "of" a terrorist party, see TRIA § 201(a), and the latter only applies to the property "of" a terrorist state, see 28 U.S.C. § 1610(g)(1).

Indeed, extending these statutes beyond ownership would expand these statutes well beyond common law execution principles. It "is basic in the common law that a lienholder enjoys rights in property no greater than those of the debtor himself; . . . the lienholder does no more than step into the debtor's shoes." *Rodgers*, 461 U.S. at 713 (Blackmun, J., concurring in part and dissenting in part); see also *id.* at 702 (majority op.) (implicitly agreeing with this

description of the traditional common law rule); 50 C.J.S. Judgments § 787 (2015). Congress enacted TRIA and section 1610(g) against the background of these principles, and the statutes should be interpreted consistent with those common-law precepts. *See Staples v. United States*, 511 U.S. 600, 605 (1994); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-10 (1991).

Nor would it make sense to expand the statutes beyond ownership. Allowing the victims of terrorism to satisfy judgments against the property of a terrorist party “impose[s] a heavy cost on those” who aid and abet terrorists. 148 Cong. Rec. S11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin, discussing TRIA). Paying judgments from assets that are *not* owned by the terrorist party would not serve that goal.

b. Despite the fact that the panel opinion took issue with none of the above, the panel treated as dispositive the fact that California law would allow a judgment creditor to reach assets owed to a debtor. Op. 17. But the mere fact that state law authorizes attachment is insufficient. As explained above, federal law has an affirmative requirement that the assets actually be *owned* by the debtor state or instrumentality. Thus if a state decided (for example) that judgment creditors could obtain assets wholly owned by third parties, that state determination would be contrary to federal law in this context and without effect.

That rule is fully in accord with his Court’s decision in *Peterson*. *Peterson* itself recognized that state law on the enforcement of judgments only applies insofar as it does not conflict with federal law. *See* 627 F.3d at 1130. And while the Court in dicta stated that “[t]he FSIA does not provide methods for the enforcement of judgments against foreign states,” *id.*, the case did not address the interpretative question at issue here, nor did it even involve a proposed execution under either TRIA or section 1610(g).

Furthermore, the same sentence in *Peterson* went on to acknowledge that the FSIA controls whether or not specifically targeted properties are immune. *Peterson*, 627 F.3d at 1130. Thus, despite the fact that California law apparently allowed the property in question there to be attached, the Court nonetheless held that the property was immune because the FSIA provision invoked there only applied to property located in the United States, which the asset in question was not. *Id.* at 1130-32. While the Court may have used state law to determine the property’s location, federal law dictated the relevant question.

Here, as explained above, TRIA and section 1610(g) only apply insofar as the targeted property is owned by Iran or one of its agencies or instrumentalities. Thus, even assuming that ownership can be determined under state law rather than federal law, the relevant state law must be actually addressed to that question; the mere fact that state law makes the asset attachable is insufficient. Accordingly, the Court should grant rehearing in order to determine, under the relevant source of law, whether Bank Melli is the owner of the assets in question here.

* * * *

(2) Weinstein v. Iran

See Chapter 11 for discussion of the *Weinstein* case, which raises the question of whether country-code top-level domains for Iran, Syria, and North Korea (.ir, .sy, and .kp, respectively), the top-level domains associated with Internet names and addresses in those geographic regions, constitute “property” or “assets” of a foreign state under the FSIA and TRIA.

(3) Villoldo

As discussed in *Digest 2014* at 157-59 and 390-93, the *Villoldo* plaintiffs sought to attach certain securities and accounts held by Computershare, Ltd. in order to satisfy a judgment against Cuba for alleged acts of torture by the Cuban government. The U.S. statement of interest filed in 2014 asserted that the securities and accounts could not properly be attached pursuant to the FSIA and TRIA because they had not been demonstrated to be property of the Cuban government. The district court agreed and vacated its previous turnover orders that had been issued prior to submission of the U.S. statement of interest. Plaintiffs appealed. Excerpts follow from the U.S. *amicus* brief filed in the U.S. Court of Appeals for the First Circuit on December 16, 2015. The brief is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

I. The Act Of State Doctrine Does Not Require The Application Of Cuban Law In This Case

A. TRIA And Section 1610 Contain An Ownership Requirement That Incorporates U.S. Law

1. As the district court recognized, ...and as plaintiffs have not disputed in this Court, both TRIA and Section 1610 only reach assets that are owned by the terrorist state itself (or its agency or instrumentality). That was the D.C. Circuit's express holding in *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 938-40 (D.C. Cir. 2013). And it stems from the fact that TRIA authorizes attachment against "the blocked assets of [a] terrorist party," TRIA § 201(a) (emphasis added), while the Foreign Sovereign Immunities Act similarly applies to the property "of" a foreign state or its agency or instrumentality, 28 U.S.C. §§ 1610(a)(7), (b)(3), (g)(1).

The assets "of" an entity are not naturally understood to include all assets in which it has any interest of any nature whatsoever. Rather, the Supreme Court has repeatedly observed that the "use of the word 'of' denotes ownership." *Board of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011) (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); see also *id.* at 2196 (describing *Flores-Figueroa v. United States*, 556 U.S. 646, 648, 657 (2009), as treating the phrase "identification [papers] of another person" as meaning such items belonging to another person (brackets in original)); *Ellis v. United States*, 206 U.S. 246, 259 (1907) (interpreting the phrase "works of the United States" to mean "works belonging to the United States").

* * * *

Extending these statutes beyond ownership would also expand these statutes well beyond common law execution principles. . . .

Nor would it make sense to expand the statutes beyond ownership. Allowing the victims of terrorism to satisfy judgments against the property of a terrorist party “impose[s] a heavy cost on those” who aid and abet terrorists. 148 Cong. Rec. S11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin, discussing TRIA). Paying judgments from assets that are *not* owned by the terrorist party would not serve that goal, and would even work at cross-purposes since it would let the terrorist party satisfy an outstanding judgment with assets owned by third parties.

2. Because TRIA and Section 1610 create a federal ownership requirement, a court applying those statutes must next determine the source of law to use in determining ownership. There are only two possibilities—ownership is either determined as a matter of federal common law, or using the law of the state where the district court sits (which may or may not entail the application of that state’s choice of law principles, a separate issue on which we take no position).

Indeed, in *Heiser* the D.C. Circuit concluded that Congress “has not provided a rule for determining ownership” under TRIA and Section 1610, nor has it “directed the federal courts to adopt state ownership rules under” these statutes. 735 F.3d at 940. Accordingly, the D.C. Circuit saw the need to develop a judge-made ownership rule as a matter of uniform federal law. *See id.* Alternatively, it is possible that a court could find it appropriate to apply state law for these purposes. *See Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1289 (2015), *petition for reh’g en banc filed*, Nos. 13-15442, 13-16100 (Sept. 9, 2015) (stating that the court would apply state law in order to determine “ownership” for purposes of TRIA and Section 1610); *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) (describing the Foreign Sovereign Immunities Act as a “pass-through to state law principles” in some circumstances); *cf. Calderon- Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1001-02 (2d Cir. 2014) (stating that Section 1610(g) “is silent as to what interest in property the foreign state, or instrumentality thereof, must have in order for that property to be subject to execution,” and then looking to New York property law to fill in the gap).

In this brief, the United States does not take a position on whether federal courts should look to federal common law principles or state law in order to apply the statutory ownership requirement. For present purposes, this Court need only recognize that nothing in TRIA or Section 1610 requires courts to determine ownership using foreign law. And tellingly, plaintiffs have not challenged the district court’s conclusion that Cuban law does not apply here unless the act of state doctrine applies. *See Villoldo Br.* 35-52.

B. The Act Of State Doctrine Does Not Displace The Otherwise Governing Law In This Case

Notwithstanding the fact that the governing law under TRIA and Section 1610 is either state or federal law, plaintiffs invoke the act of state doctrine to contend that Cuban law should determine ownership here. Plaintiffs are wrong.

1. As traditionally understood, the act of state doctrine “precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign power committed within its own territory.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 421-27 (1964). The doctrine is rooted in part on international comity considerations, recognizing that international conflict can arise when the courts of one country seek to reexamine the sovereign acts of another. *Id.* at 416-18. It also derives from separation of powers concerns, *id.* at 423,

including the desire to avoid “conflict between the Judicial and Executive Branches.” *Id.* at 433. Whether the doctrine applies in a given case is subject to case-by-case adjudication in light of the above principles. *See id.* at 427-28; Restatement (Third) of the Foreign Relations Law of the United States § 443 cmt. b (1987).

Notably, however, the doctrine’s underlying policies are not a “doctrine unto themselves” that should be expanded “into new and uncharted fields” unnecessarily. *W.S. Kirkpatrick & Co. v. Env’tl. Tectonics Corp., Int’l.*, 493 U.S. 400, 409 (1990). Accordingly, when a case does not fall within the doctrine’s traditional formulation, the doctrine’s proponent bears a particularly heavy burden. And that is especially true when a litigant seeks to apply the doctrine to assets located in the United States (as is the case here, since the securities accounts were located in Massachusetts, not Cuba, at the time of the purported confiscation). Indeed, the Supreme Court has partially justified the act of state doctrine by explaining that “the concept of territorial sovereignty is so deep seated” that “any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders.” *Sabbatino*, 376 U.S. at 432. And because of a foreign state’s “obvious inability . . . to complete an expropriation of property beyond its borders,” that state has less of an “expectation[] of dominion over that property” and “the potential for offense to the foreign state is reduced” when a foreign confiscatory law is not given extraterritorial effect. *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1028 (5th Cir. 1972); *see also Tchacosh Co. v. Rockwell Int’l Corp.*, 766 F.2d 1333, 1337 (9th Cir. 1985).

Accordingly, plaintiffs cannot succeed unless they demonstrate that the act of state doctrine’s underlying policies—including its concern for U.S. foreign policy interests—are so significantly advanced in the case that extraterritorial application of Cuba’s confiscatory law is justified. *Accord Republic of Iraq v. First Nat’l City Bank*, 353 F.2d 47, 51-52 (2d Cir. 1965) (refusing to give extraterritorial effect to an expropriation of property that was inconsistent with U.S. law and policy).

2. Plaintiffs cannot make that showing. Indeed, invoking the doctrine here will harm rather than further U.S. foreign policy interests.

First, and crucially, the targeted assets are blocked under an economic sanctions program. Such programs “permit the President to maintain” particular “foreign assets at his disposal for use in negotiating the resolution of a” serious foreign policy conflict, including for use as a bargaining chip in international negotiations. *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981); *see also Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 57 (1st Cir. 2013) (recognizing that “blocked assets play an important role in the conduct of United States foreign policy”). If the act of state doctrine were invoked here to permit execution, the pool of blocked assets would be reduced, which would in turn interfere with the President’s ability to use those assets to serve this country’s foreign policy goals. Moreover, because execution would increase interference with the President’s foreign affairs powers, applying the act of state doctrine would increase interbranch conflict—exactly the kind of circumstance the doctrine is meant to avoid.

Recent events only confirm these points. In December 2014, the President announced the Administration’s intent to normalize bilateral relations between the United States and Cuba. *See Statement By The President On Cuba Policy Changes*, <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes> (Dec. 17, 2014). Among other things, that process involves a recently-initiated dialogue on the resolution of outstanding claims. There is particular value in maintaining the pool of blocked assets during that dialogue. Plaintiffs’ proposal would also create tension with policies behind TRIA and the provisions of Section 1610 related to terrorism judgments obtained under Section 1605A. Those statutes are

based in part on the idea that it is important to “impose a heavy cost on those” who aid and abet terrorists. 148 Cong. Rec. S11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin, discussing TRIA). It does not further that goal to let Cuba satisfy the judgment against it using assets that would otherwise belong to third parties. *Accord Heiser*, 735 F.3d at 940. And while plaintiffs are correct that these statutes also seek to gain some measure of compensation for terrorism victims, ... the statutes only express a desire for victims to be compensated from assets that are actually owned by Cuba. If the relevant law triggered by those statutes does not deem Cuba the assets’ owner, then it does not advance the U.S. interests embodied in TRIA and Section 1610 to force a result the statutes would not otherwise dictate.

Additionally, to the extent the Cuban law here can be deemed an expropriation of property without any compensation for the account holders, applying the act of state doctrine would conflict with U.S. policy interests embodied in the Fifth Amendment’s Takings Clause. Those policies express the general view that it is improper for a government to take private property without paying any compensation, and so extraterritorial expropriations create particularly significant conflicts with U.S. policies. *See Maltina Corp.*, 462 F.2d at 1027 (5th Cir.); *Republic of Iraq*, 353 F.2d at 51 (2d Cir.).

Plaintiffs contend, however, that the Cuban laws in question are not actually examples of an expropriation. Rather, they view those laws as applying a “sanction of forfeiture” against Cuban nationals who failed to repatriate foreign currency accounts. ... But even assuming plaintiffs are correct that the execution of these laws accords with Fifth Amendment policies, it would still be contrary to U.S. sanctions policy and the policies embodied in TRIA and Section 1610.

Furthermore, if plaintiffs’ understanding of Cuban law is accurate, execution would trigger the penal law rule and thus not be an appropriate instance to apply the act of state doctrine. The penal law rule states the longstanding principle “that a court need not give effect to the penal . . . laws of foreign countries.” *Sabbatino*, 376 U.S. at 413. In the United States, the rule’s origin traces at least far back as *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), which explained that “[t]he Courts of no country execute the penal laws of another.” *Id.* at 123; *see also* Restatement (Third) § 483. The doctrine applies when a foreign sovereign is seeking to recover pecuniary penalties for the violation of its laws, *Oklahoma ex rel. West v. Gulf, C. & S. F. R. Co.*, 220 U.S. 290, 298 (1911), and such attempts at recovery are still “penal” even if they occur in an ostensibly civil proceeding, *see Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 290-92, 299-300 (1888), *overruled in part on other grounds by Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 278-79 (1935). *See also Pelican Ins.*, 127 U.S. at 299 (explaining that regardless of the particular form taken, a law is penal when a sovereign seeks to “punish the offense against her sovereignty” by “compelling the offender to pay a pecuniary fine”); Restatement (Third) § 483 cmt. b (explaining that even non-judicial actions can be penal, such as when a government agency imposes fines or penalties).

As described by plaintiffs, there can be little doubt that the Cuban laws are “penal” in nature. Their own expert described the key provision as “a criminal law with a criminal forfeiture penalty for failure to comply with the law.” RA578. And there is no suggestion that the Cuban laws are intended to redress a wrong visited on a private entity. Rather, plaintiffs’ expert opined that the laws were designed to address a currency crisis. RA570-72. This squarely implicates the penal law rule. *See Sabbatino*, 376 U.S. at 413 n.15 (“[A] penal law for the purposes of this doctrine is one which seeks to redress a public rather than a private wrong.”); *Huntington v. Attrill*, 146 U.S. 657, 673-74 (1892) (“The question whether a statute . . . is a penal law, in the

international sense . . . depends upon . . . whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.”).

Nor should the Court credit any suggestion by plaintiffs that the penal law rule does not apply because they are seeking a personal benefit and are “not acting on behalf of a foreign state.” . . . TRIA and Section 1610 may not themselves be “penal” laws, but the law plaintiffs are trying to give effect to is a Cuban criminal law enacted for Cuba’s public benefit. In any event, Cuba *does* benefit from plaintiffs’ proposed execution here because if plaintiffs succeed, Cuba’s outstanding liability to the plaintiffs will be reduced by the recovery amount.

Furthermore, the penal law rule is rooted in notions of territorial jurisdiction, as well as concerns for international comity (including respect for the discretion of another country’s executive branch to pardon an offense or to decline prosecution). *Huntington*, 146 U.S. at 669; *see also United States v. Federative Republic of Brazil*, 748 F.3d 86, 95 (2d Cir. 2014). Cuba’s absence in these proceedings does not alleviate the doctrine’s concerns about territorial jurisdiction. And that absence *exacerbates* concerns about respect for Cuban sovereignty since we cannot even be confident that Cuba agrees with plaintiffs’ interpretation of Cuban law.

3. This case is materially different from *United States v. Belmont*, 301 U.S. 324 (1937), and *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 658 F.2d 903 (2d Cir. 1981), both of which applied the act of state doctrine to assets located in the United States. In *Belmont*, the United States was itself asking the Court to apply the doctrine, since the United States had agreed to act as the Soviet Union’s assignee for claims against assets in this country that were purportedly nationalized. 301 U.S. at 326-30. Thus not only did *Belmont* not involve assets blocked for foreign policy reasons, it involved a clear statement by the United States that its foreign policy goals would be served if the foreign law were given effect.

Chemical Bank—which the Second Circuit decided before the Supreme Court placed important limits on the act of state doctrine in *W.S. Kirkpatrick*—also did not involve assets understood to be blocked for foreign policy reasons. *See* 658 F.2d at 909 (finding it significant that assets would “escheat to the State of New York” if the act of state doctrine were inapplicable). Nor did it involve a situation, like this case, in which the United States is affirmatively telling a court that applying the doctrine will harm the country’s interests. And while *Chemical Bank* saw significance in the fact that former owners of the U.S. assets had lodged no protest to a purported Cuban expropriation in over 20 years of litigation, *see id.*, in this case there is little reason to believe that the account holders have acquiesced in Cuba’s purported forfeiture. Rather, the relative absence of objections may well have resulted from the abbreviated period allowed for notice to the account holders (only a month and half), and the high likelihood that notices sent to addresses apparently dating to the 1950s did not reach all affected individuals.

4. For the reasons expressed above, it should be clear that U.S. policy interests will not be sufficiently furthered by the act of state doctrine so as to justify its application in this case. But if any doubt remains on that score, that doubt should be resolved by the fact that the government’s filing in this case merits substantial deference. At least eight Justices agreed in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), that the Executive Branch’s position was at a minimum entitled to deference in act of state cases. *See id.* at 768 (plurality opinion) (arguing that the executive’s views should be dispositive); *id.* at 774 (Powell, J., concurring) (arguing that the judiciary should account for “the position, if any, taken by the political branches of government”); *id.* at 790 (Brennan, J., dissenting) (recognizing that the State

Department's views "are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine"). And since the doctrine is based at least in part on the need to avoid conflict between the judicial and executive branches, *see Sabbatino*, 376 U.S. at 433, it makes particular sense for the judiciary to accord deference to the Executive's understanding of the country's foreign policy interests. *See also American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (recognizing the Executive's significant and unique role in foreign relations).

* * * *

(4) Martinez

On October 16, 2015, the United States submitted a statement of interest in *Martinez v. Cuba*, No. 07-6607 (S.D.N.Y.) to the effect that bank accounts, blocked pursuant to the Cuban Assets Control Regulations ("CACR") and sought for attachment under TRIA and the FSIA, were not owned by Cuba and therefore not subject to attachment. In particular, the U.S. statement explains that electronic fund transfers ("EFTs") are only deemed property of Cuba if the state or an agency or instrumentality of the state transmitted the EFT directly to the bank where the account was blocked.

On December 14, 2015, the United States submitted a supplemental statement of interest in response to assertions by plaintiffs that the ruling in *Vera v. Republic of Cuba*, 12-1596 (S.D.N.Y.) should be applied to the *Martinez* case. The December statement of interest makes the points that the *Vera* ruling is contrary to government regulations and that *Vera* does not support plaintiffs' arguments in *Martinez* in any event. Excerpts follow from the December statement of interest (redacted), which is also available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

I. CONTRARY TO THE *VERA* HOLDING, A BANK CANNOT DISCLAIM ITS INTEREST IN PROPERTY BLOCKED PURSUANT TO THE CACR

In *Vera*, the plaintiffs filed a petition seeking turnover of a \$3 million EFT "emanating from Cuba, or its agencies or instrumentalities, transmitted to New York banks for clearance purposes, and blocked pursuant to the [CACR]." ... In response to the petition, HSBC Bank USA N.A. ("HSBC"), the New York intermediary bank that held the blocked account, filed an interpleader petition to resolve claims on the \$3 million transfer. ... HSBC stated that the blocked transfer was initiated by a Cuban bank, Banco Internacional de Comercia, S.A. ("BICSA"), which instructed ING Bank France, Succursale de ING Bank N.V. ("ING") to transfer the \$3 million from a BICSA account at ING to another BICSA account at Banco Bilbao Vizcaya Argentaria, S.A. ("BBVA"). ... Consistent with this statement, the parties later stipulated that a Cuban bank had initiated the \$3 million transfer, and was also the intended beneficiary of the transfer. ... Neither BICSA nor ING responded to the interpleader petition. ...

The plaintiffs in *Vera* moved for summary judgment. . . . In response, HSBC “reiterate[d] its position as merely a stakeholder in [the] dispute,” but also opposed the motion, arguing that the blocked EFT was not subject to attachment under TRIA or the FSIA, because the plaintiff could not establish that the EFT was the property of Cuba for purposes of New York law. . . . In making this argument, HSBC relied on the Second Circuit’s decisions in *Calderon-Cardona* and *Hausler* holding that an EFT blocked midstream is the property of a foreign state only if the state or its agency or instrumentality transmitted the EFT directly to the bank holding the blocked EFT. *See id.* HSBC reasoned that, because the funds were transmitted to HSBC (a U.S. bank) by HSBC Bank plc, a United Kingdom bank, the EFT was not Cuban property for purposes of TRIA or the FSIA. *Id.*

Judge Hellerstein rejected this argument. The court ruled that, because HSBC Bank plc was not interpled, and because ING did not respond to the interpleader petition, “any potential interest in the chain of transactions leading from BICSA to HSBC has been disclaimed.” . . . The court concluded—without citing any legal authority—that, for the purposes of *Calderon-Cardona* and *Hausler*, the blocked assets were to be “considered to have been transmitted to HSBC directly from BICSA.” . . . Thus, *Vera* appears to stand for the proposition that where originating and intermediary banks “disclaim” interest in blocked assets, the assets may be considered to be the property of the originator. Because the originator in *Vera* was an instrumentality of Cuba, Judge Hellerstein found that the blocked EFT was Cuba’s property, and that it was therefore attachable under TRIA and the FSIA. . . .

The reasoning in *Vera* is contrary to the governing regulations. Under the CACR, a foreign bank is prohibited from disclaiming any interest in property subject to the jurisdiction of the United States, if Cuba also has an interest in that property. Specifically, section 515.201(b)(2) of the CACR prohibits “[a]ll transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States” if the transfers involve property in which Cuba (or its agency or instrumentality) has or had “any interest of any nature whatsoever, direct or indirect.” The word “transfer” is specifically defined to include “any actual or purported act or transaction, . . . the purpose, intent, or effect of which is to create, *surrender*, *release*, transfer, or alter, directly or indirectly any . . . interest with respect to any property.” 31 C.F.R. § 515.310 (emphasis added).

In *Vera*, there was no dispute that the blocked EFT was subject to the jurisdiction of the United States or that Cuba had an interest in the property. Therefore, under the CACR, ING and HSBC Bank plc were prohibited from “surrender[ing]” or “releas[ing]” their interests in the EFT that was blocked in New York and intended for a Cuban beneficiary. Moreover, the CACR specifically provides that any transfer in violation of the CACR involving property in which Cuba has an interest “is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property.” 31 C.F.R. § 515.203(a); *see also Zarmach Oil Services, Inc. v. U.S. Dep’t of the Treasury*, 750 F. Supp. 2d 150, 157 (D.D.C. 2010) (“OFAC regulations . . . provide only one method by which the Sudanese Government’s interest in the funds may be extinguished: a valid license from OFAC . . . and contain no provision by which the efforts of a sanctions target and a company it wishes to do business with can, on their own, ‘un-block’ assets frozen by OFAC.” (citations omitted)). Thus, under the CACR, any “disclaimer” by ING or HSBC Bank plc would be “null and void,” and could not operate to transfer the property interest in the blocked asset to Cuba, or its agencies or instrumentalities.

Plaintiff's argument in this case that [redacted] disclaimer of interest in Accounts 1 and 2 in this case renders them attachable under TRIA and the FSIA is therefore unavailing. Under the CACR, the foreign [redacted] entities cannot surrender or release their interests in the blocked EFTs, as they are property subject to the jurisdiction of the United States in which Cuba has an interest as the intended beneficiary. *See* 31 C.F.R. §§ 515.201(b)(2), 515.310. Any attempt to do so would be "null and void." *See* § 515.203(a). For this reason, the reasoning in *Vera* should be rejected. That decision did not consider, let alone correctly analyze, the impact of the CACR on intermediary banks' purported attempt to "disclaim" an interest in an asset subject to the regulations.

II. THE *VERA* HOLDING DOES NOT SUPPORT PLAINTIFF'S POSITION

Setting aside the error in *Vera*, Judge Hellerstein's reasoning in that case is inapplicable here for the additional reason that there is no indication that Cuba was the originator of the blocked EFTs in Accounts 1 and 2. In *Vera*, the parties stipulated that a Cuban bank was both the originator and beneficiary of the blocked EFT. ... But here, as Plaintiff concedes, there is no originator information available for the blocked transfers. ...

Plaintiff asks this Court to "infer" that Cuba was the originator of the EFTs here from the lack of originator information on the accounts. Without citing any legal or evidentiary support, Plaintiff speculates that "the originator's identity was purposefully omitted or scrubbed from the wire information" for the accounts at issue. ... Plaintiff argues that the supposed "purposeful omission" of originator information should cause the Court to infer that Cuba was the originator of the blocked EFTs, and therefore, under *Vera*'s flawed reasoning, the owner of the blocked accounts. ... But Plaintiff fails to cite a single fact to support her speculation that the lack of originator information for the EFTs at issue was purposeful, much less that Cuba was the originator.

In fact, the only evidence on this point leads to the opposite conclusion. ... In a November 5, 2015, letter to Plaintiff's counsel (copying the Government), counsel explained that the blocked EFTs at issue involve old transactions for which "[t]he absence of [originator] information at this late date is not surprising," particularly in light of the fact that the [redacted] entity involved has "undergone various mergers and acquisitions." ... And the mere fact that the EFTs were blocked does not support Plaintiff's claim, because the EFTs' intended recipient was Cuba, which would trigger a block of the transfer regardless of the originator's identity or nationality. In short, there is no evidence that Cuba originated the EFTs at issue, and therefore, no cause to apply the reasoning in *Vera*. Accordingly, this Court may rule that *Vera* would not apply to permit attachment of Accounts 1 and 2 in this case without addressing whether that case was correctly decided.

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(5) Harrison

In the November 2015 *amicus* brief in *Harrison v. Sudan*, discussed in section 10.A.3. *supra* (Service of Process), the United States also argued that the Second Circuit panel had erred by suggesting that the plaintiffs need not obtain a license from the Office of Foreign Assets Control ("OFAC") before executing upon blocked assets under the FSIA. An excerpt follows from the U.S. brief, which is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

... [T]he United States has repeatedly taken the position that section 201(a) of the Terrorism Risk Insurance Act (“TRIA”) permits a person holding a judgment under 28 U.S.C. § 1605A to attach assets that have been blocked pursuant to certain economic sanctions laws, without obtaining an OFAC license. That position rests on the terms of TRIA, which permits attachment of blocked assets in specified circumstances “[n]otwithstanding any other provision of law.” TRIA § 201(a).

But the panel erroneously applied the same construction to § 1610(g) of the FSIA. ... As the United States has previously stated, where “funds at issue fall outside TRIA but somehow are attachable by operation of the FSIA alone . . . an OFAC license would be required before the funds could be transferred to plaintiffs.” Statement of Interest of United States, *Wyatt v. Syrian Arab Republic*, No. 08 Civ. 502 (D.D.C. Jan. 23, 2015), at 18. While § 1610(g)(2) provides that certain property of a foreign state “shall not be immune from attachment,” that language, consistent with the paragraph’s title (“United States sovereign immunity inapplicable”), merely removes a defense of sovereign immunity. Section 1610(g) lacks TRIA’s broad notwithstanding any other provision” language, and does not override other applicable rules such as the need for an OFAC license. *See* 31 C.F.R. §§ 538.201(a), 538.313.

* * * *

c. *Constitutionality of the Iran Threat Reduction and Syria Human Rights Act of 2012*

In December 2015, the United States filed an *amicus* brief in the U.S. Supreme Court in support of respondents in *Bank Markazi v. Peterson et al.*, No. 14-770. The case presents the question of the constitutionality under Article III (separation of powers) of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8701 *et seq.* The Act makes certain assets in which the Central Bank of Iran has a security entitlement subject to attachment in aid of execution in connection with terrorism-related judgments against Iran in *Peterson*. 22 U.S.C. § 8772. The Act was adopted by Congress while the *Peterson* case was pending. The case was brought by more than 1000 victims of terrorist attacks sponsored by Iran, or their representatives and surviving family members, seeking to execute judgments on property of Iran within the jurisdiction of the U.S. District Court for the Southern District of New York. Based on the Act, the district court granted partial summary judgment for the respondents, holding that certain bond assets of Bank Markazi (Iran’s central bank) were subject to turnover under § 8772 and TRIA. The court of appeals affirmed. The U.S. *amicus* brief, excerpted below, explains why the Act does not violate the separation of powers because it amended the law on which the court would make its determination and did not direct the result of that determination. The United States also filed an *amicus* brief opposing the petition

for certiorari in the case in August 2015. The brief is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

C. The Political Branches Have Historically Established Particularized Rules Governing Claims Against Foreign Sovereigns And Foreign Sovereign Assets, And Those Actions Have Long Been Understood To Be Consistent With Article III

The political Branches historically have exercised extensive authority over claims against foreign sovereigns and the disposition of foreign-state assets subject to the United States’ jurisdiction—including by specifying the substantive law to be applied in a particular pending case. Those actions have never been thought to be inconsistent with courts’ exercise of the “judicial Power” under Article III. To the contrary, this Court has long recognized that in adjudicating suits against foreign sovereigns, courts must take account of the principle that the conduct of foreign relations is “so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952); see *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). The Court has also recognized that the political Branches often must quickly respond to evolving international situations, and pending suits should not be permitted to impede their ability to conduct the Nation’s foreign relations. *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981).

I. This Court has understood the Executive’s case-specific foreign sovereign immunity determinations to be consistent with Article III

a. For much of our Nation’s history, the Executive Branch had the authority to determine the immunity of foreign states in civil suits in courts of the United States on a case-by-case basis, and those determinations were binding on the courts. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945). A foreign sovereign’s immunity is grounded not in any constitutional entitlement, but instead arises out of principles of international law, reciprocity, and comity among sovereigns. *Altmann*, 541 U.S. at 689; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). In light of the potentially significant foreign relations consequences of subjecting another sovereign state to suit in our courts, the Court historically looked to “the political branch of the government charged with the conduct of foreign affairs” to decide whether immunity should be recognized in the particular case. *Hoffman*, 324 U.S. at 34. The Executive would make a determination based upon principles of immunity, informed by customary international law and reciprocal practice. *Verlinden*, 461 U.S. at 487.

This Court has described an Executive immunity determination as a “rule of substantive law governing the exercise of the jurisdiction of the courts.” *Hoffman*, 324 U.S. at 36; see also *Ex parte Peru*, 318 U.S. 578, 588 (1943) (same). As a result, the Court has explained, 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.” *Hoffman*, 324 U.S. at 35; see also, e.g. *Ex parte Peru*, 318 U.S. at 588 (“the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction”) (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)); *Compania Espagnola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938).

The Executive's determination of the "rule of substantive law" of immunity, *Hoffman*, 324 U.S. at 36, would necessarily be made in the context of a particular claim against a sovereign, and therefore necessarily pertained only to the specific case in question. Such a determination, and the effect accorded to it by the court, were never thought to be a violation of Article III. Indeed, this Court has rejected the suggestion that "the President's determination of a foreign state's immunity" could be thought to be "an encroachment on [the federal courts'] jurisdiction" in violation of Article III. *Dames & Moore*, 453 U.S. at 684-685. The Court explained that the Executive's immunity determination permissibly "direct[s] the courts to apply a different rule of law"—necessarily in a single case. *Ibid.*

b. In 1976, Congress enacted the FSIA, which transferred from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit. *Verlinden*, 461 U.S. at 488-489. Although the FSIA establishes comprehensive "legal standards governing claims of immunity" that are generally applicable to all cases involving foreign-sovereign defendants, *ibid.*, Congress has on occasion taken further steps to alter a foreign state's immunity with respect to ongoing litigation.

In 2003, in response to the institution of a new government in Iraq, Congress authorized the President to suspend the application of the FSIA's terrorism exception to Iraq in order to avoid burdening the new government with "crushing liability" for the terrorist acts of its predecessor. *Republic of Iraq v. Beauty*, 556 U.S. 848, 852-853, 864 (2009) (quoting *Acree v. Republic of Iraq*, 370 F.3d 41, 61 (D.C. Cir. 2004) (opinion of Roberts, J.), cert. denied, 544 U.S. 1010 (2005)). The President exercised that authority for the express purpose of protecting Iraq's property from "attachment, judgment, decree, lien, execution, garnishment, or other judicial process." *Message to the Congress Reporting the Declaration of a National Emergency With Respect to the Development Fund for Iraq*, 39 Weekly Comp. Pres. Doc. 647 (May 22, 2003). That action, this Court recognized, altered the law governing two pending suits against Iraq, with the result that "immunity kicked back in" and "the District Court lost jurisdiction" over the suits. *Beauty*, 556 U.S. at 865. While neither the statutes at issue nor the President's action referenced specific pending cases by name, the express purpose of the political Branches' actions was to ensure that pending and potential claims against Iraq (whatever their number) did not undermine the United States' foreign policy in the region.

2. The political Branches may settle pending claims against foreign sovereigns or transfer them to a non-Article III tribunal

The political Branches' authority over claims of U.S. nationals against foreign sovereigns extends to disposing of those claims, including by removing them from Article III courts. Because "outstanding claims by nationals of one country against the government of another country" often may be "sources of friction between the two sovereigns," the President may settle or extinguish such claims in the exercise of his authority over foreign affairs. *Dames & Moore*, 453 U.S. at 679. Since the nineteenth century, the Executive Branch has entered into numerous executive agreements "renounc[ing] or extinguish[ing] claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures." *Id.* at 679-680 & n.8 (canvassing historical practice); see, e.g., *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (same); *United States v. Pink*, 315 U.S. 203, 227-228 (1942). Many of those settlements involved the claims of identified individuals arising out of a specific incident. See John Bassett Moore, *Treaties and Executive Agreements*, 20 Pol. Sci. Q. 385, 403-417 (1905).

The political Branches' authority to settle claims extends to those pending in court. In *Schooner Peggy*, this Court, relying on a treaty that was ratified while the case was pending before the Court, reversed a judgment holding that a captured vessel should be forfeited to the United States and private parties. The treaty provided that captured ships, "not yet definitively condemned, * * * shall be mutually restored" by each party. 5 U.S. (1 Cranch) at 107 (reporter's note). The Court observed that the treaty settling the claim "positively change[d] the rule which governs." *Id.* at 110.

In *Dames & Moore*, the Court rejected an Article III challenge to the President's authority to enter into an executive agreement that suspended pending claims of U.S. nationals against Iran and provided for their submission to the Iran-United States Claims Tribunal. 453 U.S. at 684-685; Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981) (implementing agreement). This Court rejected the argument that "the President, by suspending [the plaintiff's] claims, has circumscribed the jurisdiction of the United States courts in violation of" Article III. 453 U.S. at 684. The Court explained that the President's settlement of the claims "has simply effected a change in the substantive law governing the lawsuit," much like an Executive suggestion of sovereign immunity. *Id.* at 685.

3. The political Branches have long regulated the legal status of specific foreign-state assets, including those involved in pending litigation

a. Since World War I, Congress has authorized the President, in times of war or national emergency, to regulate property in which a foreign enemy state has an interest, including by blocking it or, in certain circumstances, vesting title to it in the United States. See TWEA, 50 U.S.C. App. 2(b) and 5(b); IEEPA, 50 U.S.C. 1701 *et seq.* The Executive Branch invoked the power under TWEA to vest in the United States specific foreign-state assets. See, *e.g.*, *Propper v. Clark*, 337 U.S. 472, 474-476 (1949).

The purpose of statutes permitting blocking (or vesting) of foreign assets is "to put control of foreign assets in the hands of the President" so that he may dispose of them in the manner that best furthers the United States' foreign-relations and national-security interests. *Propper*, 337 U.S. at 493; see *Dames & Moore*, 453 U.S. at 673. By blocking assets, the Executive Branch "immobilize[s] the assets * * * so that title to them might not shift from person to person, except by license, until" the Executive Branch determines whether "those assets [are] needed for prosecution of [a] threatened war or to compensate our citizens or ourselves for the damages done by" the relevant foreign governments. *Propper*, 337 U.S. at 484.

In *Dames & Moore*, this Court upheld the President's authority under IEEPA to issue a series of orders and regulations that first blocked Iranian state assets that were the subject of litigation in federal and state court, and then subsequently "nullified" any intervening judicial attachment orders restraining the assets. 453 U.S. at 663-666; see Exec. Order No. 12,279, 46 Fed. Reg. 7919 (Jan. 19, 1981). In upholding the President's authority, the Court emphasized that the purpose of freezing foreign-state assets is to "maintain" them at the President's "disposal" for use as a "bargaining chip" in negotiations with a hostile country. 453 U.S. at 673. The Court therefore refused to adopt a construction of IEEPA that would permit "individual claimants throughout the country to minimize or wholly eliminate this 'bargaining chip' through attachments, garnishments, or similar encumbrances on property." *Ibid.*; see *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 657 F.2d 3, 5 (2d Cir. 1981) (vacating attachment orders in accordance with the Court's decision in *Dames & Moore*).

b. The political Branches have previously taken control of particular identified foreign-state assets in order to compensate terrorism victims or satisfy the victims' judgments against

foreign states. In 1996, acting under TWEA, the President “vest[ed] in the United States” \$1.2 million in blocked Cuban assets and directed payment “to surviving relatives of” individuals whose civilian airplanes were shot down over international waters by the Cuban Air Force. *Alejandre v. Republic of Cuba*, 96-10127 Doc. No. 61, at 42 (S.D. Fla. Dec. 30, 1998) (President William J. Clinton, Memorandum for the Secretary of the Treasury (Oct. 2, 1996)). And in 2000, Congress directed the President to use blocked property belonging to Cuba and Iran to make payments to certain individuals with terrorism-related judgments against those states. Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, Div. C, § 2002, 114 Stat. 1541.

4. *Functional considerations inform the political Branches’ historical authority concerning claims against, and assets of, foreign sovereigns*

Domestic litigation seeking compensation for wrongs committed by a foreign state against U.S. nationals can have significant implications for the Nation’s relations with foreign sovereigns, as well as its interest in affording a means of compensation for injuries suffered by its nationals. See *Dames & Moore*, 453 U.S. at 673-674. The history of Executive and congressional control over claims against foreign states and foreign-state assets reflects the recognition that the political Branches must have the ability to address the various concerns raised by such litigation. The political Branches often may need to employ narrow measures that are expressly limited to particular foreign-sovereign litigation or assets. See *Beatty*, 556 U.S. at 856-857 (recognizing that political Branches may alter a generally applicable statute to implement foreign-relations interests). Such targeted alterations to the governing legal framework enable the political Branches to craft nuanced responses to particular international situations, while preserving flexibility to change course as events unfold or to draw distinctions between particular claims, states, or assets. Those measures will necessarily affect only a finite number of cases. In upholding the political Branches’ ability to alter substantive rules of law governing defined sets of claims or assets, this Court has never suggested that the validity of such actions would turn on how many pending cases they affect. . . . And with good reason: such an interpretation of Article III would permit the existence of pending litigation—and the happenstance that only a single case might be pending—to tie the hands of the political Branches in an arena in which flexibility and dispatch are crucial. See *Dames & Moore*, 453 U.S. at 673-674 & n.6.

* * * *

d. *Propriety of monetary contempt sanctions under the FSIA*

(1) *Sanctions for failure to comply with discovery*

In response to a request from the court, the United States filed a statement of interest on August 25, 2015 in *Walters v. People’s Republic of China*, No. 1:01-mc-300, a case in the U.S. District Court for the District of Columbia. The plaintiffs in the case attempted to obtain post-judgment asset discovery from China in an effort to execute a \$9.8 million default judgment entered against China in the 1990s relating to the death of their teenage son. The United States previously filed statements of interest in the case in 2012 relating to the discovery sought by the plaintiffs. See *Digest 2012* at 305-07. The 2015 statement of interest addresses the plaintiffs’ request to impose monetary

contempt sanctions on China for its failure to comply with the court's discovery orders and explains that a number of important international and domestic legal considerations weigh against the imposition of such sanctions on foreign states. Excerpts follow from the U.S. statement of interest submitted in 2015. The full statement is available at <http://www.state.gov/s/l/c8183.htm>. The case was voluntarily dismissed by the plaintiffs prior to a ruling on the motion for sanctions.

* * * *

Although the D.C. Circuit has held that the FSIA does not restrict a district court's inherent authority to impose contempt sanctions against a foreign sovereign, *see FG Hemisphere*, 637 F.3d at 375, any decision to wield such authority must be consistent with the equitable principles governing civil contempt. In this case, those considerations weigh decisively against imposing monetary sanctions. The relevant considerations include (A) the unenforceability and limited utility of the sanctions order, (B) the punitive nature of the proposed sanctions, (C) the foreign policy and reciprocity concerns presented by imposing sanctions on China, and (D) the overbroad nature of the underlying discovery requests. Those considerations should guide the Court in exercising its discretion as to whether to order the sanctions requested by Plaintiffs.

A. Equitable Principles Weigh Against The Issuance of An Unenforceable Order Imposing Monetary Contempt Sanctions on China

Absent exceptional circumstances, a court "should not issue an unenforceable" order against a foreign state. *In re Estate of Marcos Human Rights Litig.*, 94 F.3d 539, 545 (9th Cir. 1996). As discussed below, the requested contempt sanctions are at odds with the purposes of the civil contempt power and the equitable principles that guide courts in exercising it.

As a preliminary matter, there does not appear to be any dispute that an order imposing monetary contempt sanctions on China would be unenforceable. Section 1609 of the FSIA provides that where a valid judgment has been entered against a foreign state, property of that state is immune from execution or attachment unless one of the statutory exceptions in sections 1610 or 1611 applies. *See* 28 U.S.C. § 1609. None of the statutory exceptions in those sections apply to allow for enforcement of an order of monetary contempt sanctions, and no other provision of the FSIA permits a court to issue an enforceable contempt order imposing monetary sanctions against a foreign state that is unwilling to pay them. *See Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006). Accordingly, any attempt to reduce the accrued fines to a judgment and collect them through the execution of Chinese assets would be foreclosed by the FSIA.

The most immediate problem with an unenforceable contempt order is that it does nothing to further the purposes of civil contempt. A civil contempt sanction may serve either to "coerce the defendant into compliance with the court's order, or [to] compensate the complainant for losses sustained." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994) (citation omitted). Although a district court has discretion in fashioning a contempt remedy, *Armstrong v. Exec. Office of the President, Office of Admin.*, 1 F.3d 1274, 1289 (D.C. Cir. 1993), "a court is obliged to use the least possible power adequate to the end proposed," *Spallone v. United States*, 493 U.S. 265, 276 (1990) (citation omitted). In this regard, courts are

advised to consider “the probable effectiveness of any suggested sanction in bringing about [compliance].” *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Technologies, Inc.*, 369 F.3d 645, 657-58 (2d Cir. 2004).

It seems apparent that imposing monetary sanctions on China would not further the purposes of civil contempt. An unenforceable sanctions order would not be an effective way to coerce China to comply with the Court’s discovery order, much less to compensate Plaintiffs for any injuries they have sustained as a result of China’s noncompliance. *See Edeh v. Carruthers*, No. 10-2860, 2011 WL 4808194, at *4 (D. Minn. Sept. 20, 2011) (observing that defendant’s “complete failure to respond to plaintiff and to the Court indicates that financial consequences would have no effect on [defendant’s] willingness to comply with the Court’s order”).

As discussed below, *see infra* Section C, given that other countries generally view it as inappropriate to impose penalties on foreign sovereigns for failing to comply with a court order, it would be exceedingly rare for *any* foreign state to voluntarily pay a contempt sanction. But the prospect of voluntary compliance is all the more remote in this case, where China has been steadfast in its refusal to participate in the litigation or to comply with orders of the Court. *See* Notice to Court, Dkt. No. 10 (“China . . . has never accepted the jurisdiction of US courts. Neither has China ever accepted the so-called default judgment against it entered by the US court in 1996.”). Rather, China’s consistent position that it is absolutely immune virtually ensures that any attempt by Plaintiffs to collect the fines would be met by the same response they have met in attempting to execute the underlying damages award.

For similar reasons, a decision to levy fines on China necessarily would discount the “probable effectiveness” of the contempt remedy, *Paramedics*, 369 F.3d at 657-58, and certainly would not represent “the least possible power adequate to the end proposed,” *Spallone*, 492 U.S. at 276. As discussed below, *see infra* Section C, while any contempt sanction imposed on a foreign state would prove worrisome from a foreign policy standpoint, a sanction against a foreign state that for some reason were willing to voluntarily comply at least could be said to serve the functions of the contempt power. But there is nothing to recommend a contempt sanction that is all but certain to be ignored by a foreign state. *See In re Estate of Marcos*, 94 F.3d at 548 (holding that the district court abused its discretion by issuing a “futile injunction” against a foreign state); *see also Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 550 (1937) (“[A] court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff.”). Such a sanction would not achieve its intended purpose, and any negligible utility it may have would almost always be outweighed by its costs.

B. The Proposed Monetary Contempt Sanctions Are Punitive in Nature and Inconsistent with the FSIA

As noted above, civil contempt sanctions may serve either to coerce compliance with an order or compensate a party for loss; they may not be designed to punish. *Landmark Legal Found. v. E.P.A.*, 272 F. Supp. 2d 70, 76 (D.D.C. 2003). Moreover, in the context of contempt proceedings involving foreign sovereigns, sanctions that are punitive in nature run afoul of the FSIA’s ban on imposing punitive damages on foreign states. 28 U.S.C. § 1606 (“[A] foreign state . . . shall not be liable for punitive damages . . .”). The monetary fines sought here (\$246,500 per day, to be paid to the Walters, until China satisfies its discovery obligations or pays the final judgment...) bear several hallmarks of a punitive contempt sanction.

First, although Plaintiffs have requested that the monetary sanctions be payable directly to them as opposed to the Court, . . . it seems clear that the requested amount has no relation to

any damages they may have incurred as a result of China's noncompliance with the discovery order. While a court may order a civil contemnor to compensate the injured party for losses caused by the violation of the court order, *Landmark Legal Found.*, 272 F. Supp. 2d at 76, such compensatory sanctions should "correspond at least to some degree with the amount of damages," and "proof of loss must be present to justify its compensatory aspects," *Paramedics*, 369 F.3d at 658 (citation omitted); see also *Landmark Legal Found.*, 272 F. Supp. 2d at 76 (observing that compensatory contempt sanctions often consist of "reasonable costs (including attorneys' fees) incurred in bringing the civil contempt proceeding.").

Plaintiffs' proposed contempt sanctions have none of these features. Plaintiffs have made no effort to tie the requested amount to any actual damages they may have incurred as a result of China's noncompliance with the discovery order. See *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1353-54 (2d Cir. 1989) (holding that the district court abused its discretion by making contempt sanctions payable directly to plaintiffs). Moreover, Plaintiffs have not suggested that any fines they may collect as a result of the contempt order would offset the amount owed by China under the final judgment. Rather, Plaintiffs request that they be paid the monetary contempt fines in addition to the amount of the outstanding final judgment.

Second, Plaintiffs have failed to present evidence as to what it would take to ensure China's compliance with the discovery order. *Autotech Techs. v. Integral Research & Dev. Corp.*, 499 F.3d 737, 751-52 (7th Cir. 2007) (holding that it was an abuse of discretion to order contempt fine against foreign government instrumentality in the absence of evidence that the requested fines were calibrated to actual losses or the prospect of coercing compliance). Plaintiffs contend that the requested sanctions are reasonable in light of the amount of the sanctions imposed against Russia in the *Chabad* litigation (\$50,000 per day), see *Chabad v. Russian Fed'n*, 915 F. Supp. 2d 148, 153-55 (D.D.C. 2003), and the relative size of China's economy ... But this rough approximation is a poor substitute for actual evidence. The discovery-related sanctions requested here would surpass not only the sanctions imposed in *Chabad*, but also other monetary contempt sanctions that have been imposed on foreign sovereigns in the past. See *FG Hemisphere*, 637 F.3d at 376 (\$5,000 per week payable to plaintiff doubling every four years until reaching a maximum of \$80,000 per week); *Chabad*, 915 F. Supp. 2d at 153-55 (\$50,000 per day to plaintiff); *Af-Cap*, 462 F.3d at 428-29 (\$10,000 per day to the court). For these reasons, it would be difficult to square these extraordinary fines with the FSIA's categorical ban on punitive damages against a foreign state.

C. The Proposed Sanctions Raise Significant Foreign Policy Concerns

The United States has significant foreign policy concerns about Plaintiffs' pursuit of contempt sanctions in this matter. Most immediately, there is a risk that contempt sanctions will create diplomatic tension between the United States and China, complicating foreign relations and risking adverse consequences for U.S. interests in Chinese courts. A finding of civil contempt is a declaration that a sovereign has behaved in a manner worthy of sanction. Cf. *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (noting that contempt order against senior Greek official "offends diplomatic niceties even if it is ultimately set aside on appeal."). As such, it is likely to be received by the foreign state as punitive and an affront to its sovereign immunity, and may even embolden the foreign state to respond in kind. The United States is cognizant of the D.C. Circuit's statement that "sensitive diplomatic considerations[,] . . . if reasonably and specifically explained[,] " could influence a court's consideration of whether to impose sanctions against a foreign sovereign. *FG Hemisphere*, 637 F.3d at 380. See also *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004) (stating that foreign policy is an area

where deference is owed to “the considered judgment of the Executive”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n. 21 (2004) (observing that “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy”).

Although the very sensitivities of diplomatic considerations make them difficult to air in public, these concerns are not “generic.” *Cf. FG Hemisphere*, 637 F.3d at 380. By way of illustration, in *Chabad*, the district court imposed monetary contempt sanctions of \$50,000 per day against Russia with the aim of coercing Russia to comply with an order directing Russia to return a collection of religious books and other documents to the plaintiff. *See* 915 F. Supp. 2d at 153-155. Rather than bringing Russia into compliance, the sanctions order created an additional hurdle to the United States’ efforts to resolve the dispute. *See* Statement of Interest of the United States, *Chabad*, No. 1:05-cv-01548-RCL, Ex. A, at 2 (D.D.C. filed Feb. 21, 2014). Moreover, in response to the sanctions order, the Russian Ministry of Culture and the Russian State Library filed a lawsuit against the United States in Moscow. The suit named the United States and the Library of Congress as defendants and requested a court order directing the defendants to return to Russia seven books that had been loaned to the Library of Congress from the *Chabad* collection and imposing a \$50,000 daily fine for each day of noncompliance. Judgment was entered, including the fine, which continues to accrue. *See* Decision, Case No. A40-82596/13, slip op. at 11 (Comm’l Ct. of Moscow May 29, 2014) (Russ.).

This is not to say that China will take the same approach that Russia did in *Chabad*. But *Chabad* does illustrate that the imposition of contempt sanctions can have negative consequences for the United States, while doing nothing to improve the position of the complainant. China already has expressed its “grave concern [of] the negative consequences that the case will cause if it continues to develop,” Dkt. No. 10 at 1, and a judicial declaration that China’s conduct is worthy of sanction, accompanied by an order levying daily fines on the Chinese Government until the conduct is corrected, is not likely to support friendly bilateral relations.

International practice also weighs against an order of monetary contempt sanctions against China. In enacting the FSIA, Congress sought to adhere closely to accepted international practice and standards relating to sovereign immunity. *See Stephens v. Nat’l Distillers & Chem. Corp.*, 69 F.3d 1226, 1234 (2d Cir. 1995) (stating that the FSIA “was primarily codifying pre-existing international and federal common law.”). It is therefore appropriate to consider foreign and international legal norms, as well as the potential ramifications for the United States if U.S. courts deviate from such norms, in adjudicating cases arising under the FSIA. *See, e.g., Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1999). As the United States has discussed at length in previous submissions, the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States and Their Property generally prohibit the imposition of monetary sanctions based on a foreign state’s conduct in judicial proceedings. *See* European Convention on State Immunity, art. 18, May 16, 1972 E.T.S. No. 74, 11 I.L.M. 470 (1972); United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 24(1), G.A. Res. 59/38, annex, Dec. 2, 2004, 44 I.L.M. 803 (2005). Indeed, under the European Convention, this bar expressly applies to monetary sanctions imposed on a foreign state for “its failure or refusal to disclose any documents or other evidence.” European Convention, art. 18-Point 70. Although the United States is not a party to either convention, the conventions reflect international practice and legal norms regarding foreign state immunity, and similar bars on monetary sanctions have been adopted by numerous nations that have codified the restrictive view of sovereign immunity law,

including Canada, the United Kingdom, and Australia. *See, e.g.*, Canadian State Immunity Act, §§ 12(1), 10(1); United Kingdom State Immunity Act, § 13; Australian Foreign States Immunities Act of 1985, § 34. The United States, as a defendant to foreign proceedings, has benefitted from the international practice prohibiting such sanctions against sovereigns. While foreign courts for the most part have followed accepted international practice and not allowed monetary contempt sanctions against other sovereigns, orders of U.S. courts imposing monetary sanctions on foreign states may embolden foreign courts to impose similar sanctions on the United States.

The *FG Hemisphere* court discounted these examples of international practice as “irrelevant” to whether contempt sanctions are available under the FSIA. 637 F.3d at 380. But the question here is not whether the Court has authority to impose contempt sanctions; rather, the question is whether such authority should be exercised in this case. In considering that question, including the likelihood that China will comply, it is appropriate to account for the manner in which comparable orders are received under foreign and international law. *See, e.g., De Letelier v. Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984) (examining European Convention on State Immunity and United Kingdom’s immunity statute in construing the FSIA’s executorial immunity provisions). Indeed, China’s repeated appeals to international law and practice in its notices to the Court suggest that these concerns are particularly salient here. *See* Dkt. Nos. 10, 25. Thus, foreign policy considerations weigh against the sanctions that Plaintiffs propose in this case.

D. The Proposed Sanctions Are Unwarranted in Light of The Scope of The Overbroad Discovery Order

A final factor weighing against contempt sanctions is the overly broad nature of the underlying discovery order. The Court has ordered China to provide Plaintiffs with information on what appears to be every commercial asset owned directly or indirectly by the Chinese government in the United States. . . . The United States has previously taken the position in this case that such “broad, general-asset discovery” is inconsistent with the FSIA. . . . Although the Supreme Court has since held that the FSIA does not immunize foreign sovereigns from post-judgment discovery, *see Republic of Argentina v. NML Capital Ltd.*, 134 S. Ct. 2250 (2014), the Court explained that “other sources of law ordinarily will bear on the propriety of discovery requests of this nature and scope, such as settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted.” *Id.* at 2258 n.6 (internal quotation marks omitted). The Court also recognized that foreign sovereigns may be able to obtain relief from post-judgment discovery to the extent the discovery is directed to “information that could not lead to executable assets in the United States or abroad” *Id.* at 2257. Because the scope of the Court’s discovery order permits plaintiffs to seek information that is not relevant to their ability to execute their judgment, the Court should be extremely cautious about imposing monetary contempt sanctions on China. *See FG Hemisphere*, 637 F.3d at 379 & n.3 (noting, without addressing, the United States’ “serious[]” concerns about a district court imposing sanctions for non-compliance with overbroad discovery). Even as narrowed by the Court, the requests at issue here are overbroad in a number of respects:

1. Plaintiffs obtained the judgment against China under the commercial activities exception, 5 U.S.C. § 1605(a)(2). The only potentially relevant exception to China’s attachment immunity is 5 U.S.C. § 1610(a)(2), under which China’s property in the United States is not immune from execution if it “is or was used for the commercial activity upon which the claim is based” Thus, in this case discovery requests relating to China’s commercial property in the

United States are relevant only to the extent they concern assets used in connection with the sale and distribution of firearms. But Plaintiffs' requests are not limited to the commercial activity "upon which the claim is based." ...

2. Plaintiffs' discovery requests are inconsistent with the principle that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." See *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983). ...

* * * *

(2) *Pursuit of monetary contempt sanctions in Chabad*

The United States has filed several statements of interest in the U.S. District Court for the District of Columbia in *Chabad v. Russian Federation*, No. 1:05-cv-01548. See *Digest 2014* at 410-13 for a discussion of the statement of interest of the United States filed in 2014; *Digest 2012* at 319-23 for a discussion of the statement of interest of the United States filed in 2012; and *Digest 2011* at 445-47 for a discussion of the statement of interest of the United States filed in 2011. The case concerns Chabad's efforts to secure the transfer of certain books and manuscripts ("the Collection") from the Russian Federation. The Collection consists of materials that were seized at the time of the Bolshevik Revolution and are now held by the Russian State Library, and materials seized by Nazi Germany and later taken by Soviet forces and now held at the Russian State Military Archive. In 2010, the district court entered a default judgment in Chabad's favor directing transfer of the Collection. In 2013, the court imposed monetary contempt sanctions for Russia's failure to make the transfer.

Despite the opposition of the United States to the imposition and enforcement of monetary sanctions against the Russian Federation, including at a hearing before the Court in August 2015, the Court granted Chabad's motion for an interim judgment of accrued sanctions on September 10, 2015, finding that \$43.7 million in fines had accrued since the sanctions order was entered. In an effort to enforce the Court's sanctions order and judgment, Chabad proceeded to serve subpoenas on a number of third parties, and also obtained documents from the Office of Foreign Assets Control within the Department of Treasury.

The United States filed a further statement of interest on October 23, 2015, objecting to the proposed protective order, filed by Chabad in September 2015, regarding the handling of information Chabad is seeking from third parties. The October 23, 2015 statement of interest is available at <http://www.state.gov/s/l/c8183.htm>.

B. IMMUNITY OF FOREIGN OFFICIALS

1. Overview

In 2010, the U.S. Supreme Court held in *Samantar v. Yousuf* that the FSIA does not govern the immunity of foreign officials. See *Digest 2010* at 397-428 for a discussion of *Samantar*, including the *amicus* brief filed by the United States and the Supreme Court's opinion. The cases discussed below involve the consideration of foreign official immunity after the Court's 2010 decision.

2. Samantar

In 2015, the United States filed a brief as *amicus* on the third petition for a writ of certiorari in *Samantar*. On remand from the Supreme Court's 2010 decision, the district court determined that Samantar was not entitled to immunity, the court of appeals affirmed, and the Supreme Court denied the second petition for certiorari. After the district court entered its final judgment and the court of appeals denied the appeal, Samantar petitioned for certiorari yet again. The United States submitted a brief as *amicus curiae* on January 30, 2015, suggesting that the petition for certiorari should be denied because the court reached the correct result despite erroneously holding that the Executive Branch's immunity determination was not binding on the court and adopting a per se rule of non-immunity that was not drawn from a determination made or principles articulated by the Executive Branch. The Supreme Court denied the petition for certiorari on March 9, 2015. Excerpts follow from the U.S. *amicus* brief.

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I. THE COURT OF APPEALS' DECISION IS ERRONEOUS IN TWO RESPECTS

A. The Court Of Appeals Erred In Holding That The Executive Branch's Determination As To Conduct-Based Immunity Is Not Controlling

Under this Court's decisions, an Executive Branch determination whether a foreign official is immune from suit is binding on the courts. This principle applies both to status-based and conduct-based immunities, and the court of appeals erred in holding otherwise.

1. a. In *Samantar*, this Court held that the FSIA left in place the Executive Branch's historical authority to determine the immunity of foreign officials. 560 U.S. at 321-325. The Court described that historical practice in terms that made clear the deference that courts traditionally accorded to Executive Branch foreign sovereign immunity determinations before the FSIA's enactment. See *id.* at 311-312. As the Court explained, under the pre-FSIA two-step procedure, a foreign state facing suit could request a "suggestion of immunity" from the State Department and, if the State Department made such a suggestion, the district court "surrendered its jurisdiction." *Id.* at 311. If the State Department took no position on immunity, "a district court had authority to decide for itself whether all the requisites for such immunity existed," applying "the established policy" of the State Department to make that determination. *Id.* at 311-

312 (citation and internal quotation marks omitted). The Court also recognized that the same two-step process would be applied in cases against individual foreign officials. *Id.* at 312.

b. The pre-FSIA immunity decisions that this Court cited in *Samantar* confirm that the State Department's determination regarding immunity is, and historically has been, binding in judicial proceedings. 560 U.S. 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).

From early in the Nation's history, individual foreign officials were recognized as having immunity "from suits brought in [United States] tribunals for acts done within their own States, in the exercise of governmental authority." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see, e.g., *Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794). 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 (GLG), 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 the Executive Branch because the Executive did not express a position in the case); see also 560 U.S. at 311-312.

2. The court of appeals drew a distinction between Executive Branch determinations concerning status-based immunities, which the court acknowledged would be binding, and Executive Branch determinations of conduct-based immunities, which the court considered itself free to second-guess. That distinction has no basis.

a. As an initial matter, this Court in *Samantar* did not distinguish between conduct-based and status-based immunities in discussing the deference traditionally accorded to the Executive Branch. Rather, in endorsing the two-step approach to immunity questions, the *Samantar* Court recognized that the same procedures applied in cases involving the conduct-based immunity of foreign officials. 560 U.S. at 311-312. 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 involved consular officials who were entitled only to conduct-based immunity for acts carried out in their official capacity. And in reasoning that Congress did not intend to modify the historical practice regarding individual foreign officials, the Court cited *Greenspan*, in which the district court deferred to the State Department's recognition of conduct-based immunity of individual foreign officials. 1976 WL 841, at *2; see 560 U.S. at 321-322.

b. In concluding that conduct-based immunity determinations are not binding on the Judiciary, the court of appeals relied on two law review articles for the proposition that the Executive's determinations of status-based immunity are based on its power to recognize foreign sovereigns, see U.S. Const. Art. II, § 3, while the Executive's conduct-based determinations are not grounded on a similar "constitutional basis." Pet. App. 56a-57a. 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, not the more specific recognition power. See, e.g., *Ex parte Peru*, 318 U.S. at 589 (suggestion of immunity "must be

accepted by the courts as a conclusive determination by the political arm of the Government” that “continued retention of the vessel interferes with the proper conduct of our foreign relations”); see also *Hoffman*, 324 U.S. at 34; *Lee*, 106 U.S. at 209; *National City Bank v. Republic of China*, 348 U.S. 356, 360-361 (1955).

The Executive’s authority to make foreign official immunity determinations similarly is grounded in its power to conduct foreign relations. While the scope of foreign state and foreign official immunity is not invariably coextensive, see 560 U.S. 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 Pet. App. 78a-84a. As a result, suits against foreign officials—whether they are heads of state or lower-level officials—implicate recognition power. Pet. App. 55a-56a. To the contrary, they emphasized the Executive’s responsibility for foreign affairs. See *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005); *United States v. Noriega*, 117 F.3d 1206, 1211- 1212 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 110-111 (D.D.C. 2005).

c. Accordingly, in the years before the FSIA, courts routinely accepted as binding Executive Branch determinations of conduct-based immunity of both foreign states and foreign officials. Because the Executive Branch, beginning in 1952, applied the restrictive theory of sovereign immunity, under which foreign states enjoy immunity only as to sovereign, not commercial, activity, 560 U.S. at 312, determinations of foreign state immunity were conduct-based, and courts deferred to the Executive’s decisions. See, e.g., *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir.), cert. denied, 404 U.S. 985 (1971); *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103, 110 (2d Cir.), cert. denied, 385 U.S. 931 (1966); *Amkor Corp. v. Bank of Kor.*, 298 F. Supp. 143, 144 (S.D.N.Y. 1969). In the relatively few cases involving foreign officials, moreover, courts also followed the “same two-step procedure” as in cases involving foreign states. 560 U.S. at 312 (citing *Heaney and Waltier*).

That deferential judicial posture as to conduct-based immunity determinations is based on the constitutional principle of separation of powers. Under the Constitution, the Executive is “the guiding organ in the conduct of our foreign affairs.” *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). As this Court recognized previously in this case, the Executive Branch’s constitutional authority over the conduct of foreign affairs continues as a foundation for the Executive’s authority to determine the immunity of foreign officials. 560 U.S. at 323; see *Mistretta v. United States*, 488 U.S. 361, 401 (1989). In the absence of a governing statute (such as the FSIA), it continues to be the Executive Branch’s role to determine foreign official immunity from suit. See, e.g., *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005). The court of appeals therefore erred in holding that the Executive Branch’s determinations of conduct-based immunity are not entitled to controlling weight.

B. The Court Of Appeals Erred In Creating A New Categorical Judicial Exception To Immunity

The court of appeals also committed legal error in declining to rest its determination of non-immunity on the specific grounds set forth in the Executive Branch’s Statement of Interest, and instead fashioning a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms.

1. The per se rule of non-immunity adopted by the Fourth Circuit is not drawn from a determination made or principles articulated by the Executive Branch. To the contrary, the

United States specifically requested the court not to address respondents' broader argument that a foreign official cannot be immune from a private civil action alleging *jus cogens* violations. Pet. App. 111a n.3. 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 19-25, *Matar v. Dichter*, No. 07-2579-cv (2d Cir. Dec. 19, 2007); U.S. Amicus Br. at 23-34, *Ye v. Zemin*, No. 03-3989 (7th Cir. Mar. 5, 2004); see also Statement of Interest & Suggestion of Immunity at 7- 11, *Rosenberg v. Lashkar-e-Taiba*, No. 1:10-cv-5381- DLI-CLP (E.D.N.Y. Dec. 17, 2012); Suggestion of Immunity at 6, *Doe v. De León*, No. 3:11-cv-01433- AWT (D. Conn. Sept. 7, 2012); Statement of Interest & Suggestion of Immunity at 5-8, *Giraldo v. Drummond Co.*, No. 1:10-mc-00764-JDB (D.D.C. Mar. 31, 2011). The courts deferred to the United States' Suggestions of Immunity in those cases. See *Matar v. Dichter*, 563 F.3d 9, 14-15 (2d Cir. 2009); *Ye*, 383 F.3d at 626-627; *Rosenberg v. Pasha*, 577 Fed. Appx. 22, 23- 24 (2d Cir. 2014); *Doe v. De León*, 555 Fed. Appx. 84, 85 (2d Cir.), cert. denied, 135 S. Ct. 78 (2014); *Giraldo v. Drummond Co.*, 493 Fed. Appx. 106 (D.C. Cir. 2012) (per curiam), cert. denied, 133 S. Ct. 1637 (2013).

2. Respondents erroneously suggest (Br. in Opp. 2- 3, 24-25) that the court of appeals' creation of a categorical exception to immunity whenever *jus cogens* violations are alleged is supported by the United States' 2010 merits-stage amicus brief in this case. See 08-1555 U.S. Amicus Br. 7, 24-26. Specifically, they contend (Br. in Opp. 24) that the United States stated that various factors, including the nature of the acts alleged, are "appropriate to take into account" in immunity determinations. As the United States explained in its December 2013 invitation brief, that is incorrect. 12-1078 U.S. Amicus Br. 20-21.

The passages in the United States' merits-stage amicus brief identified considerations, not accounted for under the FSIA, which the Executive Branch could find appropriate to take into account in making immunity determinations. The passages thereby served to underscore the range of discretion properly residing in the Executive Branch under the Constitution in making immunity determinations. The United States' brief in this Court did not state that the Executive Branch had in fact decided if or how any particular consideration should play a role in specific immunity determinations, much less suggest that a court should independently weigh those considerations (or invoke any one of them) to make a determination of immunity or non-immunity on its own.

In any event, this Court unanimously ruled in this case that the courts should continue to adhere to official immunity determinations formally submitted by the Executive Branch, just as they did before the enactment of the FSIA. See 560 U.S. at 321-325. The Executive Branch made a determination of non-immunity in this case. The court of appeals fundamentally erred in failing to rest on the United States' submission and instead itself announcing a categorical exception to official immunity whenever allegations of *jus cogens* violations are made. See *Hoffman*, 324 U.S. at 35.

The court of appeals thus erred in two significant respects, and its decision conflicts with the Second Circuit's decision in *Matar v. Dichter*, *supra*, which held that courts must defer to the immunity determination in the Executive Branch's suggestion of immunity in a case involving alleged violations of *jus cogens* norms. See *Rosenberg*, 577 Fed. Appx. at 23- 24 (following *Dichter*, but acknowledging conflict with Fourth Circuit); see also *Kazemi Estate v. Islamic Rep.*

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 announcing a categorical judicial exception for cases involving alleged violations of *jus cogens* norms would warrant review by the Court at an appropriate time.

II. THIS COURT SHOULD DENY CERTIORARI

This Court should deny certiorari because, although the Fourth Circuit's opinion was erroneous for the reasons stated above, its judgment affirming the denial of petitioner's immunity is in accord with the Executive Branch's determination that petitioner is not immune. The Fourth Circuit's judgment therefore properly disposes of the immunity issue in this case.

A. The United States' previous recommendation that the Court GVR [grant certiorari, vacate, and remand without an opinion] in this case rested primarily on the State Department's need to engage in diplomatic discussions with the newly recognized Somali Government in order to consider the position on the immunity issue that had been expressed by that Government. 12-1078 U.S. Amicus Br. 22-23. The correspondence filed by the parties concerning the Somali Government's position on immunity that occurred shortly after the United States filed its brief, see p. 8, *supra*, underscored the need for diplomatic engagement.

Those discussions have now occurred. The State Department has concluded that Somalia does not request immunity for petitioner in this suit. The Executive has decided that, under the circumstances, there is no reason to alter its determination that petitioner is not immune from this suit. See pp. 10-11, *supra*. Unlike the last time this case was before the Court, the United States is able to convey to the Court its determination with respect to immunity.

B. Because the Executive Branch has decided not to alter its determination that petitioner is not immune, it is now clear that the judgment of the court of appeals (albeit not its rationale) is consistent with the Executive Branch's determination. Accordingly, it is the view of the United States that the court of appeals' judgment properly disposes of the immunity issue in this case. In light of the unique circumstances of this case, review of the now-final judgment in this case is not warranted.

Petitioner argues (Pet. 23) that the Court should address "the legal question presented—whether *jus cogens* allegations categorically preclude common-law immunity—and then remand for application of the appropriate legal rule, taking into account the position of the Somali government." Petitioner contends (Reply Br. 7-9) that such a decision would afford him meaningful relief because, once the Court has established that there is no *jus cogens* exception, he might obtain on remand a judicial decision finding him immune from this suit. Petitioner bases that prediction on two premises: first, his incorrect assumption that the Somali Government *does* request immunity, such that the United States might alter its immunity determination; and second, his assertion that the United States' original Statement of Interest has been overtaken by subsequent events. *Id.* at 8. Both of those premises, however, have been vitiated by the Executive Branch's intervening ascertainment of the Somali Government's actual position, and the Executive's conclusion under the circumstances that it will not alter its immunity determination.

In the event of the remand petitioner seeks, the Fourth Circuit would presumably accord at least "substantial weight" to the Executive Branch's conclusion that petitioner is not entitled to immunity. Pet. App. 58a. The Fourth Circuit has already opined that the factors on which the Statement of Interest initially relied were entitled to significant weight. See *id.* at 67a (stating that the low "risk of offending a foreign nation by exercising jurisdiction" in this case and petitioner's "binding tie to the United States" added "substantial weight in favor of denying

immunity”). Now that the Executive Branch has reaffirmed its determination of non-immunity, following its diplomatic engagement with the Government of Somalia, there is no reason to believe that the Fourth Circuit would decline to reinstate its judgment denying immunity.

In sum, because the court of appeals’ judgment in respondents’ favor is consistent with the Executive Branch’s determination that petitioner is not immune, and in light of all the circumstances, this Court should not grant review simply to correct the erroneous reasoning in the Fourth Circuit’s opinion. ...

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3. Immunity of Rabbinical Judges and Administrator

On December 9, 2015, a state court in New Jersey accepted the U.S. suggestion of immunity and dismissed a complaint filed against rabbinical judges and a rabbinical court official in Israel relating to child custody disputes. *Ben-Haim v. Edri*, No. L-3502-15 (Sup. Ct. N.J.). The suggestion of immunity is excerpted below (with footnotes omitted) and is also available, along with Attachment 1 referenced therein (the letter from the State Department to the Justice Department) at <http://www.state.gov/s/l/c8183.htm>.

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A. The Department of State’s Foreign Official Immunity Determinations Are Controlling and Not Subject to Judicial Review.

Unlike foreign sovereign immunity determinations, which are now governed by the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1602 et seq., the immunity of foreign officials continues to be resolved according to a long-standing two-step procedure. *See Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (“Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the [FSIA’s] origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.”); *Rosenberg v. Lashkar-e-Taiba*, 980 F. Supp. 2d 336, 341 (E.D.N.Y. 2013) *aff’d sub nom. Rosenberg v. Pasha*, 577 F. App’x 22 (2d Cir. 2014) (“[C]ourts have extended this two-step procedure to provide foreign officials immunity from civil suits.”). Under this regime, a diplomatic representative of the sovereign can request a “Suggestion of Immunity” from the Department of State. *Samantar*, 560 U.S. at 311. If the Department of State accedes to the request and files a Suggestion of Immunity, the court “surrender[s] its jurisdiction.” *Id.* If the Department of State takes no position in the suit, the “court ‘ha[s] authority to decide for itself whether all the requisites for such immunity exist[,]’” applying “‘the established policy of the [State Department].’” *Id.* (internal citations omitted; alteration in original).

As the U.S. Court of Appeals for the Second Circuit has recognized, the separation of powers requires courts to defer to the Executive Branch’s determination regarding foreign official immunity. *See Matar v. Dichter*, 563 F.3d 9, 15 (2009) (“Here, the Executive Branch has urged the courts to decline jurisdiction over appellants’ suit, and under our traditional rule of deference to such Executive determinations, we do so.”); *Rosenberg*, 577 F. App’x at 24 (“[I]n

light of the Statement of Interest filed by the State Department recommending immunity . . . the action must be dismissed”). And as the U.S. Court of Appeals for the Seventh Circuit observed in *Ye v. Zemin*, “[i]t is a guiding principle in determining whether a court should [recognize a suggestion of immunity] in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs . . . by assuming an antagonistic jurisdiction.” 383 F.3d 620, 626 (2004) (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (alteration in original)). Similarly, principles of federalism require state courts to defer to Executive Branch immunity determinations. Thus, “[t]he common law of foreign sovereign immunity is, perhaps uncharacteristically, facile and straight-forward: if the State Department submits a Suggestion of Immunity, then the district court surrender[s] its jurisdiction.” *Rosenberg*, 980 F. Supp. 2d at 341 (quoting *Tawfik v. al-Sabah*, 2012 WL 3542209, at *2 (S.D.N.Y. Aug. 16, 2012) (alteration in original)).

B. The Department of State Has Determined that Defendants Are Immune From Suit.

According to the procedure set forth above, the Court should dismiss this action because the Department of State has determined that defendants are immune from this suit. As a general matter, under principles of customary international law accepted by the Executive Branch, a foreign official enjoys immunity from suit based upon acts taken in an official capacity. In making the immunity determination, the Department of State considers, *inter alia*, a foreign government’s request (if there is such a request) that the Department of State suggest the official’s immunity. Notwithstanding such a request, the Department of State could determine that a foreign official is not immune. That would occur, for example, should the Department of State conclude that the conduct alleged was not taken in an official capacity, as might be the case in a suit challenging an official’s purely private acts, such as personal financial dealings. In making that determination, it is for the Executive Branch, not the courts, to determine whether the conduct alleged was taken in a foreign official’s official capacity. *See Hoffman*, 324 U.S. at 35 (“It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”).

Here, the Government of Israel has requested the Department of State to recognize the immunities of the seven defendants. Upon careful consideration of this matter, the Department of State has determined that defendants are immune from suit in this case. *See Exhibit 1* (Letter from Mary E. McLeod, Principal Deputy Legal Adviser, Department of State, to Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Civil Division, Department of Justice, requesting that the United States suggest the immunity of defendants). In arguing otherwise, Plaintiff relies primarily on his view that, because the rabbinical courts are “religious tribunals,” their judgments are not enforceable in New Jersey and they should “not [be] recognized in New Jersey as . . . judicial tribunal[s] of the State of Israel.” Compl. ¶¶ 10, 37-38, 87-88. Neither the religious nature of the rabbinical courts, nor the enforceability of their judgments in U.S. courts, is relevant to the issue of immunity, however. Instead, the relevant inquiry is whether the rabbinical courts are part of the Government of Israel, such that defendants’ actions on behalf of the courts could be said to have been undertaken in their official capacities and whether the Department of State has determined that the officials are immune from suit. *See e.g., Rosenberg*, 980 F. Supp. 2d at 342 (deferring to Department of State’s view that the Inter-Services Intelligence (“ISI”) is part of the Pakistani government and that individual defendants were immune for acts taken in their capacities as Directors General of the ISI). Here, the U.S. District Court for the District of New Jersey, *see Remand Order, Ben-Haim v. Edri*, No. 15-cv-3877, ¶ 8 (D.N.J. Oct. 1, 2015) (ECF No. 31), the Department of State, *see Attachment 1 at 2* (citing

Complaint Exhibits 12-14), and the Government of Israel, *see id.*; <http://www.rbc.gov.il/Documents/AboutEnglishVersion.docx>, have confirmed that the rabbinical courts are courts of the State of Israel.

Moreover, by expressly challenging defendants' exercise of their powers as judges and as (in the case of Gamliel) an employee of the rabbinical courts, Plaintiff's claims challenge defendants' exercise of their official powers as officials of the Government of Israel. The Complaint does not refer to any private conduct by defendants, but only to their actions as officials of the State of Israel. Plaintiff's allegations against the six judges are bound up with orders they issued and decisions they made as part of their duties as judges on Israel's rabbinical courts, Compl. ¶¶ 82-84, 97-99 & Ex. 12, and Plaintiff's allegations against Mr. Gamliel all concern actions he allegedly took "on behalf of" the rabbinical courts "while working with" them as their "agent and messenger," *id.* ¶¶ 30, 102-04, 109f. On their face, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity, and Plaintiff has provided no reason to question that determination.

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C. HEAD OF STATE IMMUNITY

1. President Xi of China

On October 6, 2015, the United States submitted a suggestion of immunity in a lawsuit against President Xi Jinping, the sitting head of state of the People's Republic of China. Excerpts follow (with footnotes omitted) from the suggestion of immunity. The submission in its entirety, including the Letter from Principal Deputy Legal Adviser Mary E. McLeod to Principal Deputy Assistant Attorney General Benjamin C. Mizer, dated September 22, 2015, attached as Exhibit A, is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

1. The United States has an interest in this action because President Xi is the sitting head of a foreign state, and thus this lawsuit raises the question of President Xi's immunity from the Court's jurisdiction while in office. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has authority to determine the immunity from suit of sitting heads of state. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and the conduct of its international relations, to recognize President Xi's immunity from this suit while in office. As discussed below, this determination is controlling and is not subject to judicial review. Indeed,

no court has ever subjected a sitting head of state to suit once the Executive Branch has determined that he or she is immune.

2. The Office of the Legal Adviser of the Department of State has informed the Department of Justice that the Embassy of the People's Republic of China has formally requested the Government of the United States to "take the steps necessary to have this action against the President dismissed on the basis of his immunity from jurisdiction as a sitting foreign head of state." Letter from Mary E. McLeod to Benjamin C. Mizer, dated September 22, 2015 (copy attached as Exhibit A). The Office of the Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Xi as a sitting head of state from the jurisdiction of the United States District Court in this suit." *Id.*

3. For many years, the immunity of both foreign states and foreign officials was determined exclusively by the Executive Branch, and courts deferred completely to the Executive's foreign sovereign immunity determinations. *See, e.g., Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."). In 1976, Congress codified the standards governing suit against foreign states in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, transferring to the courts the responsibility for determining whether a foreign state is subject to suit. *See id.* § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.").

4. As the Supreme Court has explained, however, Congress has not similarly codified standards governing the immunity of foreign officials from suit in our courts. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) ("Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity."). Instead, when it codified the principles governing the immunity of foreign states, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *See id.* at 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."). Thus, the Executive Branch retains its historic authority to determine a foreign official's immunity from suit, including the immunity of foreign heads of state. *See id.* at 311 & n.6 (noting the Executive Branch's role in determining head of state immunity).

5. The doctrine of head of state immunity is well established in customary international law. *See Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1979). In the United States, head of state immunity determinations are made by the Department of State, incident to the Executive Branch's authority in the field of foreign affairs.

6. The Supreme Court has held that the courts of the United States are bound by Suggestions of Immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35-36; *Ex parte Peru*, 318 U.S. 578, 588-89 (1943). In *Ex parte Peru*, in the context of foreign state immunity, the Supreme Court, without further review of the Executive Branch's immunity determination, declared that such a determination "must be accepted by the courts as a conclusive determination by the political arm of the Government." 318 U.S. at 589. After a Suggestion of Immunity is filed, it is the "court's duty" to surrender jurisdiction. *Id.* at 588. The

courts' deference to Executive Branch determinations of foreign state immunity is compelled by the separation of powers. *See, e.g., Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

7. For the same reason, courts also have routinely deferred to the Executive Branch's immunity determinations concerning sitting heads of state. *See Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit—even for acts committed prior to assuming office—as a conclusive determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations." (quotation omitted)); *Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) ("The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff."); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (noting that "in the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state"; "flexibility to react quickly to the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision").

8. When the Executive Branch determines that a sitting head of state is immune from suit, judicial deference to that determination is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. *See Ye*, 383 F.3d at 626 (citing *Spacil*, 489 F.2d at 618). Judicial deference to the Executive Branch in these matters, the Seventh Circuit noted, is "motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved." *Id.* *See also Spacil*, 489 F.2d at 619 ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." (citing *United States v. Lee*, 106 U.S. 196, 209 (1882))); *Ex parte Peru*, 318 U.S. at 588. As noted above, in no case has a court subjected a sitting head of state to suit after the Executive Branch has determined that the head of state is immune.

9. Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state's status as the current holder of the office. In this case, because the Executive Branch has determined that President Xi, as the sitting head of a foreign state, enjoys head of state immunity from the jurisdiction of U.S. courts in light of his current status, President Xi is entitled to immunity from the jurisdiction of this Court over this suit.

* * * *

2. Prime Minister Modi of India

On January 14, 2015, the court dismissed a lawsuit brought against Prime Minister Narendra Modi of India in the U.S. District Court for the Southern District of New York. *American Justice Center v. Modi*, No. 14-7780 (S.D.N.Y.). As discussed in *Digest 2014* at 425, the United States submitted a suggestion of immunity and a supplemental brief in 2014. Excerpts follow from the court's order dismissing the claims on the basis of the Executive Branch's immunity determination.

* * * *

...[T]he FSIA is not controlling with respect to the immunity determination here. The immunity of foreign heads of state and heads of government is governed not by FSIA but by common law principles of foreign official immunity. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (“Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the [FSIA’s] origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.”); *see also Zemin*, 383 F.3d at 625 (“Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976-with the Executive Branch.” (citation omitted)).

... The Executive Branch’s assertion of foreign official immunity is not rendered ineffective by allegations that Modi engaged in unlawful conduct that exceeded his official authority by violating *jus cogens* (international law norms) and that took place before he became Prime Minister. A sitting head of state’s immunity from jurisdiction is based on the Executive Branch’s determination of official immunity without regard to the specific conduct alleged. *Matar*, 563 F.3d at 15 (“[I]n the common-law context, we defer to the Executive’s determination of the scope of immunity. ... A claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity.”); *see also Zemin*, 383 F.3d at 627.

Courts are likewise bound by the Executive Branch’s determination even when the alleged conduct took place prior to the assumption of office. *Habyarimana*, 696 F.3d at 1032; *see also Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272, 280 (S.D. Tex. 2005) (accepting Executive Branch’s determination that Pope Benedict XVI was entitled to head-of-state immunity even though the alleged conduct occurred before he was Pope and “exceeded the authority granted him by former Pope John Paul II”).

Finally, ... the TVPA and ATS did not override or create an exception to an Executive Branch determination of foreign official immunity. *See, e.g., Manoharan v. Rajapaksa*, 711 F.3d 178, 180 (D.C. Cir. 2013) (“[T]he common law of head of state immunity survived enactment of the TVPA.” (citing *Matar*, 563 F.3d at 15)). Indeed, the Second Circuit has dismissed analogous claims in recognizing an Executive Branch determination of immunity in a case brought under the TVPA and ATS. *See Matar*, 563 F.3d at 15; *accord Devi v. Rajapaksa*, 11 Civ. 6634, 2012 WL 3866495, at *3 (S.D.N.Y. Sept. 4, 2012), *appeal dismissed*, 2013 WL 3855583 (2d Cir. Jan. 30, 2013); *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994). The Court has considered the remainder of Plaintiffs’ arguments and finds them to be without merit.

* * * *

D. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Consular and Diplomatic Immunity

a. *Rana v. Islam et al.*

On January 6, 2015, the U.S. District Court for the Southern District of New York denied defendants' motion to dismiss a complaint brought against them by their former domestic employee. Among other grounds for dismissal, the defendants asserted they were immune from suit based on their consular status. Excerpts from the district court's opinion, including the reasoning for finding defendants not to be entitled to immunity, appear below.

* * * *

The Vienna Convention on Consular Relations (“VCCR”) governs consular immunity. *United States v. Kostadinov*, 734 F.2d 905, 910 (2d Cir. 1984). The degree of immunity that consular officers receive is more restricted than that enjoyed by diplomats. *See United States v. Khobragade*, 15 F. Supp. 3d 383, 385 (S.D.N.Y. 2014). Specifically, whereas diplomatic officers have almost complete immunity from a receiving state's civil and criminal jurisdiction, consular officers and employees are only entitled to immunity “in respect of acts performed in the exercise of consular functions.” *Compare* Vienna Convention on Diplomatic Relations [hereinafter “VCDR”] art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *with* Vienna Convention on Consular Relations [hereinafter “VCCR”] art. 43(1), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

When he was Consul General of the Consulate General of Bangladesh in New York, Defendant Islam was unquestionably a “consular officer” within the meaning of Article 43 of the VCCR. *See Park v. Shin*, 313 F.3d 1138, 1141 (9th Cir. 2002). Consequently, Islam is entitled to consular immunity for acts he “performed in the exercise of consular functions.” VCCR art. 43(1).

* * * *

Determining whether consular immunity applies “involves a two part inquiry.” *Ford v. Clement*, 834 F. Supp. 72, 75 (S.D.N.Y. 1993) (citing *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 346 (9th Cir. 1993)). First, the court must determine whether the official's actions “implicated some consular function.” *Id.* Second, the “acts for which the consular officials seek immunity must be ‘performed in the exercise of the consular functions’ in question.” *Id.*

The VCCR sets forth twelve specific consular functions, including protecting “the interests of the sending State and its nationals” and “issuing passports and travel documents to nationals of the sending State.” VCCR art. 5. In addition, the VCCR contains a catchall provision defining consular functions as “any other functions entrusted to a consular post by the sending

State which are not prohibited by the laws and regulations of the receiving State or . . . which are referred to in the international agreements in force between the sending State and the receiving State.” VCCR art. 5(m).

The Court finds that defendants’ employment of Rana was not a consular function within the meaning of the VCCR. Hiring a domestic worker to cook, clean, and provide childcare in a consular official’s household falls neither within any of the specific functions set forth in the VCCR nor within the scope of Article 5(m)’s catchall provision.

This Court’s determination accords with the decisions of at least two Courts of Appeal. In *Park v. Shin*, the U.S. Court of Appeals for the Ninth Circuit held that a consular official’s employment of a “*personal domestic servant*” is not a consular function. 313 F.3d at 1142 (emphasis in original). Similarly, in *Swarna v. Al Awadi*, 622 F.3d 123, 137140 (2d Cir. 2010), the U.S. Court of Appeals for the Second Circuit rejected the notion that “residual” diplomatic immunity—that is, immunity for past acts performed in the receiving state that the diplomat continues to enjoy even after he has left that country—shields a diplomat from causes of action arising out of the employment of a domestic worker. The standard for residual diplomatic immunity is virtually identical to that for consular immunity. Specifically, Article 39(2) of the VCDR provides that former diplomats are entitled to immunity for “acts performed by such a person in the exercise of his functions as a member of the mission,” while Article 43(1) of the VCCR art. 43(1) grants immunity to consular officers “in respect of acts performed in the exercise of consular functions.” Because the residual immunity enjoyed by diplomats is essentially the same as that accorded consular officers, *Swarna* thus teaches that consular immunity cannot shield a consular officer from claims arising out of his or her employment of a personal domestic worker.

Both the Second Circuit decision—*Swarna*—and the Ninth Circuit decision—*Park*—emphasized three facts in reaching their conclusions, all of which are present in this case. First, the plaintiffs in both cases were issued visas specifically intended for personal employees of diplomats or consular officers. *Swarna*, 622 F.3d at 138; *Park*, 313 F.3d at 1142–43. Here, Rana held an A 3 visa (Compl. ¶ 9), the same visa issued to the plaintiff in *Park*, 313 F.3d at 1142–43. Second, the defendants in *Park* and *Swarna* paid for the domestic workers’ services out of their own personal funds. *Swarna*, 622 F.3d at 138; *Park*, 313 F.3d at 1143. Similarly, Prova allegedly promised to pay Rana \$3,000 per month for his services (Compl. ¶ 34), and there is nothing in the record to suggest that the Bangladesh Consulate agreed to pay Rana or that it maintained a practice of compensating the personal employees of its consular officers. Third, in both *Park* and *Swarna*, the plaintiffs spent “the bulk” of their time cooking and cleaning for the defendants and caring for their children. *Swarna*, 622 F.3d at 138; *Park*, 313 F.3d at 1143. Here, Rana allegedly worked over 16 hours per day in defendants’ household, cooking, cleaning, and looking after their child. (Compl. ¶¶ 40–41.)

Defendants contend that they are entitled to immunity because their employment of Rana was “incidental” to Islam’s post as Consul General of Bangladesh. (Defs.’ Mem. at 5.) They point to two facts in support of this argument: (1) Rana “was retained to perform domestic services for [defendants] while Defendant Islam was posted as Consul General”; and (2) Rana was required to perform services not only at defendants’ apartment, but also at the Bangladesh Consulate. (*Id.*)

These exact arguments, however, were rejected in *Park*. There, the defendants, a consular officer and his wife, argued that the officer “could not fulfill his other functions as a consular officer as effectively if he were required to cook, clean, take care of his children, and perform the

other services that Plaintiff provided for” his family. 313 F.3d at 1142. Although the Ninth Circuit panel recognized that that contention might indeed be true, it nonetheless concluded that “this fact alone is insufficient to make hiring and supervising [a domestic worker] a consular function.” *Id.* (“A direct, not an indirect, benefit to consular functions is required.”).

The defendants in *Park* also argued that their employment of the plaintiff constituted a consular function because her duties included preparing and serving food when the defendants entertained official guests of the consulate in their home. *Park*, F.3d at 1142. However, the court held that because the plaintiff spent “the bulk” of her time attending to the defendants’ household, the “[p]laintiff’s work for the Consulate was merely incidental to her regular employment as the [defendants’] personal domestic servant and, accordingly, Mr. Shin’s hiring and supervision of her was not a consular function.” *Id.* at 1143.

Here, too, the fact that Rana worked for defendant Islam while he was a consular officer does not mean that defendants’ employment of Rana was a consular function. The record on this motion shows that Rana was employed to meet defendants’ private needs and not the official needs of the Consulate General of Bangladesh. *See Swarna*, 622 F.3d at 138 (the plaintiff’s work in the home of defendant, a diplomat, was not “part of any mission related functions”). Defendants have not alleged that their employment of Rana required consular authorization or approval. Furthermore, nothing in the record suggests that Rana’s occasional work in the Bangladesh Consulate was anything more than incidental to his regular employment in defendants’ household. As noted above, defendants have provided no evidence that the Consulate hired or paid Rana and the facts alleged are that Rana devoted substantially all of his time attending to defendants’ household. (Compl. ¶¶ 40–42.) The fact that Rana occasionally “cook[ed] food for events at the Bangladesh Consulate” and provided services at “monthly community events” there (Compl. ¶ 42) is not sufficient to render his employment a consular function. *See Swarna*, 622 F.3d at 128, 138 (defendants’ employment of a domestic servant was not an official diplomatic function, even though the plaintiff “cooked for an official event held at the Kuwait Mission on ‘at least one occasion.’”); *Park*, 313 F.3d at 1143.

Defendant Prova’s claim to immunity rests on the same grounds as her husband’s; therefore, she also is not entitled to consular immunity.

c. Consular Immunity Does Not Shield Islam from this Action Because He Was Not Acting as an “Agent” of Bangladesh When He Contracted for Rana’s Employment

Even if Article 43(1) of the VCCR provided a basis for consular immunity here, the Court would still find subject matter jurisdiction to exist because the alleged circumstances of Rana’s employment would trigger an exception to the immunity provision of the VCCR. Specifically, the VCCR provides that immunity from jurisdiction in a civil action does not apply when the action “aris[es] out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State.” Art. 43(2)(b).

First, there is little doubt that Rana’s claims for relief arise out of his employment contract with defendants. As an initial matter, Rana’s breach of contract, unjust enrichment, and quantum meruit claims arise directly out of the contract. Defendants’ alleged fraudulent misrepresentations also arise out of the contract insofar as they occurred in the course of the parties’ negotiation over the terms of Rana’s employment. (Compl. ¶¶ 2, 28, 34–35.) Finally, the alleged acts giving rise to the remaining claims— conversion, trespass to chattels, assault and battery, and false imprisonment—all occurred during the course of Rana’s employment.

Second, the alleged facts also clearly show that Islam was not acting as an agent of the state of Bangladesh when he contracted to employ Rana. Here, too, the pertinent facts are that Rana was issued an A 3 visa, that defendants were responsible for paying him, and that Rana spent the bulk of his time serving defendants' household. Indeed, insofar as these facts establish that defendants' employment and supervision of Rana do not qualify as consular functions, they also demonstrate that Islam was not acting as Bangladesh's agent when he contracted for Rana's labor.

For all of these reasons, defendants are not immune from this action. Consequently, to the extent their motion to dismiss is premised on a lack of subject matter jurisdiction, it is denied.

* * * *

b. *Waiver of immunity: Ambassador Lippert*

On March 5, 2015, U.S. Ambassador to the Republic of Korea Mark Lippert was attacked by a Korean national wielding a knife. Ambassador Lippert was treated at a hospital in Seoul and recovered from the attack. The U.S. Department of State granted limited waivers of testimonial immunity and archival inviolability under the Vienna Convention on Diplomatic Relations to assist authorities in the Republic of Korea investigating the incident. The limited waiver of testimonial immunity allowed Ambassador Lippert to provide statements. The limited waiver of archival inviolability allowed the Embassy to provide documents from its archives regarding Ambassador Lippert's injuries as well as statements from an embassy staff member who witnessed the attack. The suspected attacker was taken into custody by Korean National Police and charged with multiple crimes. Excerpts follow from the diplomatic note granting the limited waivers, which was delivered by the U.S. Embassy to the Foreign Ministry of the Republic of Korea.

* * * *

The Korean National Police requested testimony from Ambassador Mark Lippert and Mi Yeon Kim regarding the attack on Ambassador Lippert on March 5, 2015, in the Republic of Korea. The police have also requested documents regarding the attack that were produced by the Embassy and maintained in the Embassy's archives and documents.

Ambassador Lippert is accredited to Korea as the head of the United States diplomatic mission. As an accredited diplomatic agent, under Article 31(2) of the Vienna Convention on Diplomatic Relations, he is not obliged to give evidence as a witness. Given the circumstances of this case, and in the spirit of cooperation, the United States expressly waives the immunity Ambassador Lippert enjoys under Article 31 (2) for the limited purpose of allowing him to provide a statement to the Korean National Police and/or the prosecutor regarding the events of March 5, 2015, and related events and for no other purpose.

Under Article 24 of the Vienna Convention on Diplomatic Relations, the archives and documents of the Embassy shall be inviolable at any time and wherever they may be. Given the

circumstances of this case, and in the spirit of cooperation, the United States expressly waives the inviolability of the Embassy's archives under Article 24 for the limited purpose of providing documents regarding the attack against Ambassador Lippert on March 5, 2015, and related events, and for no other purpose.

Mi Yeon Kim, a Korean national, is a translator for the Embassy and was seated beside Ambassador Lippert during the attack. The United States considers that the knowledge its employees obtain as a result of their employment with the Embassy is part of the Embassy's inviolable archives and documents. Given the circumstances of this case, and in the spirit of cooperation, the United States expressly waives the archival inviolability it enjoys under Article 24 for the limited purpose of allowing Mi Yeon Kim to be interviewed by the Korean National Police and/or the prosecutor regarding the events of March 5, 2015, and related events, which might include information from the Embassy's inviolable archives, and to provide a witness statement regarding those events, and for no other purpose.

The Ministry is requested to inform the Korean National Police and the prosecutor of Ambassador Lippert's immunity and the inviolability of the Embassy's archives and documents under the Vienna Convention on Diplomatic Relations. Further, the Ministry is requested to inform the Korean National Police and the prosecutor of this limited waiver of Ambassador Lippert's immunity and limited waiver of the Embassy's archival inviolability.

* * * *

2. Determination under the Foreign Missions Act

On July 14, 2015, Under Secretary of State Patrick Kennedy made a designation and determination pursuant to the Foreign Missions Act regarding the development of a portion of the former Walter Reed Army Medical Center in Washington, D.C. to be used to provide facilities for foreign missions in the United States. 80 Fed. Reg. 44,415 (July 27, 2015). Excerpts follow from the Federal Register notice of Under Secretary Kennedy's determination.

* * * *

In order to facilitate the Department of State's acquisition abroad of real property on which to construct safe, secure, and modern facilities for American diplomatic and consular operations, and in light of the difficulties that a growing number of foreign missions in the United States have encountered with respect to identifying properties and locations in the District of Columbia suitable for the construction and operation of modern chancery facilities, the Department of State intends to establish a second location in the Nation's Capital that is dedicated to foreign mission operations.

Thus, pursuant to the Department of State's authority under 22 U.S.C. 4308(e)(1), which authorizes the head of any Federal agency to transfer property to the Department of State to further the purposes of the Foreign Missions Act (22 U.S.C. 4301–4316) ("FMA"), the Department of State has concluded an agreement with the Department of the Army concerning

the transfer to the Department of State of approximately 32 acres of excess Federal property at the location of the former Walter Reed Army Medical Center (hereinafter referred to as the “Foreign Missions Center” or “FMC”). The official metes and bounds of this property are in the process of being formally established.

In accordance with the authority vested in me under the FMA and under Delegation of Authority No. 147, dated September 13, 1982, and after due consideration of the need to exercise reciprocity to obtain certain benefits for the United States, I hereby designate the acquisition and use of property (including construction or renovation of facilities on the property) by foreign missions at the FMC, as well as access to and use of roads, sidewalks and other common areas, and other public services at the FMC, to be a benefit as defined in 22 U.S.C. 4302(a)(1). I hereby determine, under 22 U.S.C. 4304, that the Department of State’s regulation of the acquisition and use of property in the FMC, as well as access to and use of roads, sidewalks and other common areas, and other public services at the FMC is reasonably necessary in order to: (1) Facilitate relations between the United States and a sending State; (2) protect the interests of the United States; and (3) adjust for costs and procedures of obtaining benefits for missions of the United States abroad. This action will enable the Office of Foreign Missions (OFM) of the Department of State to facilitate the secure and efficient operation of foreign missions in the United States.

Accordingly, the process through which foreign missions will be authorized to acquire, use, and dispose of property and to construct or renovate facilities will be subject to all terms and conditions established in this regard by the Director of the Office of Foreign Missions (OFM). At a minimum, such terms and conditions on which OFM will approve a request from a foreign mission for the acquisition of a lot at the FMC shall include due consideration of the related real property accommodations extended to missions of the United States in the country or territory represented by that foreign mission.

Pursuant to 22 U.S.C. 4306(b)(2)(B), because the FMC is in an area other than one referenced in § 4306(b)(1), the location, replacement, or expansion of chanceries at the FMC is permitted, subject only to disapproval by the District of Columbia Board of Zoning Adjustment in accordance with the procedures and criteria set forth in 22 U.S.C. 4306.

* * * *

3. Enhanced Consular Immunities

Section 7056 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Div. K, P.L. 114-113) (“FY 2016 SFOAA”) authorizes the Secretary of State, with the concurrence of the Attorney General, on the basis of reciprocity, to specify privileges and immunities for the members of a consular post and their families which result in treatment more favorable than that provided in the Vienna Convention on Consular Relations (“VCCR”). The Vienna Convention on Diplomatic Relations and the VCCR provide differing levels of immunity from, among other things, the criminal and civil jurisdiction of the host government. Section 7056 states:

The Secretary of State, with the concurrence of the Attorney General, may, on the basis of reciprocity and under such terms and conditions as the Secretary may determine, specify privileges and immunities for a consular post, the

members of a consular post and their families which result in more favorable or less favorable treatment than is provided in the Vienna Convention on Consular Relations, of April 24, 1963 (T.I.A.S. 6820), entered into force for the United States December 24, 1969: Provided, That prior to exercising the authority of this section, the Secretary shall consult with the appropriate congressional committees on the circumstances that may warrant the need for privileges and immunities providing more favorable or less favorable treatment specified under such Convention.

E. INTERNATIONAL ORGANIZATIONS

1. *Georges v. United Nations*

On January 9, 2015, the U.S. District Court for the Southern District of New York issued its opinion in *Georges v. United Nations*, No. 13-7146 (2015), finding that the UN and UN officials were immune from a suit alleging their liability for a cholera outbreak in Haiti. The U.S. Statement of Interest filed in 2014, asserting immunity, is discussed and excerpted in *Digest 2014* at 434-47. Excerpts follow from the opinion of the district court.

* * * *

Plaintiffs bring this class action diversity suit alleging various tort and contract claims against defendants the United Nations (“UN”), the United Nations Stabilization Mission in Haiti (“MINUSTAH”), United Nations Secretary-General Ban Ki-moon, and former Under-Secretary-General for MINUSTAH, Edmond Mulet. (Dkt. No. 1 (“*Compl.*”).) Specifically, Plaintiffs allege that Defendants are responsible for an epidemic of cholera that broke out in Haiti in 2010, killing over 8,000 Haitians and making over 600,000 ill. (*Id.* ¶¶ 1-2.)

Before the Court are two issues. First, Plaintiffs have been unable to serve the UN in person, and they request affirmation by the Court that service has been made, or, in the alternative, an extension of time for service of process by alternative means. Second is the question whether, under international treaties to which the United States is a party, Defendants are immune from Plaintiffs’ suit. For the reasons that follow, the Court concludes that all Defendants are immune. Accordingly, the case is dismissed for lack of subject matter jurisdiction, and Plaintiffs’ motion is denied as moot.

* * * *

Plaintiffs allege that in October 2010, Defendants deployed over 1,000 UN personnel from Nepal to Haiti without screening them for cholera, a disease that is endemic to Nepal and with which some of the personnel were infected. (*Compl.* ¶¶ 5, 59.) Plaintiffs further allege that Defendants stationed these personnel on a base at the banks of the Meille Tributary, which flows into Haiti’s primary source of drinking water, the Artibonite River. It was at this base, Plaintiffs

contend, that these recently transferred personnel discharged raw untreated sewage into the tributary, causing an outbreak of cholera in Haiti. (Id. ¶¶ 6-9.)

Plaintiffs allege that Defendants have failed to establish any claims commission or other dispute resolution mechanism to resolve the claims of those who have been injured or who have lost family members to the cholera outbreak. This refusal, Plaintiffs contend, is in direct contravention of Defendants' responsibility under the Convention on the Privileges and Immunities of the United Nations ("CPIUN") and the Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti ("SOFA") to offer appropriate modes of settlement for third-party private-law claims. (Id. ¶¶ 10-12.)

Because Plaintiffs could not personally serve the Complaint, they moved this Court to affirm that service had been made or to permit service by alternative means. (Dkt. No. 4.) The UN did not respond to Plaintiffs' motion; instead, the United States filed a "Statement of Interest" contending that Defendants are immune from Plaintiffs' suit and requesting that the Court dismiss the Complaint for lack of subject matter jurisdiction. (Dkt. No. 21 ("Statement of Interest").)

* * * *

The Charter of the United Nations ("UN Charter") states 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." U.N. Charter art. 105, para. 1. The CPIUN, which was adopted less than a year after the UN Charter, defines the UN's privileges and immunities in more detail. See Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, entered into force with respect to the United States Apr. 29, 1970, 21 U.S.T. 1418. The CPIUN provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." CPIUN art. II, § 2. Because the CPIUN is self-executing, this Court must enforce it despite the lack of implementing legislation from Congress. *Brzak*, 597 F.3d at 111-12.

The Second Circuit's decision in *Brzak v. United Nations* requires that Plaintiffs' suit against the UN be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(h)(3). In *Brzak*, the Second Circuit unequivocally held that "[a]s the CPIUN makes clear, the United Nations enjoys absolute immunity from suit unless 'it has expressly waived its immunity.'" 597 F.3d at 112 (quoting CPIUN art. II, § 2). Here, no party contends that the UN has expressly waived its immunity. (Statement of Interest at 6 ("In this case, there has been no express waiver. To the contrary, the UN has repeatedly asserted its immunity."); (Dkt. No. 43, at 1 ("Waiver is not at issue here.");).) Accordingly, under the clear holding of *Brzak*, the UN is immune from Plaintiffs' suit. In addition, MINUSTAH, as a subsidiary body of the UN, is also immune from suit. See *Sadikoglu v. United Nations Dev. Programme*, No. 11 Civ. 0294 (PKC), 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011).

Plaintiffs argue that the UN has materially breached the CPIUN such that it is not entitled to the "benefit of the bargain." Specifically, Plaintiffs insist that the UN has breached section 29(a), which provides that "[t]he United Nations shall make provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party." CPIUN art. VIII, § 29(a). Because the UN has failed to

provide any mode of settlement for the claims at issue here, Plaintiffs argue, it is not entitled to benefit from the CPIUN's grant of absolute immunity.

This argument is foreclosed by *Brzak*. In *Brzak*, the plaintiffs argued that the UN's dispute resolution mechanism was inadequate to resolve their case, and that this inadequacy stripped the UN of its immunity. The Second Circuit rejected this argument on the ground that it ignores the "express waiver" requirement of the CPIUN. *Brzak*, 597 F.3d at 112. Here too, construing 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.

Moreover, nothing in the text of the CPIUN suggests that the absolute immunity of section 2 is conditioned on the UN's providing the alternative modes of settlement contemplated by section 29. See *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004) ("When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used." (internal quotation marks omitted) (interpreting the CPIUN)). As the Second Circuit held in *Brzak*, the language of section 2 of the CPIUN is clear, absolute, and does not refer to section 29: the UN is immune from suit unless it expressly waives its immunity. *Brzak*, 597 F.3d at 112; see also *Sadikoglu*, 2011 WL 4953994, at *5 ("Nor does the contested status of the parties' efforts to arbitrate or settle the current dispute strip [the United Nations Development Programme] of its immunity. The CPIUN merely requires the UN to 'make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.' However, nothing in this section or any other portion of the CPIUN refers to or limits the UN's absolute grant of immunity as defined in article II—expressly or otherwise." (citation omitted)). Further, the CPIUN's drafting history indicates at most the commitment that, pursuant to section 29, the UN will provide a dispute resolution mechanism for private claims; it does not, as Plaintiffs argue, indicate the intent that such a mechanism is required in order for the UN to claim immunity in any particular case. See *Tachiona*, 386 F.3d at 216 ("Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." (brackets and internal quotation marks omitted)).

It is true that section 29 uses mandatory language, providing that the UN "shall make provisions for appropriate modes of settlement of . . . disputes . . ." This language may suggest that section 29 is more than merely aspirational—that it is obligatory and perhaps enforceable. But even if that is so, the use of the word "shall" in section 29 cannot fairly be read to override the clear and specific grant of "immunity from every form of legal process"—absent an express waiver—in section 2, as construed by the Second Circuit.

Finally, "in construing treaty language, '[r]espect is ordinarily due the reasonable views of the Executive Branch.'" *Id.* (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999)) (alteration in original); see also *Swarna v. Al-Awadi*, 622 F.3d 123, 133 (2d Cir. 2010) ("[W]hile the interpretation of a treaty is a question of law for the courts, given the nature of the document and the unique relationships it implicates, the 'Executive Branch's interpretation of a treaty is entitled to great weight.'" (quoting *Abbott v. Abbott*, 560 U.S. 1, 15 (2010))). For the reasons given above, the United States' interpretation that the CPIUN's grant of immunity is vitiated only by an express waiver of that immunity by the UN is reasonable. Here, where such an express waiver is absent, the UN and its subsidiary body MINUSTAH are immune from suit.

C. Immunity from Suit of Ban Ki-moon and Edmond Mulet

The UN Charter provides that “officials of the Organization shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organization.” U.N. Charter art. 105, para. 2. The CPIUN further provides that “the Secretary-General and all Assistant Secretaries-General shall be accorded . . . the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law.” CPIUN art. V, § 19. The Vienna Convention on Diplomatic Relations is the relevant international law here; that convention states that current diplomatic agents “enjoy immunity from [the] civil and administrative jurisdiction” of the United States, except in three situations, none of which is relevant here. See Vienna Convention on Diplomatic Relations, art. 31, Apr. 18, 1961, entered into force with respect to the United States Dec. 13, 1972, 23 U.S.T. 3227, (the “Vienna Convention”); *Brzak*, 597 F.3d at 113 (stating that, under the Vienna Convention, “current diplomatic envoys enjoy absolute immunity from civil and criminal process”). Thus, Ban Ki-moon and Edmond Mulet, both of whom currently hold diplomatic positions, are immune from Plaintiffs’ suit. Accordingly, Plaintiffs’ suit against them must be dismissed. See 22 U.S.C. § 254d (requiring a district court to dismiss “[a]ny action or proceeding against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention”).

* * * *

Plaintiffs appealed the dismissal by the district court to the U.S. Court of Appeals for the Second Circuit. *Georges v. United Nations*, No. 15-455 (2015). On August 26, 2015, the United States filed its *amicus* brief arguing in favor of affirming the dismissal by the district court. Excerpts follow (with footnotes omitted) from the U.S. brief on appeal. The brief in its entirety is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

I. Appellants’ Claims Against The United Nations And MINUSTAH Were Properly Dismissed For Lack Of Subject Matter Jurisdiction

A. The UN and MINUSTAH Are Immune From Suit Unless Such Immunity Is Expressly Waived

It is well-established that the UN and its subsidiary organ MINUSTAH are absolutely immune from suit in domestic courts. See, e.g., *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010). The district court therefore correctly rejected Appellants’ argument that the UN’s immunity from suit is conditioned upon the provision of an alternate mechanism to resolve Appellants’ tort claims. Nothing in the General Convention or the SOFA suggests that the UN’s immunity is conditional. To the contrary, as reflected by the text and drafting history of the General Convention, and as confirmed by every court to have considered the issue, the UN’s immunity is absolute in the absence of an express waiver.

1. The UN and MINUSTAH Enjoy Absolute Immunity From Suit Pursuant to Section 2 of the General Convention

“The interpretation of a treaty, like the interpretation of a statute, begins with its text.”

Medellin v. Texas, 552 U.S. 491, 506 (2008). Section 2 of the General Convention provides, in pertinent part, that “[t]he United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” The United States understands Section 2 of the General Convention to mean what it unambiguously says: the UN, including MINUSTAH, enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity. The provision could not be any clearer. The word “except” is followed by a single exception: express waiver. Section 2 does not admit of any other exceptions or preconditions, it does not cross-reference other sections of the treaty, and it does not contain any caveats. It therefore establishes the UN’s absolute immunity from suit, absent an express waiver, in unequivocal terms.

* * * *

2. The Text of the General Convention Confirms that the UN’s Immunity is Not Preconditioned upon Compliance with Section 29

The plain language of the treaty makes clear that the immunity conferred upon the UN by Section 2 is not conditioned upon compliance with the settlement resolution provisions found in Section 29(a) of the General Convention. Section 29 provides: “The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.” General Convention, art. VIII, §29. Nothing in Section 29(a) states, either explicitly or implicitly, that compliance with its terms is a precondition to the UN’s immunity under Section 2. Conversely, Section 29(a) is not even referenced in Section 2, let alone listed as a precondition or an exception to the immunity afforded the UN under that provision. Appellants argue, in effect, that such a precondition should exist, but the text of the General Convention makes clear that it does not.

This Court has previously rejected an almost identical argument regarding the interplay between Section 29 and Section 2. In *Brzak*, plaintiffs argued that, where there are “inadequacies with the [UN’s] internal dispute resolution” that would preclude a party from obtaining relief from the UN, the UN could no longer claim its immunity from suit under Article 2. *Brzak*, 597 F.3d at 112. This Court disagreed, holding that “crediting this argument would read the word ‘expressly’ out of the [General Convention].” *Id.* The *Brzak* decision therefore reaffirmed that the UN “enjoys absolute immunity” regardless of whether a party would have adequate recourse under Section 29 to alternate claims resolution procedures. *Id.*

The district court below, in applying the *Brzak* decision to the instant case, noted that the language in Section 29

may suggest that section 29 is more than merely aspirational—that it is obligatory and perhaps enforceable. But even if that is so, the use of the word “shall” in section 29 cannot fairly be read to override the clear and specific grant of “immunity from every form of legal process”—absent an express waiver—in section 2, as construed by the Second Circuit.

SA 6; see also *Bisson v. UN*, 2007 WL 2154181, at *9 (S.D.N.Y. July 27, 2007) (recommendation by magistrate judge, adopted, 2008 WL 375094 (S.D.N.Y. Feb. 11, 2008)) (“[S]ection 29(a) of the [General] Convention does not contain any language effecting an express waiver under any circumstances. Even assuming arguendo that the UN and the [World

Food Programme] have failed to provide an adequate settlement mechanism for Bisson's claims, such a failure does not constitute the equivalent of an express waiver of immunity. An express waiver may not be inferred from conduct."'). Therefore, the existence or adequacy of an alternative remedy is irrelevant to a court's immunity analysis.

* * * *

3. The Drafting History of the General Convention Confirms that the UN's Immunity is Unconditional

Although the text of the treaty makes clear that the UN enjoys absolute immunity, the drafting history confirms that the UN's immunity is not contingent on whether or how it settles disputes. As the district court correctly held, "the [Convention's] drafting history . . . does not, as Plaintiffs argue, indicate the intent that such a mechanism is required in order for the UN to claim immunity in any particular case;" instead, it indicates "at most the commitment . . . that the UN will provide a dispute resolution mechanism for private claims." SA 6 (emphasis in original; citing *Tachiona*, 386 F.3d at 216).

The United States representative to the UN understood, from the date that the UN Charter was signed, that

[t]he United Nations, being an organization of all of the member states, is clearly not subject to the jurisdiction or control of any one of them and the same will be true for the officials of the Organization. The problem will be particularly important in connection with the relationship between the United Nations and the country in which it has its seat.

Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State (June 26, 1945), *reprinted in* 13 Digest of Int'l Law 37 (1963).

Thus, the work of building on the privileges and immunities provisions of the UN Charter, including the statement that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes," Charter § 105(1), was undertaken with the understanding—at least as far as the United States was concerned—that the UN would be absolutely immune from the jurisdiction of all of its members.

Before the Preparatory Commission transmitted a draft convention to the General Assembly for its consideration, the Commission studied a set of precedents for the UN's privileges and immunities. See Preparatory Commission Report, Chapter VII, Annex to Study of Privileges and Immunities. The Commission evaluated approaches ranging from absolute immunity subject only to waiver, to immunity provisions that would permit lawsuits in the national courts under various circumstances. See *id.* The General Assembly, in approving the General Convention, chose absolute immunity.

Appellants have not identified anything in the drafting history of the General Convention that would suggest that the drafters of the General Convention intended that compliance with Section 29 is a precondition to an assertion of immunity under Section 2. For example, the isolated statements culled by Appellants from the Report of the Executive Committee of the Preparatory Commission refer alternately to the immunities requested by diplomats, Ap. Br. at 16 (quoting A-203 (the Study on Privileges & Immunities, PC/EX/113/Rev.1, at 70, Nov. 12, 1945, ¶ 7)), and to the immunities and privileges of "specialized agencies" such as the

International Monetary Fund and the International Bank for Reconstruction and Development, which operate independently of the UN and whose privileges and immunities are the subject of a separate treaty, Ap. Br. at 16 (quoting A-203 ¶ 5). Not only do these passages not address the immunity of the UN itself, neither of these selections so much as refers to alternate dispute procedures, let alone indicates that the establishment of such procedures is a precondition to immunity.

Similarly inapposite is the statement by the UN's Executive Committee of the Preparatory Commission to the effect that, when the UN enters into contracts with private individuals or corporations, "it should include in the contract an undertaking to submit to arbitration disputes arising out of the contract, if it is not prepared to go before the Courts." Ap. Br. at 28 (quoting A-203 ¶ 7) (first emphasis added). The use of the word "should" is hortatory and undermines Appellants' position that the UN's immunity is conditioned upon providing a dispute resolution mechanism.

Nor do drafts of the General Convention state that providing access to alternative methods of dispute resolution is a "critical pre-condition to . . . immunity," as Appellants argue. Ap. Br. at 29. There is no suggestion in the drafting history that the UN's immunity would be abrogated if the UN does not comply with another provision of the General Convention. To the contrary, the provisions for UN immunity and dispute resolution mechanisms consistently remained in separate articles and sections of the draft convention, without any link between them.

Although Appellants claim that such a link can be found in the title of a draft of a predecessor to Section 29, that title referred to the "Control of Privileges and Immunities of Officials[.]" and not the UN itself. . . . More importantly, the draft of that section said nothing about any pre-conditions to the UN's immunity. See A-303-304. In any event, the language regarding "[c]ontrol" disappeared in subsequent drafts of the General Convention. See A-317-328. What is constant throughout all the drafts of the General Convention is that they provide for absolute immunity for the UN, subject only to express waiver. . . . As the district court correctly held, . . . the drafting history does not reflect any intent to make the UN's immunity in any particular case legally contingent on the UN providing a dispute resolution mechanism.

4. The UN's Immunity Has Been Consistently Recognized by Foreign and International Authorities

In interpreting a treaty, the "opinions of our sister signatories . . . are entitled to considerable weight." *Abbott v. Abbott*, 560 U.S. 1, 16 (2010). Yet neither Appellants nor the putative Amici Curiae can cite to a single case in which a foreign or international court failed to recognize the UN's immunity from suit under the General Convention, let alone found that the UN's purported failure to provide alternative remedies served to abrogate the UN's immunities under the General Convention. To the contrary, the opinions of other member states to the General Convention is in accord with, and thus reinforces, the United States' reading of the treaty.

Member states have recognized the UN's absolute immunity from suit. See, e.g., *Stavrinou v. United Nations* (1992) CLR 992, ILDC 929 (CU 1992) (Sup. Ct. Cyprus 17 July 1992). Indeed, many of the cases cited by Appellants and Amici themselves upheld the UN's immunity from suit. See *Perez v. Germany*, 2015 Eur. Ct. H.R. ¶¶ 78, 86 (upholding Germany's decision to grant immunity to the UNDP, even where UN's employment dispute resolution process appeared to violate the German constitution); *Stichting Mothers of Srebrenica Ass'n v. Netherlands*, 2013 Eur. Ct. H.R., 40 ¶ 155 (Sup. Ct. Netherlands 2012) (noting that "the question

of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations” (further citations omitted); *Stavrinou*, (1992) CLR 992, ILDC 929 (CU 1992).

* * * *

5. Appellants Are Not Entitled To Assert Breach of the Treaties

Recasting this same argument in a different form, Appellants argue in the alternative that, even if Section 29 is not a precondition to immunity, the UN nonetheless cannot invoke the protections of Section 2 if it is in breach of Section 29 because “a material breach of a treaty by one party excuses performance by the other parties.” Ap. Br. at 37. Yet this principle of international law is of no assistance to Appellants, as they are not parties to the relevant treaties. The obligations under the General Convention and the SOFA are owed to the parties to those agreements. It is those parties, and not Appellants, that have a right to invoke an alleged breach and seek an appropriate remedy from among those legally available. Because Appellants are not a party to either the General Convention or the SOFA, they may not independently assert an alleged breach and insist upon their own preferred remedy.

Because “a treaty is an agreement between states forged in the diplomatic realm and similarly reliant on diplomacy (or coercion) for enforcement,” courts have “recognize[d] that international treaties establish rights and obligations between States-parties and generally not between states and individuals, notwithstanding the fact that individuals may benefit because of a treaty’s existence.” *Mora v. New York*, 524 F.3d 183, 200 (2d Cir. 2008). As the Supreme Court explained:

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Edye v. Robertson, 112 U.S. 580, 598 (1884), quoted in *Mora*, 524 F.3d at 200. Because “the nation’s powers over foreign affairs have been delegated by the Constitution to the Executive and Legislative branches of government,” the Supreme Court “has specifically instructed courts to exercise ‘great caution’ when considering private remedies for international law violations because of the risk of ‘impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.’ ” *Mora*, 524 F.3d at 200 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727- 28 (2004)).

Any claim regarding a purported breach of Section 29 therefore belongs exclusively to the parties to the General Convention. “[E]ven where a treaty provides certain benefits for nationals of a particular state, . . . any rights arising out of such provisions are, under international law, those of the states[.]” *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) (finding the fact that no state party argued that the United States violated the United Nations Charter was “fatal” to appellant’s claim of violation of the treaty; “the failure of Bolivia or Argentina to object to [the U.S. actions] would seem to preclude any violation of international law”).

Here, both the General Convention and the SOFA provide methods by which the member states or Haiti, respectively, may dispute the UN's interpretation of the UN's obligations under these agreements. The General Convention and the SOFA provide that any dispute between a state party and the UN shall be submitted to the International Court of Justice, see General Convention, art. VIII, § 30; SOFA art. VIII, § 58; and the SOFA provides that any dispute between MINUTSAH and the Government of Haiti shall be submitted to arbitration, see SOFA art. VIII, § 57. Accordingly, the treaties provide that the sovereign states—not private parties—can seek redress for any purported breach of the General Convention or of the SOFA. Because Appellants are private parties, they cannot prevail on arguments based on breaches of the provisions of the General Convention or the SOFA. See *Lujan*, 510 F.2d at 67.

* * * *

II. Secretary-General Ban And Assistant Secretary-General Mulet Enjoy Immunity From Suit

The district court correctly held that Secretary-General Ban and Assistant Secretary-General Mulet are immune from suit. Federal courts, including the Second Circuit, have repeatedly recognized the immunity of UN officials pursuant to the General Convention, incorporating the immunities of the Vienna Convention. See, e.g., *Brzak*, 597 F.3d at 113 (noting that, under the Vienna Convention, “current diplomatic envoys enjoy absolute immunity from civil and criminal process”).

Article V, Section 19 of the General Convention provides that “the Secretary-General and all Assistant Secretaries-General shall be accorded . . . the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law.” *Id.* art. V, § 19. The privileges and immunities enjoyed by diplomats are governed by the Vienna Convention. 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—with a few exceptions that do not apply to this case. See *id.* art. 31; see also *Swarna v. Al-Awadi*, 622 F.3d 123, 134 (2d Cir. 2010) (the purpose of diplomatic immunity is “ ‘to ensure the efficient performance of the functions of diplomatic missions as representing States’ ” (quoting Vienna Convention preamble cl. 4)).

Moreover, Secretary-General Ban's and Assistant Secretary-General Mulet's immunity will continue beyond their terms as Secretary-General and Assistant Secretary-General, respectively. Although a diplomatic agent's privileges and immunities cease soon after the diplomatic agent's functions cease, immunity continues “with respect to acts performed by such a person in the exercise of his functions as a member of the mission” Vienna Convention, art. 39(2). Article V, Section 18(a) of the General Convention likewise provides that UN officials are “immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity” General Convention, art. V, § 18(a). Accord 22 U.S.C. § 288d(b) (IOIA provision conferring upon officers and employees of international organizations “immun[ity] from suit and legal process relating to acts performed by them in their official capacity and falling within their functions”).

Here, Secretary-General Ban and Assistant Secretary-General Mulet are currently serving as diplomatic envoys, . . . and are therefore entitled to diplomatic immunity under the Vienna Convention. Further, because Appellants have sued Secretary-General Ban and Assistant Secretary-General Mulet for acts taken in their official capacity as UN officials, see Complaint

¶¶ 21-22, they are immune for those actions on that basis as well. Because the UN has not waived, but rather has expressly asserted the immunity of Secretary-General Ban and Assistant Secretary-General Mulet in this matter, see A-129-135, they both enjoy immunity from this suit.

Appellants point to no support for their novel theory that the UN's purported breach of the General Convention or the SOFA renders void the Secretary-General and Assistant Secretary-General's immunity. To the contrary, this Court has recognized that, under the Vienna Convention, subject only to exceptions that do not apply in this case, "current diplomatic envoys enjoy absolute immunity from civil and criminal process . . ." *Brzak*, 597 F.3d at 113. Because such immunity is absolute, it is necessarily not contingent on the UN's provision of dispute resolution mechanisms. Accordingly, this Court should likewise affirm the district court's decision that Secretary-General Ban and Assistant Secretary-General Mulet are immune from this lawsuit.

III. Appellants' Constitutional Arguments Fail

Appellants' argument that the UN's immunity deprives United States citizens of their constitutional right of access to the courts has already been considered and rejected by this Court. As this Court previously recognized when last confronted with this issue, Appellants' constitutional arguments "do[] no more than question why immunities in general should exist." *Brzak*, 597 F.3d at 114. Yet the existence of various types of immunities, which have been enshrined in the common law since this country was founded, have never been held to violate the Constitution. Appellants' argument is therefore without merit.

In *Brzak*, the plaintiffs, one of whom was a United States citizen, argued that granting the UN absolute immunity would violate their procedural due process right to litigate the merits of their case and their substantive due process right to access the courts. See 597 F.3d at 113. This Court disagreed, noting: "The short—and conclusive—answer is that legislatively and judicially crafted immunities of one sort or another have existed since well before the framing of the Constitution, have been extended and modified over time, and are firmly embedded in American law." *Id.* The Court concluded that "[i]f appellants' constitutional argument were correct, judicial immunity, prosecutorial immunity, and legislative immunity, for example, could not exist," and accordingly upheld the UN's immunity from suit. *Id.*

Appellants attempt to distinguish *Brzak*, noting that plaintiffs there had access to an internal UN redress process. . . . But the existence—or lack thereof—of any redress process was irrelevant to the Court's Constitutional analysis.

* * * *

... Accordingly, this Court should adhere to its prior ruling in *Brzak*, and affirm the dismissal of Appellants' constitutional claims.

* * * *

2. *All Craft Fabricators, Inc. v. ATC Associates Inc.*

On January 13, 2015, the United States submitted a statement of interest in *All Craft Fabricators, Inc. v. ATC Associates Inc.*, No. 156899/2013, asserting the immunity and inviolability of UN property, including documents, from legal process. The case involves

allegations that contractors for a project at the UN contaminated plaintiffs' facilities and offices with asbestos contained in wood panels and doors that were removed from the UN during the project. Plaintiffs propounded discovery requests seeking documents that are the property of the UN. The U.S. statement of interest includes as an exhibit the note verbale from the UN dated December 5, 2014, addressed to the United States Mission to the UN, requesting that the United States Government "take appropriate steps to ensure that the privileges and immunities of the United Nations are respected in this matter." As explained in the vote verbale, the documents requested include drawings and plans of non-public spaces in the UN. Excerpts follow from the U.S. statement of interest, which is available, along with the note verbale, at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The Property of the UN (Including Its Proprietary Documents), Wherever Located and by Whomsoever Held, Is Immune from 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 fulfilment [sic] of its purposes." UN Charter, art. 105, § 1. The UN's General Convention, which the UN adopted shortly after the UN Charter, defines the UN's privileges and immunities, and specifically provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, § 2; *see* Ex. 1. Moreover, "[t]he property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action." General Convention, art. II, § 3. Finally, "[t]he archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located." General Convention, art. II, § 4.

As courts have long recognized, the United States is a party to the General Convention. *See, e.g., Brzak v. United Nations*, 597 F.3d 107, 111 (2d Cir. 2010); *Sadikoglu v. United Nations Development Programme*, No. 11 Civ. 0294(PKC), 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011); *Askir v. Boutros-Ghali*, 933 F. Supp. 368, 371 (S.D.N.Y. 1996); *Shamsee v. Shamsee*, 74 A.D.2d 357, 361 (N.Y. App. Div. 1980); *Hunter v. United Nations*, 800 N.Y.S.2d 347, 2004 WL 3104829, at*2-3 (N.Y. Sup. Ct. Nov. 15, 2004). Moreover, numerous New York courts have acknowledged the need to respect and enforce the UN treaty obligations of the United States. *See, e.g., Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225, 230 (N.Y. 1990) (noting that "[t]he Supremacy Clause provides that 'all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land'" and analyzing the applicability of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards); *Cooper v. Ateliers de la Motobecane*, 57 N.Y. 2d 408, 410-15 (N.Y. 1982) (enforcing the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards); *Hunter*, 2004 WL 3104829, at *2-6 (because of the immunities conferred by the UN Charter and General Convention, dismissing claims against the UN, a UN agency, and UN officials); *Curran v. City of New York*,

77 N.Y.S.2d 206, 211-12 (N.Y. Sup. Ct. 1947) (analyzing plaintiff's allegations in light of the provisions of and immunity conferred by the UN Charter).

The United States understands the General Convention, Article II sections 2, 3, and 4, to mean what they unambiguously say: all property of the UN, *wherever located and by whomsoever held*, enjoys absolute immunity from legal process except where expressly waived. To the extent there could be any alternative reading of the General Convention's text, the Court should defer to the Executive Branch's reasonable 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.") (internal citation and quotation marks omitted); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004) (interpreting the General Convention and noting, "in construing treaty language, '[r]espect is ordinarily due the reasonable views of the Executive Branch'" (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999))); *Keesler v. Fuji Heavy Indus., Ltd.*, 862 N.Y.S.2d 815, 2008 WL 860116, at *2 (N.Y. Sup. Ct. Mar. 28, 2008) (Courts are required to 'give great weight to treaty interpretations made by the Executive Branch'" (quoting Restatement (Third) of Foreign Relations Law of the United States § 326(2) (1986))); *Curran*, 77 N.Y.S. 2d at 208-09 (deferring to the executive branch's determination regarding the immunity of the UN and the UN Secretary-General). Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, and so its views are entitled to deference.

Consistent with the applicable treaty language and the Executive Branch's and the UN's views, federal and state courts have repeatedly declined to subject the property, assets, or documents of the UN, wherever located or by whomsoever held, to legal process or other judicial orders. *See, e.g., United States v. Chalmers*, No. S5 05 CR 59(DC), 2007 WL 624063, at *1-3 (S.D.N.Y. Feb. 26, 2007) (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, *inter alia*, the General Convention, and observing that the UN had voluntarily agreed to produce some documents); *Paris v. Dep't of Nat'l Store Branch 1 (Vietnam)*, No. 99 Civ. 8607 (NRB), 2000 WL 777904, at *1-5 (S.D.N.Y. June 15, 2000) (citing the UN Charter and the General Convention in vacating a restraining notice on funds held in an account at Banque National de Paris, where the account was governed by an agreement between the bank and the UN providing that the funds are "specifically-identified assets held by the United Nations"); *Shamsee*, 74 A.D.2d at 361-62 (holding that moneys held in a UN pension fund are immune from process pursuant to, *inter alia*, the General Convention).

Therefore, the property of the UN (including its documents), wherever located and by whomsoever held, is immune from legal process absent an express waiver. Accordingly, an order requiring the production of any UN proprietary documents would be contrary to the UN's rights, and the obligations of the United States, under the General Convention. As described herein, however, the UN has expressed its willingness to assess, within the framework of its privileges and immunities, whether it is in a position voluntarily to authorize the release of documents at issue in this matter, and continues to engage in discussions with the defendants on this issue.

* * * *

3. *Gallo v. Baldini*

On February 23, 2015, the United States submitted a statement of interest to the U.S. District Court for the Southern District of New York concerning the immunity of Roberta Baldini, a UN official, from legal process in a defamation lawsuit brought against her by UN employee Peter Gallo. Along with the statement, the United States provided letters from UN legal counsel and the UN Office of Legal Affairs confirming Ms. Baldini's immunity. Excerpts follow from the U.S. statement of interest, which is also available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

A. Ms. Baldini Is Immune from Legal Process in the Present Suit

* * * *

According to the UN, Ms. Baldini is an official of the UN within the meaning of Article V of the General Convention. *See* January 7 Letter at *2 (Ms. Baldini “is a United Nations staff member and is not assigned to hourly rates”); *see also* G.A. Res. 76(I), U.N. Doc. A/116, at 139 (Dec. 7, 1946). Absent a waiver of her immunity, she is immune from legal process with respect to all words spoken or written and acts performed by her in her official capacity. *See* General Convention, Art. V, § 18(a).

Plaintiffs suit against Ms. Baldini relates entirely to words allegedly spoken or written and actions allegedly undertaken by Ms. Baldini in her official capacity as a UN staff member in the Office of Internal Oversight Services and as Plaintiff's supervisor at the UN. Plaintiff's suit centers on his employment with the UN, namely the alleged retaliatory misconduct of his former supervisor. ... Courts have routinely held that defendants in such employment related disputes are immune from legal process because they were UN officials acting in their official capacity. *See Van Aggelen v. United Nations*, 311 F. App'x 407,409 (2d Cir. 2009) ...; *McGehee v. Albright*, 210 F. Supp. 2d 210, 217-18 (S.D.N.Y. 1999) ...; *D'Cruz v. Annan*, No. 05 Civ. 8918 (DC), 2005 WL 3527153, at*1 (S.D.N.Y. Dec. 22, 2005) ...; *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 72 (E.D.N.Y. 1987) ... Accordingly, absent a waiver by the UN Secretary General, Article V, § 18(a) of the General Convention grants immunity to Ms. Baldini in this matter.

B. Ms. Baldini's Immunity Has Not Been Waived

As noted above, the UN Secretary General may “waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.” General Convention, Art. V, § 20. Here, the UN has expressly sought to preserve Ms. Baldini's immunity. In its December 17 Letter, the UN explained that it is “expressly asserting the immunity of [Defendant] in relation to [Plaintiffs suit].” December 17 Letter at *2. Similarly, in its January 7 Letter, the UN stated that it “expressly maintains the immunity of the United Nations, and specifically, the immunity accorded to [Defendant].” January 7 Letter at *2. In both letters, the UN also requested that the

United States Government “take the appropriate steps with a view to ensuring that the privileges and immunities of the United Nations and its officials are maintained in respect of this legal action.” December 17 Letter at *2; January 7 Letter at *2. Accordingly, because the UN Secretary General has not waived the immunity of Ms. Baldini, she is immune in the present action.

C. Plaintiff's Allegations Concerning the Location of the Alleged Misconduct and the UN's Internal Grievance Procedures Have No Bearing on the Immunity of Ms. Baldini

Plaintiff's Complaint suggests two reasons that this Court has jurisdiction over this matter. Both are mistaken. First, Plaintiff alleges that this Court has jurisdiction because some of the alleged misconduct occurred “within the City of New York, not on United Nations property,” and outside the UN Headquarters District. *See* Cplt. at 146-48. However, the unambiguous text of the General Convention makes clear that Ms. Baldini, as a UN official acting in her official capacity, and regardless of the location of her official acts, is immune from legal process absent a waiver by the UN Secretary General. *See* General Convention, Art. V, § 18(a) (applying, without limitation, to “words spoken or written and all acts performed by [officials] in their official capacity”). *Cf. Askir v. Boutros-Ghali*, 933 F. Supp. 368, 370-73 (S.D.N.Y. 1996) (recognizing immunity of UN officials where alleged misconduct involved the “unauthorized and unlawful possession” of plaintiffs real property located in Somalia).

Second, Plaintiff emphasizes that the UN's internal procedures have failed to effectively address his grievances. *See* Cplt. at 143, 162. In its December 17 Letter and its January 7 Letter, the UN stated that “there is an available forum and process for dealing with such workplace disputes at the United Nations.” December 17 Letter at *2; January 7 Letter at *2. Nevertheless, whether the UN's internal procedures have been or will be able to adequately address Plaintiff's grievances has no bearing on Ms. Baldini's immunity under Article V, § 18(a) of the General Convention. *See Brzak*, 597 F.3d at 112-13 (holding the UN and its officials immune despite plaintiffs' contention that the UN's dispute mechanisms were inadequate); *McGehee*, 210 F. Supp. 2d at 212, 218 (dismissing claim against immune defendant, notwithstanding plaintiffs allegations that the UN's administrative tribunal “abused its discretion, violated its own rules, and denied her due process in rendering its decision” regarding her reinstatement).

D. Deference Should Be Granted to the Executive Branch's Reasonable Interpretation of the General Convention

To the extent there could be any alternative reading of the General Convention's text, the Court should defer to the Executive Branch's reasonable interpretation.

* * * *

4. *Zuza v. Office of the High Representative*

On November 20, 2015, the United States filed a statement of interest in *Zuza v. Office of the High Representative*, No. 14-01099 (D.D.C.). The United States District Court for the District of Columbia had requested the views of the United States on whether defendants the current and former High Representatives of OHR enjoyed immunity under section 8(a) of the International Organizations Immunities Act (“IOIA”). The U.S. statement of interest, explaining that the individual defendants were immune under the IOIA, is excerpted below and available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The IOIA confers immunity from suit for qualifying “international organizations” and officers and employees of such organizations. Pub. L. No. 291, 59 Stat. 669 (1945) (codified as amended at 22 U.S.C. §§ 288-288f-7). Under the IOIA, a qualifying international organization “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity.” 22 U.S.C. § 288a(b). As for “officers and employees of such organizations,” they “shall be 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 except insofar as such immunity may be waived by the . . . international organization concerned.” *Id.* § 288d(b).

In 2010, the IOIA was amended to authorize the President to extend the provisions of the statute to the Office of the High Representative for Bosnia and Herzegovina (“OHR”) and its officers and employees. Pub. L. 111-177, 124 Stat. 1260 (2010) (codified at 22 U.S.C. § 288f-7). In 2011, the President used this authority to order that “all privileges, exemptions, and immunities provided by the International Organizations Act be extended to the Office of the High Representative in Bosnia and Herzegovina and to its officers and employees.” Exec. Order No. 13,568, 76 Fed. Reg. 13,497 (Mar. 8, 2011).

As a result of this Executive Order, OHR enjoys the same protections from suit as other qualifying international organizations under the IOIA. For this reason, the Court held that OHR is immune from plaintiff’s lawsuit. Mem. Op. Granting Defendants’ Motion to Dismiss (“Mem. Op.”) (ECF 18) at 7-12 (court lacks subject matter jurisdiction over plaintiff’s suit against the OHR); 22 U.S.C. § 288a(b) (qualifying international organization under the IOIA “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments”).

Officers and employees of OHR also enjoy immunity with respect to their official acts under the IOIA, but they must satisfy the requirements of section 8(a) of the statute, which provides:

No person shall be entitled to the benefits of this subchapter, unless he (1) shall have been duly notified to and accepted by the Secretary of State as a representative, officer, or employee; or (2) shall have been designated by the Secretary of State, prior to formal notification and acceptance, as a prospective representative, officer, or employee; or (3) is a member of the family or suite, or servant, of one of the foregoing accepted or designated representatives, officers, or employees.

22 U.S.C. § 288e(a). In the Court’s Request for Statement of Interest, it asked for the views of the United States “regarding whether Defendants Inzko and Ashdown satisfy the requirements set forth at section 8(a) of the IOIA,” “or, more generally, the interpretation of that statutory provision, specifically the language ‘duly notified to and accepted by the Secretary of State as a representative, officer, or employee.’” Request for Statement of Interest at 2.

II. ASHDOWN AND INZKO HAVE BEEN FORMALLY NOTIFIED AND ACCEPTED WITHIN THE MEANING OF SECTION 8(a) OF THE IOIA

In response to the Court's Request, the United States confirms that both individual defendants satisfy section 8(a)'s requirements. On November 20, 2015, the Department of State's Acting Deputy Director of the Office of Foreign Missions certified that both Inzko and Ashdown have been notified to the Department and accepted as the current and former High Representative, respectively, of the OHR. *See* November 20, 2015 Certification from Clifton Seagroves, Acting Deputy Director of the Office of Foreign Missions (Exhibit A).

Thus, section 8(a)'s requirements are satisfied with respect to Inzko and Ashdown and they are entitled to the immunity conferred by section 7(b) of the IOIA and Executive Order No. 13,568. This immunity extends to all "acts performed by them in their official capacity and falling within their functions. . . except insofar as such immunity may be waived by the...international organization concerned." 22 U.S.C. § 288d(b). As the Court correctly determined, Ashdown and Inzko carried out the actions on which plaintiff's complaint is based in their official capacity as officers of the OHR, Mem. Op. at 16; *see also* Compl. ¶ 6, and OHR has not waived Ashdown's and Inzko's immunity. Accordingly, section 7(b) of the IOIA and Executive Order No. 13,568 render the individual defendants immune from plaintiff's suit.

* * * *

On February 4, 2016 the district court issued its decision, agreeing with the United States that Paddy Ashdown and Valentin Inzko satisfied the requirements of section 8(a) of the IOIA and were immune from suit. Excerpts follow (with footnotes omitted) from the court's memorandum opinion. Plaintiff has appealed the court's decision to the United States Court of Appeals for the District of Columbia Circuit.

* * * *

...Zuza argues that the Court erroneously disregarded section 8(a) of the IOIA, which states that an individual must be "duly notified to and accepted by the Secretary of State as a representative, officer, or employee" before he can enjoy IOIA immunity. 22 U.S.C. § 228e(a). The parties' supplemental briefs and the United States' statement of interest address this issue at length. ...

a. The United States' Statement of Interest

The government's statement of interest states that "the United States confirms that both individual defendants satisfy section 8(a)'s requirements." Statement of Interest 3. In support, the United States attached a signed letter from Clifton Seagroves, the Department of State's Acting Deputy Director of the Office of Foreign Missions. *See* Statement of Interest Ex. A, ECF No. 41-1. According to that letter, "[t]he official records of the Department of State" indicate that Inzko and Ashdown "have been notified to the Secretary of State and accepted by the Director of the Office of Foreign Missions, acting pursuant to delegated authority from the Secretary of State." *Id.*

b. Notification and Acceptance Shown

With the government’s statement of interest and Seagroves’s signed letter, it is clear that Inzko and Ashdown meet 29 U.S.C. § 288e(a)’s requirements. Seagroves’s letter expressly confirms that Inzko and Ashdown have been “notified to” and “accepted by” the Secretary of State, just as § 288e(a) prescribes. ... And Zuza himself implies that a certificate or letter from the Department of State is sufficient to show acceptance. See Pl.’s Suppl. Brief 2, 11–15.

* * * *

Zuza’s evidentiary objections lack merit, and Zuza makes no arguments disputing the relevant facts: Inzko and Ashdown were notified under 29 U.S.C. § 288e(a) to the Secretary of State, and the Secretary of State accepted them under § 288e(a) as appropriate recipients of IOIA immunity. Inzko and Ashdown therefore meet the requirements set forth in § 288e(a). On this front, Zuza has not shown a “need to correct a clear error” of law. *Ciralsky v. CIA*, 355 F.3d 661, 671 (D.C. Cir. 2004); see also *Kittner v. Gates*, 783 F. Supp. 2d 170, 172 (D.D.C. 2011) (placing the burden of proof for a Rule 59(e) motion on the movant).

c. Retroactive Notification and Acceptance Permissible

Even if Inzko and Ashdown did not meet 29 U.S.C. § 288e(a)’s requirements at the time Zuza’s complaint was filed, that would not bar their IOIA immunity now. The IOIA itself states that, once individuals merit IOIA immunity, they are immune not just “from suit,” but also from “legal process.” 22 U.S.C. § 288d(b). And the weight of relevant case law favors finding that if international officials acquire immunity during the pendency of a suit, the suit must be dismissed. See generally *Abdulaziz v. Metro. Dade Cnty.*, 741 F.2d 1328, 1329–30 (11th Cir. 1984) (discussing diplomatic immunity and holding that it “serves as a defense to suits already commenced”); *Fun v. Pulgar*, 993 F. Supp. 2d 470, 474 (D.N.J. 2014) (same); *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 799 (N.D. Cal. 1987) (same). The Supreme Court, in discussing foreign sovereign immunity, has stated that “such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some present ‘protection from the inconvenience of suit as a gesture of comity.’” *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004). More broadly, the D.C. Circuit has explained that, for parties who merit IOIA immunity, the IOIA creates a “baseline” of “absolute immunity” to all kinds of suits. *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998).

These authorities persuade the Court that the IOIA, like diplomatic immunity and foreign sovereign immunity, can serve as a defense to suits already commenced. As this Court has noted before, IOIA immunity “is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits.” *Garcia v. Sebelius*, 919 F. Supp. 2d 43, 47 (D.D.C. 2013) (internal quotation marks omitted) (quoting *Foremost–McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990)).

Because IOIA immunity can apply retroactively, 22 U.S.C. § 288e(a)’s requirements will not bar Inzko and Ashdown’s IOIA immunity, even if they first satisfied those requirements after Zuza filed his complaint in this case. Thus, § 288e(a) is not a reason for the Court to disturb its decision to find Inzko and Ashdown immune from suit.

* * * *

5. Immunity of UN in Bankruptcy Proceeding

On December 11, 2015, the United States filed a statement of interest asserting the immunity of the UN in the U.S. Bankruptcy Court for the District of Delaware. *In re: Altegrity, Inc.*, No. 15-10226. Altegrity filed for bankruptcy in the Delaware court and part of the reorganization plan it filed included rejection of a contract entered into by the UN with Altegrity's subsidiary, Kroll, for the design of a security system at UN Headquarters. Excerpts follow (with footnotes omitted) from the U.S. statement of interest, which is available in full (with its Exhibit, a letter from the UN Office of Legal Affairs) at <http://www.state.gov/s/l/c8183.htm>.

* * * *

Absent an express waiver, the UN is absolutely immune from suit and all legal process. *E.g.*, *Brzak v. United Nations*, 597 F.3d 107, 111 (2d Cir. 2010); *Van Aggelen v. United Nations*, No. 06 Civ. 8240, 2007 WL 1121744, at *1 (S.D.N.Y. April 12, 2007). Article 105 of the UN Charter provides that the UN “shall enjoy . . . such privileges and immunities as are necessary for the fulfillment of its purposes.” UN Charter, art. 105.1-2, June 26, 1945, 59 Stat. 1031. Article II, Section 2 of the General Convention, adopted February 13, 1946, and acceded to by the United States in 1970, 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, § 2. Article II, Section 3 of the General Convention further provides that “[t]he property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.” *Id.* art. II, § 3. These immunities apply without limitation to contractual disputes. *Sadikoglu v. United Nations Dev. Programme*, No. 11 CIV. 0294 PKC, 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011).

The United States understands the provisions of these treaties to mean what they unambiguously state: the UN and its property and assets enjoy immunity from the effects of this Court’s Order confirming the joint plan and its purported rejection of the executory Contract between the UN and Kroll. Issuance of the Order constitutes a form of legal process. See *Shamsee v. Shamsee*, 74 A.D.2d 357, 361 (N.Y. App. Div. 1980) (vacating sequestration order against former UN employee and relying primarily on Article II, Section 2 of the General Convention), *aff’d*, 421 N.E.2d 848 (N.Y. 1981). Further, interpreting “legal process” in this manner comports with the legal definition of that term as understood at the time of the General Convention’s adoption in 1946 and accession by the United States in 1970. See *Black’s Law Dictionary* 1370 (4th ed. 1951) (stating that the term “legal process” “properly [] means a writ, warrant, mandate, or other process issuing from a court of justice, such as an attachment, execution, injunction, etc.”); *Black’s Law Dictionary* 1370 (4th ed. rev. 1968) (same). Accordingly, pursuant to Article II, Section 2 of the General Convention, the UN and its property and assets—specifically, its rights under the Contract—are immune from the effects of the Court’s Order. Similarly, notwithstanding the Court’s Order purporting to confirm the debtors’

rejection of the Contract and thereby purporting to limit the UN's contractual rights, the Court should avoid engaging in a "form of interference" by "judicial [] action" from which the UN's property and assets are immune under Article II, Section 3 of the General Convention.

To the extent there could be any alternative reading of the applicable treaties, the Court should defer to the Executive Branch's reasonable 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." (citation omitted)); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004) (interpreting the General Convention and noting, "in construing treaty language, '[r]espect is ordinarily due the reasonable views of the Executive Branch'") (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999)).

Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the UN, and its views are entitled to deference. The Court should also defer to the Executive Branch's interpretation in this case because the interpretation is shared by the UN. See Ex. A. Cf. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) ("When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.").

Therefore, absent waiver, the UN is immune from legal process in this matter, including the Court's Order dated August 14, 2015.

II. The UN Has Not Waived Its Immunity.

Any waiver of the UN's absolute immunity from suit or legal process must be "express[]." General Convention, art. II, § 2; see also *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) ("Under the Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases."). "Express waiver requires a clear and unambiguous manifestation of the intent to waive." *United States v. Chalmers*, No. S5 05 CR 59, 2007 WL 624063, at *2 (S.D.N.Y. Feb. 26, 2007).

There is no indication that the UN has expressly waived its immunity here. To the contrary, the UN has expressly sought to preserve its immunity. In its Note Verbale, the UN "confirm[ed] that the Secretary-General has not waived, and is expressly maintaining, the privileges and immunities of the United Nations in this matter." Ex. A, at 3. The UN also requested that the Government "take appropriate steps with a view to ensuring that the privileges and immunities of the United Nations are maintained in respect of this matter." *Id.* Accordingly, because the UN has not waived its immunity, it was and is immune from any legal process and from what would otherwise be the effects of the Court's Order on its executory Contract with Kroll. ...

* * * *

Cross References

Meshal case regarding extraterritoriality, **Chapter 5.A.1.**

Alien Tort Claims Act and Torture Victim Protection Act, **Chapter 5.B.**

ILC's work on immunity, **Chapter 7.D.2.**

Statement of interest in Holocaust claims litigation, **Chapter 8.C.**

Diplomatic relations, **Chapter 9.A.**

Weinstein case regarding internet names as property under FSIA, **Chapter 11.G.4.**

COMMISA v. PEP, **Chapter 15.C.1.a.**

Salini v. Morocco, **Chapter 15.C.1.b.**

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 www.state.gov/e/eb/rls/othr/ata/index.htm. The United States signed six new air transport agreements in 2015: with Togo, Barbados, Serbia, Ukraine, Seychelles, and Mexico. The U.S.-Togo Air Transport Agreement of April 7, 2015 is available at <http://www.state.gov/e/eb/rls/othr/ata/t/to/241924.htm>. The U.S.-Barbados Air Transport Agreement of May 5, 2015 is available at <http://www.state.gov/e/eb/rls/othr/ata/b/bb/242440.htm>. The U.S.-Serbia Air Transport Agreement of May 29, 2015 is available at <http://www.state.gov/e/eb/rls/othr/ata/s/serbia/243160.htm>. The U.S.-Ukraine Air Transport Agreement of July 14, 2015 is available at <http://www.state.gov/e/eb/rls/othr/ata/u/up/244983.htm>. The U.S.-Seychelles Air Transport Agreement of December 7, 2015 is available at <http://www.state.gov/e/eb/rls/othr/ata/s/se/251057.htm>. The U.S.-Mexico Air Transport Agreement of December 18, 2015 is available at <http://www.state.gov/e/eb/rls/othr/ata/m/mx/250782.htm>.

On July 14, 2015, Under Secretary of State for Economic Growth, Energy, and the Environment Catherine A. Novelli delivered remarks at the ceremony for the signing of the U.S.-Ukraine Air Transport Agreement. Her remarks, excerpted below, are available in full at <http://www.state.gov/e/rls/rmk/244904.htm>.

* * * *

This agreement is a tangible example of the strong bonds of friendship and cooperation between the United States and Ukraine. It strengthens our bilateral economic ties and facilitates the growth of civil aviation between our two countries.

And fostering closer ties and economic growth is exactly what Open Skies agreements are meant to do. Since 1992, the United States has entered into almost 120 bilateral Open Skies agreements.

Over two decades, these agreements have vastly expanded passenger and cargo flights to and from the United States, promoted increased travel and trade, enhanced productivity, and spurred high-quality job opportunities and economic growth for both the United States and our foreign partners.

A study released by the Brookings Institution this March estimated that U.S. Open Skies agreements have generated at least \$4 billion in annual gains to both American and foreign travelers. These agreements also produce countless new cultural links worldwide.

Open Skies agreements work because they eliminate government interference in the commercial decisions of air carriers about routes, capacity, and pricing: this allows carriers to provide more affordable, convenient, and efficient air service.

By allowing air carriers unlimited access to partner countries, Open Skies agreements also provide flexibility for alliance partners while supporting high standards for aviation safety and security.

Finally, Open Skies agreements facilitate code-sharing and other cooperative relationships between carriers. For example, any Ukrainian carrier can now establish code-sharing alliances with any U.S. or third-country carrier to any point in the United States.

* * * *

On December 18, 2015, the United States and Mexico signed an air transport agreement. Charles H. Rivkin, Assistant Secretary of State for Economic and Business Affairs, delivered remarks at the signing of the agreement in Washington, D.C., which are available at <http://www.state.gov/e/eb/rls/rm/2015/250807.htm>. Secretary Kerry and Secretary Foxx issued a joint statement, available at <http://www.state.gov/r/pa/prs/ps/2015/12/250774.htm>, which says:

We welcome the signing this morning of a new air transport agreement between the United States and Mexico. This landmark agreement with one of our largest aviation partners will significantly increase future trade and travel between the United States and Mexico. The signing of this important agreement is the result of more than two years of negotiations led by the Department of State with the Department of Transportation and the Department of Commerce.

The new agreement will benefit U.S. and Mexican airlines, travelers, businesses, airports and localities by allowing increased market access for passenger and cargo airlines to fly between any city in Mexico and any city in the United States. Cargo carriers will now have expanded opportunities to provide service to new destinations that were not available under the current, more restrictive agreement.

This new air transport agreement further elevates and strengthens the dynamic commercial and economic relationship between the United States and Mexico and advances our goal of shared prosperity. By allowing air carriers to

better meet increasing demand in both countries, the agreement will help drive economic growth in sectors beyond aviation, including tourism and manufacturing.

Following internal ratification procedures in Mexico, both governments will be in a position to bring the new agreement into force.

2. Airline Subsidies

On April 10, 2015, the U.S. Departments of Commerce, State, and Transportation announced the establishment of an open forum to gather information and views on assertions that three foreign airlines—Emirates Airline, Etihad Airways, and Qatar Airways—have received and are benefitting from subsidies from their respective governments that are distorting the global aviation market. See July 1, 2015 press statement, available at <https://www.transportation.gov/briefing-room/us-departments-commerce-state-and-transportation-announce-deadlines-and-stakeholder>. The three federal agencies issued a Federal Register notice on May 5, 2015 regarding their review of these assertions. 80 Fed. Reg. 25,671 (May 5, 2015). A supplemental Federal Register notice published by the three agencies announced the establishment of deadlines for the submission of information and views to the public dockets and provided additional guidance for the submission of information that the submitter believes to be exempt from disclosure under the Freedom of Information Act. 80 Fed. Reg. 39,059 (July 8, 2015).

3. Aviation Arrangement with Cuba

On December 16, 2015, the United States and Cuba successfully negotiated a bilateral arrangement to establish scheduled air services between the two countries. See December 17, 2015 media note, available at <http://www.state.gov/r/pa/prs/ps/2015/12/250733.htm>. The media note announcing the conclusion of the talks explains:

This arrangement will continue to allow charter operations and establish scheduled air service, which will facilitate an increase in authorized travel, enhance traveler choices, and promote people-to-people links between the two countries.

While U.S. law continues to prohibit travel to Cuba for tourist activities, a stronger civil aviation relationship will facilitate growth in authorized travel between our two countries—a critical component of the President’s policy toward Cuba.

4. Determination in the *Gatt* case regarding Kuwait Airways Company

On September 30, 2015, the U.S. Department of Transportation (“DOT”) informed Kuwait Airways Company (“KAC”) that it had completed its investigation of a complaint brought by Mr. Eldad Gatt regarding KAC’s policies and practices. Mr. Gatt, an Israeli citizen, attempted to purchase a ticket online through Kuwait Airways in 2013 from the United States (JFK Airport) to London in the U.K. (LHR Airport), but was prevented from doing so because the online booking system precluded selecting Israel as his passport-issuing country. Further background on the case is available at <https://www.transportation.gov/briefing-room/us-department-transportation-finds-discrimination-kuwait-airways>. Excerpts follow from the September 30, 2015 letter from Blane A. Workie, DOT Assistant General Counsel, to counsel for KAC. The letter notifying KAC of DOT’s determination is available at <https://www.transportation.gov/sites/dot.gov/files/docs/Kuwait-Airways-Letter-Sept-30-2015.pdf>. After receiving the determination, KAC revised its routes such that it no longer flies from JFK to LHR (it transports passengers from JFK to Kuwait City, via London, with no passengers disembarking or embarking in London).

* * * *

Mr. Gatt’s complaint alleged that KAC discriminated against him, an Israeli citizen traveling on an Israeli passport, in violation of 49 U.S.C. § 40127(a) by preventing him from purchasing a ticket for travel on KAC from John F. Kennedy International Airport (JFK) to London Heathrow Airport (LHR). Upon notice of our initial decision finding no unlawful discrimination in this matter, Mr. Gatt filed a petition for review with the U.S. Court of Appeals for the D.C. Circuit. We subsequently reopened our investigation and reconsidered the matter anew. As part of our reconsideration, we considered Mr. Gatt’s claim upon an alternative ground, i.e. 49 U.S.C. § 41310, which holds that, “[a]n air carrier or foreign air carrier may not subject a person, place, port, or type of traffic in foreign air transportation to unreasonable discrimination.” After a thorough review of the information provided by the parties, we find that KAC unreasonably discriminated against Mr. Gatt in violation of 49 U.S.C. § 41310 by refusing to sell him a ticket on its flight from JFK to LHR. Our conclusion that KAC unreasonably discriminated against Mr. Gatt is based on the history and intent of 49 U.S.C. § 41310, case law, and the permit authority granted to KAC to engage in scheduled foreign air transportation.

Section 41310, formerly 49 U.S.C. § 1374(b), was adapted from its predecessor statutes—i.e., section 404(b) of the Federal Aviation Act of 1958, section 404(b) of the Civil Aeronautics Act of 1938, and section 3 of the Interstate Commerce Act (ICA) of 1887. Section 3 of the ICA stated, in relevant part:

[I]t shall be unlawful for any common carrier subject to the provision of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any

respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Interstate Commerce Act of 1887, sec. 3, 24 Stat. 379, 380 (1887) (emphasis added); see also Federal Aviation Act of 1958, Pub. L. No. 85-726, sec. 404(b), 72 Stat. 731, 760 (1958); Civil Aeronautics Act of 1938, Pub. L. No. 75-706, sec 404(b), 52 Stat. 973, 993 (1938).

Given its relation to the ICA, Congress intended the prohibition against “unreasonable discrimination” in 49 U.S.C. § 41310 to extend common carrier obligations to airlines. ...

In cases interpreting the common law non-discrimination duty of common carriers, the Supreme Court has upheld the common carrier duty not to discriminate on the basis of race using the unreasonable discrimination standard under the Interstate Commerce Act. ...

Further, the common carrier duty not to unreasonably discriminate is not limited to discrimination on the basis of race. The courts have permitted air carriers to refuse passage if “the carrier decides [a passenger or property] is, or might be, inimical to safety.” 49 U.S.C. § 44902. ...

We have applied these principles to determine whether KAC’s refusal to sell a ticket to Mr. Gatt from JFK to LHR on the basis of his Israeli citizenship is unreasonable discrimination. KAC contends that its denial of transportation to Mr. Gatt from JFK to LHR is reasonable because Kuwaiti law prohibits the carrier from selling a ticket to an Israeli passport holder. KAC emphasizes that the statutory penalties for violation of the Kuwaiti law include imprisonment with hard labor, in addition to a fine, as evidence that it cannot comply with U.S. law. This is not a proper justification for the denial of transportation as the penalties that allegedly have compelled KAC’s conduct are part of a discriminatory statutory scheme. We know of no authority that would allow an airline to discriminate based simply on penalties that might be imposed under the foreign law that is said to have mandated the discriminatory conduct.

Moreover, this complaint does not involve travel to a country where the complainant is not allowed to disembark based on the laws of that country. There is no question that a person holding a valid Israeli passport can depart the U.S. and enter the United Kingdom. As such, we find that it is unreasonable discrimination for KAC to refuse transport to Israeli citizens between the U.S. and a third country where their passports are recognized as valid travel documents and they are allowed to disembark based on the laws of that country.

In our application of the “reasonableness” test, we also considered the permit authority KAC was granted to engage in scheduled foreign air transportation of persons from points behind Kuwait via Kuwait and intermediate points to a point or points in the United States and beyond. Its permit states that the carrier is “subject to the provisions of Title 49 of the U.S. Code and the orders, rules and regulations of the Department of Transportation.” Permit to Foreign Air Carrier, KAC Corporation, Order 2011-3-30, (March 24, 2011), available at www.regulations.gov, Docket DOT- OST-2010-0246. Additionally, KAC must be in compliance “with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department [of Transportation].” *Id.* Accordingly, based on explicit language in KAC’s grant of permit authority by the Department, the carrier must comply with all provisions of Title 49 of the U.S. Code, including 49 U.S.C. § 41310, which prohibits foreign air carriers from engaging in unreasonable discrimination.

We have evaluated the interest in applying 49 U.S.C. § 41310 against this background. The application of the statute in question takes place within the sovereign territory of the United States. The connection of that activity to Kuwait is significantly diminished relative to its application to a flight entering the sovereign territory of Kuwait. The activity is critical to U.S. law and policy in this field, which has prioritized “wiping out discrimination...of all types.” *U.S. v. Baltimore & Ohio R.R. Co.*, 333 U.S. 169, 175 (1948). This law is not novel; it has been well-established both in the aviation context as well as in other common carrier contexts for decades. See generally *id.*; *Fitzgerald*, 229 F.2d 499. This should have been understood by KAC, as the airline acknowledged the applicability of relevant laws when it accepted its foreign air carrier permit in 2011. Given these factors and the general importance of protecting against unreasonable discrimination specifically by “foreign air carrier[s]” as expressed in Congressional enactment of 49 U.S.C. § 41310, we find its application reasonable in these circumstances.

Furthermore, Kuwait’s refusal to sell air transportation to Israeli citizens on a route between the U.S. and another point may also be in violation of U.S. anti-boycott laws and regulations, which are designed to prohibit and/or penalize cooperation with international economic boycotts in which the U.S. does not participate. The Kuwait law at issue here was enacted pursuant to the Arab Leagues’ boycott against persons doing business with Israel. U.S. policy has opposed such economic boycotts. Sec. 3 of the U.S. Export Administration Act of 1979, Pub. L. 96-72, 93 Stat. 503, describes the policy of the United States to “oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States...” 50 App. U.S.C. 2402(5)(A). The Department of Commerce’s Office of Anti-Boycott Compliance has promulgated regulations in this area. See 15 C.F.R. 760 (outlining Department of Commerce’s anti-boycott regulations). These regulations include provisions specifically prohibiting entities, including offices or branches of foreign concerns in the U.S. from refusing to do business with nationals or residents of a boycotted country when such refusal is pursuant to a requirement of the boycotting country. See 15 CFR 760.2 (a) (1). As such, we find KAC’ actions, which are inconsistent with and possibly in violation of U.S. anti-boycott laws, to be unreasonable as a matter of U.S. policy.

Finally, we do not find the interest of Kuwait in the enforcement of its laws in this case to be greater than the interest of the United States in the enforcement of its laws. An agency balancing of interests is necessarily built into the statutory standard of unreasonable discrimination in 49 U.S.C. § 41310, permitting the Department to apply its expertise in this area to make a determination about the relative public interests implicated in a conflict between domestic law and foreign law. In balancing the interests of the U.S. and Kuwait with respect to the application of 49 U.S.C. § 41310, it is our view that the U.S. interest in providing nondiscriminatory access to air transportation to an individual traveling from the U.S. to a third country that allows that individual’s entry is greater than Kuwait’s interest in applying its economic boycott of Israel.

For all the aforementioned reasons, we conclude that KAC unreasonably discriminated against Mr. Gatt in violation of 49 U.S.C. § 41310 by refusing to sell him a ticket on a KAC flight from JFK to LHR. KAC has chosen to operate an air route between the U.S. and the United Kingdom. In so doing, the airline has availed itself of the facilities and benefits of the U.S. and must comply with its laws. One of those laws is 49 U.S.C. § 41310, which prohibits “unreasonable discrimination” in foreign air transportation. Our determination that KAC’s decision to refuse to sell Mr. Gatt a ticket on its flight from JFK to LHR is not rational or

reasonable in light of the facts and circumstances is consistent with the letter and spirit of that provision.

Based on the foregoing, by refusing to transport Israeli passport holders to and from the U.S. and a third country that accepts Israeli citizens, KAC is in violation of 49 U.S.C. § 41310.

* * * *

5. International Civil Aviation Organization (“ICAO”)

Response to Downing of Malaysia Airlines Flight MH17 in Ukraine

On October 13, 2015, the State Department welcomed the findings in the Dutch Safety Board's final report on the shootdown of Malaysia Airlines Flight MH17. See State Department press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/10/248131.htm>. As discussed in *Digest 2014* at 450-52, the United States joined with the UN Security Council in calling for an ICAO investigation into the incident. The State Department press statement notes that the Dutch Safety Board's report:

is the result of an independent, transparent, and rigorous 15-month investigation completed in accordance with Annex 13 to the Convention on International Civil Aviation, and includes contributions from a wide array of experts from many countries, including the United States.

This report validates what Secretary Kerry first said more than a year ago, MH17 was shot down by a BUK surface-to-air missile. Secretary Kerry also made clear that the United States detected a missile launch from separatist-controlled territory at the moment of the shootdown and drew attention to verified conversations among separatist leaders bragging about shooting down an aircraft in the immediate aftermath of this tragic event.

We also take note of the finding of the Dutch Safety Board's recommendations regarding the handling of airspace during armed conflicts, and we are studying them.

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS

1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement

a. Mercer v. Canada

On May 8, 2015, the United States made a submission pursuant to Article 1128 of the North American Free Trade Agreement (“NAFTA”) in the arbitration under Chapter 11 of

the NAFTA between Mercer International, Inc. (“Mercer”), and the Government of Canada, ICSID Case No. ARB(AF)/12/3. Mercer, a U.S. company, claims Canada violated Article 1102 (National Treatment), Article 1103 (Most-Favored-Nation Treatment), Article 1105 (Minimum Standard of Treatment), and Article 1503 (State Enterprises) with regard to the provision of electricity by British Columbia authorities to a Mercer investment in British Columbia. Excerpts follow (with most footnotes omitted) from the U.S. Article 1128 submission, which is available in full at <http://www.state.gov/s/l/c67290.htm>.

* * * *

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

4. All claims under NAFTA Chapter Eleven must be brought within the three-year limitations period set out in Articles 1116(2) and 1117(2). Specifically, Articles 1116(2) and 1117(2) require 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 claimant or enterprise.

5. 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 such, a continuing course of conduct 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.

* * * *

Article 1105 (Minimum Standard of Treatment)

14. Article 1105 is titled “Minimum Standard of Treatment.” Article 1105(1) requires each Party to “accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

* * * *

17. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 1105(1), concerns the obligation to provide “fair and equitable treatment.” This includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings, such as when a State’s judiciary administers justice to aliens in a “notoriously unjust” or “egregious” manner “which offends a sense of judicial propriety.”

18. Other such areas concern the obligation to provide “full protection and security,” as also addressed in Article 1105(1), and the obligation not to expropriate covered investments, except under the conditions specified in Article 1110, neither of which are at issue in this case.

* * * *

22. With respect to economic rights, the relevant context here, State practice permits numerous forms of discrimination against aliens that do not violate customary international law. Aliens, for example, may be excluded from certain occupations or sectors of the economy or certain geographical areas of the country without infringing any principle of international law. Further, “onerous restrictions may be imposed on ‘the property rights of aliens in certain national resources, *e.g.*, national vessels, national mines, and other kinds of property.’” International law upholds the right of governments to limit—or forbid altogether—foreign ownership of real property within their territory. Aliens thus enjoy no general right under international law to freely engage in economic activity.

23. Customary international law does prohibit discrimination under certain circumstances. These include prohibitions against discriminatory takings or access to judicial remedies or treatment by the courts, as well as the obligation of States to compensate aliens and nationals on an equal basis for damages incurred during such times of violence, insurrection, conflict or strife. Other than in these limited circumstances, however, no established rule of customary international law has emerged to prohibit economic discrimination against aliens.

24. For all these reasons, regulatory action may violate “fair and equitable treatment” under the minimum standard of treatment only as that term is understood in customary international law.

25. States may decide expressly by treaty to extend protections under the rubric of “fair and equitable treatment” and “full protection and security” beyond that required by customary international law. Extending such protections through “autonomous” standards in any particular treaty represents a policy decision by a State, rather than an action taken out of a sense of legal obligation. That practice is not relevant to ascertaining the content of Article 1105...

26. Thus, the NAFTA Parties expressly intended Article 1105(1) 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.

27. 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*. ...

28. Once a rule of customary international law has been established, the claimant must 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 own borders.”

* * * *

b. Mesa Power Group LLC v. Canada

On June 12, 2015, the United States made a second Article 1128 submission in the arbitration under NAFTA Chapter 11 between Mesa Power Group, LLC (“Mesa”) and the

Government of Canada. Mesa, a U.S. renewable energy company, alleges violations of Articles 1102, 1103, 1105, and 1106 (prohibition on performance requirements) relating to regulation and production of renewable energy in Ontario. The United States made the supplemental Article 1128 submission to provide its views on questions of interpretation of NAFTA arising from the March 17, 2015 award in the NAFTA Chapter 11 arbitration, *Bilcon v. Canada*. Excerpts follow (with footnotes omitted) from the June 12, 2015 submission by the United States, which is available at <http://www.state.gov/s/l/c63963.htm>. See *Digest 2014* at 463-66 for a discussion of the previous U.S. Article 1128 submission in this arbitration.

* * * *

Article 1102 (National Treatment)

* * * *

4. The *Bilcon* tribunal properly recognized that a claimant has “the affirmative 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. The tribunal, however, failed to apply these factors properly. In particular, the tribunal failed to adequately address nationality-based discrimination when determining whether the Claimants were in like circumstances with alleged comparators. The foreign investor or foreign-owned investment should be compared to a domestic investor or domestically owned investment that is like in all relevant respects but for nationality of ownership. Instead, the tribunal provided an overly broad interpretation of like circumstances and gave inadequate weight to all relevant characteristics, as required under Article 1102. The tribunal also improperly placed the burden on Canada to justify the “differential and adverse treatment accorded to Bilcon[.]” Having failed to apply the “like circumstances” test properly to find nationality-based discrimination, the *Bilcon* tribunal should not have proceeded to place the burden on Canada to justify differential treatment. The burden to prove each element of a claim under Article 1102 rests and remains squarely with the claimant. The NAFTA Parties agree on this point.

Article 1105 (Minimum Standard of Treatment)

* * * *

7. The *Bilcon* tribunal correctly acknowledged that:

- (1) The Commission’s interpretation of Article 1105(1) constitutes an “authentic interpretation” of the Agreement by the NAFTA Parties¹⁴ and is “binding and conclusive” on Chapter Eleven tribunals, in accordance with NAFTA Article 1131(2);
- (2) Chapter Eleven tribunals “are bound to interpret and apply” Article 1105(1) “in accordance with customary international law” and thus may not apply sources of international law beyond customary international law when interpreting and applying Article 1105(1); and

(3) The concepts of “fair and equitable treatment” and “full protection and security” in Article 1105(1) “cannot be regarded as ‘autonomous’ treaty norms that impose additional requirements above and beyond what the minimum standard requires.”

8. Despite these acknowledgements, the *Bilcon* tribunal failed to apply customary international law when interpreting and applying Article 1105(1). Specifically, as addressed below, the *Bilcon* tribunal failed to recognize that the burden is on a claimant to establish the existence and applicability of a rule of customary international law, and failed to determine whether the *Bilcon* Claimants had met that burden. In addition, the *Bilcon* tribunal incorrectly adopted standards from prior NAFTA Chapter Eleven awards, which are not founded in State practice and *opinio juris*.

* * * *

12. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. ...

13. 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. 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 three NAFTA Parties agree on this point.

14. Decisions of international courts and tribunals do not constitute State practice or *opinio juris* for purposes of evidencing customary international law. Such decisions can be relevant, however, for determining State practice and *opinio juris* when they include a thorough examination of these elements of customary international law.

15. The *Bilcon* tribunal’s application of Article 1105 does not reflect customary international law demonstrated by State practice and *opinio juris*. Instead, the tribunal relied primarily on an arbitral award that contains little or no examination of State practice and *opinio juris*.

16. Specifically, the *Bilcon* tribunal adopted the minimum standard of treatment proffered by the *Waste Management II* tribunal:

it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

This formulation of the minimum standard of treatment, by its terms, is based entirely on other arbitral awards, rather than on an examination of State practice and *opinio juris*. The *Bilcon* tribunal nonetheless adopted the *Waste Management II* standard as the “epitome of the minimum standard.”

17. Indeed, a majority of the *Bilcon* tribunal “specifically applie[d]” the *Waste Management II* standard to the facts of the case, concluding that Canada breached Article 1105(1) in part by:

- (1) Upsetting Claimants’ “reasonable expectations,” which Claimants had relied upon when making their investment.
- (2) Failing to provide Claimants “reasonable notice” before adopting a standard of evaluation of Claimants’ project; and

(3) Departing in “fundamental ways from the standard of evaluation required by the laws of Canada[.]”

In each instance, the *Bilcon* tribunal failed to identify an applicable rule of customary international law on which to base its decision.

18. *First*, the tribunal improperly concluded that “[t]he reasonable expectations of the investor are a factor to be taken into account in assessing whether the host state breached the international minimum standard of treatment of fair and equitable treatment under Article 1105 of NAFTA.” Because the *Bilcon* tribunal cited no State practice or *opinio juris* for this finding, it was erroneous to conclude that “reasonable expectations” are part of the customary international law minimum standard of treatment. A claimant’s “expectations” are not a component element of “fair and equitable treatment” under the customary international law that gives rise to an independent host State obligation. 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.” An investor may develop expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. Instead, something more is required than the mere interference with those expectations. As Professor McRae noted in his Dissenting Opinion, “disappointment is not a basis for finding a violation of Article 1105.”

19. *Second*, the *Bilcon* tribunal found that Canada failed to provide Claimants “reasonable notice” before adopting a standard of evaluation of Claimant’s project. As the *Apotex III* tribunal recognized, however, the failure to provide notice may form part of a denial of justice, but it is not a “free-standing rule[] of customary international law.” The relevant question, rather, is “whether the specific procedural protections claimed by the Claimants . . . are part of the customary international law minimum standard of treatment of aliens required by NAFTA Article 1105(1).” The *Bilcon* tribunal failed to address that issue when adopting this standard.

20. *Third*, the *Bilcon* tribunal concluded that Canada had breached Article 1105(1) because the government’s review of the Claimants’ proposed project “departed in fundamental ways from the standard of evaluation required by the laws of Canada[.]” As the tribunal recognized, a determination of a breach of Article 1105(1) “must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.” Accordingly, “there is a high threshold for Article 1105 to apply,” and “[r]oom must be left for judgment to be used to interpret legal standards and apply them to the facts.” The *Bilcon* tribunal stated:

Even when state officials are acting in good faith there will sometimes be not only controversial judgments, but clear-cut mistakes in following procedures, gathering and stating facts and identifying the applicable substantive rules. State authorities are faced with competing demands on their administrative resources and there can be delays or limited time, attention and expertise brought to bear in dealing with issues. The imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard.

21. Having recognized the deference owed to a NAFTA Party’s interpretation of its domestic law, however, the *Bilcon* tribunal failed to afford Canada any such deference. Instead,

the tribunal made its own *de novo* determination of the “standard of evaluation required by the laws of Canada[.]” International tribunals, however, do not sit as appellate courts with authority to review the legality of domestic measures under a Party’s own domestic law.

22. A failure to satisfy requirements of national law, moreover, does not necessarily violate international law. Rather, “something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1).” As Professor McRae observed in his Dissenting Opinion in *Bilcon*:

[T]he NAFTA standard is not the domestic law standard and a NAFTA claim must meet the NAFTA standard. Showing that domestic law could have been violated does not mean that there has been a violation of Article 1105.

Accordingly, a departure from domestic law could not in and of itself sustain a violation of Article 1105(1). Any breach of Article 1105(1) must be grounded in conduct by a NAFTA Party that breaches the customary international law minimum standard of treatment.

* * * *

2. Non-Disputing Party Submissions under other Trade Agreements

***a.* Spence International Investments, LLC and Others v. Republic of Costa Rica**

On April 17, 2015, the United States made a submission pursuant to Article 10.20.2 of the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”) on questions of interpretation of the CAFTA-DR in the arbitration between Spence International Investments, LLC and the Republic of Costa Rica. Spence International Investments, LLC and other U.S. nationals filed a Chapter Ten claim against the Republic of Costa Rica in connection with the establishment and regulation of Las Baulas National Marine Park. Claimants allege that Costa Rica has violated CAFTA-DR Articles 10.5 (Minimum Standard of Treatment) and 10.7 (Expropriation and Compensation) with respect to their investments. Excerpts follow (with footnotes omitted) from the U.S. Article 10.20.2 submission. The submission in its entirety, and a link to further information about the arbitration, are available at <http://www.state.gov/s/l/c66056.htm>.

* * * *

Article 10.1.3 (Scope and Coverage)

* * * *

3. A host State's conduct prior to the entry into force of an obligation may be relevant in determining whether the State subsequently breached that obligation. Given the rule against retroactivity, however, there must exist "conduct of the State after that date which is itself a breach." As the *Mondev* tribunal confirmed, "[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct."

Article 10.18 (Conditions and Limitations on Consent of Each Party)

* * * *

6. A tribunal constituted under CAFTA-DR Chapter Ten is bound by the terms of the agreement. Article 10.18.1 expressly requires a claimant to submit a claim to arbitration within three years of the date on which the claimant "first acquired" (or should have first acquired) knowledge of breach and loss.

* * * *

10. Finally, because the claimant bears the burden to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1,¹¹ the claimant must prove the necessary and relevant facts (*i.e.*, the date when such knowledge of breach and loss was first acquired) to establish that its claims fall within the three-year claims limitation period.

Article 10.5 (Minimum Standard of Treatment)

* * * *

15. CAFTA-DR Annex 10-B 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[] 10.5 . . . 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." . . . Relevant State practice must be widespread and consistent and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation. Moreover, the twin requirements of State practice and *opinio juris* "must *both* be identified . . . to support a finding that a relevant rule of customary international law has emerged." The annex provides important guidance for assessing whether an alleged norm has been sufficiently demonstrated to be an element of customary international law.

* * * *

17. 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. ...

18. 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 than the mere interference with those expectations.

19. In fact, tribunals discussing State practice confirm that expectations about a particular legal regime do not preclude a State from taking future regulatory action. States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor’s “expectations” about the state of regulation in a particular sector. ...

* * * *

21. Thus, the CAFTA-DR Parties expressly intended Article 10.5 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.

* * * *

24. Finally, Article 10.5.3 makes clear a “determination that there has been a breach of another provision of” the CAFTA-DR “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 10.7 does not *per se* constitute a separate violation of Article 10.5.

Article 10.7 (Expropriation and Compensation)

25. Article 10.7.1 provides that no State Party to the CAFTA-DR 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. ...

26. If an expropriation does not conform to each of the specific conditions set forth in Article 10.7.1, paragraphs (a) through (d), it constitutes a breach of Article 10.7. ...

27. Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory. CAFTA-DR Annex 10-C, paragraph 4, provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation.

28. As explained in paragraph 4(a), 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.”

29. 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.”

30. 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”).

31. Annex 10-C, paragraph 4(b), further provides that “[e]xcept in rare circumstances, nondiscriminatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.” This paragraph is not an exception, but rather is intended to provide tribunals with additional guidance in determining whether an indirect expropriation has occurred.

* * * *

b. Renco Group v. Republic of Peru

On September 1, 2015, the United States made a submission pursuant to Article 10.20.2 of the U.S.-Peru Trade Promotion Agreement (“TPA”) in the arbitration between Renco Group and the Republic of Peru. Renco Group, Inc. (“Renco”), a New York corporation, requested arbitration of its claims of arbitrary and unfair treatment of its interests in mining operations in Peru. Renco alleges violations of Article 10.3 (National Treatment), Article 10.5 (Minimum Standard of Treatment), and Article 10.7 (Expropriation). The United States made a previous Article 10.20.2 submission in 2014 in the case. See *Digest 2014* at 467-69. All U.S. submissions in the case are available at <http://www.state.gov/s/l/c64390.htm>. Excerpts follow from the second U.S. submission (with footnotes omitted).

* * * *

Waiver Requirement (Article 10.18)

2. One of the preconditions to the Parties’ consent to arbitrate claims under Chapter Ten of the U.S.-Peru TPA is the waiver required by Article 10.18. ...

* * * *

3. Similar to provisions found in many of the United States' international investment agreements, Article 10.18 requires a claimant, at the time the notice of arbitration is submitted, to waive "any right to initiate or continue" any other dispute settlement "proceeding." Article 10.18 does not require a claimant to exhaust domestic remedies prior to submitting a claim to arbitration under the Agreement. Nor does Article 10.18 require a claimant to make an irrevocable choice between domestic proceedings and arbitration pursuant to the Agreement (as with a so-called "fork in the road" clause).

* * * *

7. Compliance with Article 10.18 entails both formal and material requirements. A claimant must not only provide a written waiver (formal requirement), but must also act consistently with that waiver by abstaining from initiating or continuing proceedings with respect to the measure(s) alleged to constitute a Chapter Ten breach in another forum (material requirement). If all formal and material requirements are not met, the waiver shall be deemed ineffective and will not engage the respondent's consent to arbitration under the Treaty, and the tribunal will lack jurisdiction.

* * * *

9. Compliance with Article 10.18 requires that the claimant not only provide a written waiver, but that it act consistently with that waiver by abstaining from initiating or continuing proceedings with respect to the measure alleged to constitute a breach of the Agreement in another forum. ...

10. Article 10.18.2(b) requires a waiver of a claimant's "right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure that is alleged to constitute a breach referred to in Article 10.16." The phrase "with respect to" in Article 10.18.2(b) should be interpreted broadly. ...

Relationship Between Articles 10.16 and 10.18 with Respect to Waiver

11. Article 10.16.1 permits two types of claims, which serve distinct purposes. Article 10.16.1(a) permits a claim by an investor solely on its own behalf for direct loss or damage suffered by it. Article 10.16.1(b) permits a claim by an investor on behalf of an enterprise that it owns or controls. The scope of the waiver required by Article 10.18.2 depends upon the claims being asserted under Article 10.16.1.

12. As the United States explained with respect to similar provisions in NAFTA, Article 10.16.1(a) is not intended to derogate from the rule of customary international law that shareholders may assert claims only for injuries to their interests and not for injuries to the enterprise. Examples of direct losses sustained by an investor that would give rise to a claim under Article 10.16.1(a) include wrongful expropriation of the shareholders' ownership interests, whether directly through an expropriation of the shares, or indirectly by expropriating the corporation as a whole, or losses sustained as a result of the investor having been denied its right to vote its shares in a company incorporated in the territory of the host State.

13. In contrast, Article 10.16.1(b) *is* intended to derogate from customary international law by allowing an investor of a Party that owns or controls an enterprise to submit a claim on behalf of that enterprise for loss or damage incurred *by the enterprise*.

14. If the claim is brought by an investor for losses it suffers directly, then only a waiver from the claimant under Article 10.18.2(b)(i) is required. Likewise, an investor that owns or controls an enterprise in the territory of the respondent State and makes a claim on behalf of the enterprise must bring such a claim under Article 10.16.1(b) and must submit waivers both for itself and for the enterprise under Article 10.18.2(b)(ii). If an investor seeking to recover for its direct loss or damage also seeks to recover loss or damage sustained by the enterprise, but the waiver is not for the enterprise, then the waiver requirement would not be met for the claims of loss or damage suffered by the enterprise.

15. Failure to make a claim under the appropriate provision(s) in Article 10.16 and to comply with the conditions and limitations on consent in Article 10.18, including the waiver provision, results in lack of consent by the Party and the concomitant lack of jurisdiction of the tribunal with respect to that claim.

16. The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent as a function of the respondent's general discretion to consent to arbitration. Therefore, while a tribunal may determine whether a waiver complies with the requirements of Article 10.18, a tribunal itself cannot remedy an ineffective waiver. Accordingly, a claim can be submitted, and the arbitration can properly commence, only if a claimant submits an effective waiver. The date of the submission of an effective waiver is the date on which the arbitration commences for purposes of Article 10.18.1.

* * * *

On October 11, 2105, the United States made a third Article 10.20.2 submission in *Renco Group v. Republic of Peru*. This third U.S. submission responds to an invitation by the Tribunal to address a question from the Tribunal. Excerpts follow (with most footnotes omitted) from the third U.S. submission in *Renco*.

* * * *

Applicability of the "Principle of Severability" to a Waiver Submitted in an Investor-State Arbitration

3. The Tribunal invited the United States to comment on the following question:

The Tribunal notes that neither party has addressed the relevance, if any, of the principle of severability in connection with the question of the legal effect of the reservation contained in Renco's waiver. The Tribunal invites the parties to comment on this point in their reply submissions. The opinions in ICJ cases Norwegian Loans and Interhandel as well as Loizidou v Turkey refer to the principle.

In particular, could this principle be applied in this case, such as to allow the reservation to be severed from the remainder of Renco's waiver, and, if so, what consequences (if any) might this have?

4. As the United States noted in its Second Submission, while a tribunal may determine whether a waiver complies with the requirements of Article 10.18, a tribunal itself cannot remedy an ineffective waiver. The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent as a function of the respondent's general discretion to consent to arbitration and not with a tribunal.

5. A tribunal cannot rely on a purported "principle of severability" to alter its lack of authority in this regard. In fact, what the tribunal refers to as the "principle of severability," addressed by Judge Lauterpacht in his opinions in the *Norwegian Loans* and *Interhandel* cases before the International Court of Justice and by the European Court of Human Rights in its decision in *Loizidou v. Turkey*, is not a generally accepted rule of international law or custom.³ For that reason, the proposed "principle of severability" is not an "applicable rule[] of international law" under Article 10.22 of the U.S.-Peru TPA that may serve as a rule of decision in this case.

6. A State's consent to arbitration is paramount. Here, Article 10.18 is titled "Conditions and Limitations on Consent of Each Party" to reinforce the point that the requirements that follow, including the waiver requirement, must be met by the claimant in order to engage the respondent State's consent to arbitrate. To determine whether a waiver complies with the requirements of Article 10.18 and thus may be considered effective, a tribunal must evaluate whether a claimant's waiver meets *both* the formal and material requirements. As to the formal requirements, the waiver must be in writing and must be "clear, explicit and categorical." ...But, this waiver must be provided *at the time the request for arbitration is made*. If all formal and material requirements are not met, the waiver shall be deemed ineffective ..., and the tribunal will lack jurisdiction *ab initio*. The *post hoc* application of the proposed "principle of

³ Notably, the Vienna Convention on the Law of Treaties does not address severability of allegedly prohibited or invalid reservations to treaties, and the few cases where severability of a State's reservation has been deemed possible have primarily arisen in the context of human rights treaties, such as *Loizidou v. Turkey*. See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 130-31 (3d ed. 2013). In its non-binding Guide to the Practice on Reservations to Treaties ("Guide"), the International Law Commission (ILC) states that guidelines regarding the consequences of an invalid reservation "form part of the cautious progressive development of international law." ILC, Report on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10/Add.1, (2011) (available at <http://legal.un.org/ilc/reports/2011/english/addendum.pdf>). In his article on the topic, Alain Pellet, the Special Rapporteur for the ILC's programme of work on reservations to treaties, stated that the non-binding Guide's guidelines on invalid reservations are "ambiguous and largely impracticable" due to "the deep division between states." Alain Pellet, *The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur*, 24 EUR. J. INT'L L. No. 4 1093-94 (2013). The United States has consistently maintained that "a reserving state . . . cannot be bound without its consent to a treaty without the benefit of its reservation." Remarks on Agenda Item 81 – Report of the ILC on the Work of its 63rd and 65th Sessions: Reservations to Treaties – Part II (Oct. 30, 2013) (available at <http://usun.state.gov/remarks/5845>); see *id.* (noting that guideline 4.5.3 of the ILC's non-binding Guide on the consequences of an invalid reservation "should not be understood to reflect existing law," and "the approach articulated in that section should not be regarded as a desirable rule, since it cannot be reconciled with the fundamental principle of treaty law that a state should only be bound to the extent it expressly accepts a treaty obligation").

severability” cannot operate to create consent by the respondent retroactively. The waiver requirement seeks to give the respondent certainty, from the very start of arbitration under the treaty, that the claimant is not pursuing and will not pursue proceedings in another forum with respect to the measures challenged in the arbitration.

7. The waiver provision is designed to avoid the need for a respondent to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of double recovery, but also the risk of “conflicting outcomes (and thus legal uncertainty).” To apply the proposed “principle of severability” in order to sever an invalid reservation of rights in a claimant’s waiver would defeat the purpose of the Agreement’s arbitration provisions. It would alter the conditions of the respondent’s offer to arbitrate and deprive the waiver provision of its intended purpose, thereby exposing the respondent to the risk of having to litigate, even temporarily, concurrently in multiple fora.

8. In summary, the United States and the Republic of Peru agree that the proposed “principle of severability” is not relevant and that the discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent as a function of the respondent’s general discretion to arbitration and not with a tribunal. I...

* * * *

C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

U.S. submissions in WTO dispute settlement proceedings are available at <https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/dispute-settlement>. The following discussion of a selection of WTO dispute settlement proceedings involving the United States in 2015 is drawn largely from Chapter II “The World Trade Organization” of the 2015 Annual Report of the President of the United States on the Trade Agreements Program (“2015 Annual Report”), available at <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/2016-trade-policy-agenda-and-2015-Annual-Report>. 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) *Argentina — Measures Affecting the Importation of Goods (DS444)*

The Appellate Body issued its report on January 15, 2015 in proceedings brought by the United States, the EU, and Japan in 2012 to examine Argentina’s import restrictions. Argentina appealed the Panel’s findings that its import licensing requirement and its trade balancing are inconsistent with Article XI of the GATT 1994. On January 26, 2015, the WTO Dispute Settlement Body (“DSB”) adopted the panel and Appellate Body

reports. The Appellate Body rejected Argentina's arguments, upholding the Panel's findings that Argentina's import licensing requirement and trade balancing requirements are inconsistent with Article XI of the GATT. The United States and Argentina subsequently agreed that Argentina could have a reasonable period of 11 months and 5 days, ending on December 31, 2015, to implement the findings. In December 2015, Argentina modified its import licensing requirements, but the United States is still working to ensure that the requirements comply with WTO obligations. See 2015 Annual Report at II.52-53.

(2) *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States (DS414)*

As discussed in *Digest 2010* at 475-78, *Digest 2011* at 372, and *Digest 2012* at 377-78, the United States initiated proceedings in 2010 regarding China's imposition of antidumping duties and countervailing duties on imports of grain oriented flat rolled electrical steel ("GOES") from the United States. In 2012, the DSB adopted the panel and Appellate Body reports upholding U.S. claims and China announced its intention to implement the DSB recommendations and rulings in the dispute. However, China's redetermination in the antidumping and countervailing duty investigations at issue continued to impose duties on imports of GOES from the United States. China continued to find that U.S. exports caused material injury to the domestic industry. The United States considered that China had failed to comply with the DSB findings, and requested the establishment of a compliance panel, which was established with the same chair and members as the original panel. As described in the 2015 Annual Report at II.59:

The compliance panel issued its report on July 31, 2015, and the DSB adopted the report at its meeting on August 31, 2015. As in the original proceeding, the compliance panel upheld U.S. claims that China's antidumping and countervailing duty determinations were inconsistent with WTO rules. In particular, the compliance panel found numerous defects in China's determination that U.S. exports caused adverse price effects in the Chinese market, and that U.S. exports caused injury to China's domestic industry. The compliance panel also found that China failed to disclose the essential facts underlying its revised material injury determination. As a result, the WTO panel found that China failed to comply with the recommendations and rulings of the DSB in this dispute.

In April 2015, after the compliance panel's meeting with the parties and after the parties had submitted all of their submissions, China's MOFCOM revoked the antidumping and countervailing duties on GOES from the United States.

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

As discussed in *Digest 2014* at 472-73, the United States requested proceedings relating India's import prohibitions on various agricultural products from the United States based on purported fears about avian influenza. The panel issued its report in favor of the United States in 2014. As described in the 2015 Annual Report at II.67-68:

On 4 June 2015, the Appellate Body issued its report in this dispute, upholding the Panel's findings that India's restrictions: are not based on international standards or a risk assessment that takes into account available scientific evidence; arbitrarily discriminate against U.S. products because India blocks imports while not similarly blocking domestic products; are more trade restrictive than necessary since India could reasonably adopt international standards for the control of avian influenza instead of imposing an import ban; and fail to recognize the concept of disease-free areas and are not adapted to the characteristics of the areas from which products originate and to which they are destined.

On July 13, 2015, India informed the DSB that it intended to implement the DSB's recommendations and rulings ...

India and the United States agreed that the reasonable period of time for India to implement the DSB's recommendations expires on June 19, 2016.

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, and *Digest 2013* at 320, Mexico challenged U.S. dolphin-safe labeling requirements for tuna and tuna products. The United States amended its labeling measure in response to the recommendations and rulings of the DSB. Mexico then requested that a compliance panel review the amended labeling measure and the panel issued its report on April 14, 2015. Both Mexico and the United States appealed aspects of the compliance panel's report. The Appellate Body issued its report on November 20, 2015. The 2015 Annual Report summarizes the Appellate Body's decision at II.78:

The Appellate Body found that the compliance panel had erred in its analytical approach to the amended measure, and it reversed the Panel's findings as to the measure's consistency with the covered agreements as to the eligibility criteria, the certification requirements, and the tracking and verification requirements. The Appellate Body found, however, that because the compliance panel had not

made a proper factual assessment of the matter, the Appellate Body could not complete the analysis and made no findings as to those three regulatory distinctions under either Article 2.1 of the TBT Agreement or Article XX of the GATT 1994. The Appellate Body also found that analysis of other aspects of the measure did not depend on factual findings and that these aspects rendered the measure inconsistent with Article 2.1 of the TBT Agreement and Article XX of the GATT 1994.

On December 3, 2015, the DSB adopted the Article 21.5 Appellate Body report and Article 21.5 panel report, as modified by the Appellate Body report.

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

See *Digest 2014* at 473 and *Digest 2013* at 321 for previous developments in these disputes challenging U.S. country of origin labeling (“COOL”). Following previous panel and Appellate Body reports, the United States modified its labeling provisions. A compliance panel found the new measures to be inconsistent with U.S. WTO obligations and the United States appealed. As summarized in the 2015 Annual Report at II.80-83, the Appellate Body issued its report on May 18, 2015:

The Appellate Body upheld the compliance Panel’s findings with respect to Article 2.1. of the TBT Agreement. In particular, it maintained the compliance Panel’s conclusions with respect to the alleged lack of accuracy of the labels, the burdens imposed by “heightened” recordkeeping and verification requirements, and the relevance of exemptions from the labeling requirements. The Appellate Body also upheld the compliance Panel’s ultimate determination with respect to Article 2.2 of the TBT Agreement.

On June 4, 2015, Canada [and Mexico] sought authorization to suspend concessions under the covered agreements. ... On December 21, 2015, the DSB granted authorization to Canada [and Mexico] to suspend concessions ...

On December 18, 2015, the President signed legislation repealing the country of origin labeling requirement for beef and pork. This action withdraws the WTO-inconsistent measure and brings the United States into compliance with the WTO’s recommendations and rulings.

(3) *Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from Vietnam (DS429)*

As summarized in the 2015 Annual Report at 83-84, Vietnam initiated dispute settlement proceedings regarding antidumping duties imposed by the United States on imports of certain shrimp from Vietnam. Vietnam claimed, among other things, that the use of “zeroing,” the treatment of producers as a single, non-market (“NME”) entity, and the application of adverse facts available to the entity were inconsistent with the

GATT 1994 and the Antidumping Agreement. The panel issued its report in 2014. Vietnam appealed certain of the panel's findings. The Appellate Body issued its report on April 7, 2015, rejecting Vietnam's challenge. The DSB adopted its recommendations and rulings on April 22. The United States communicated its intention to comply with the DSB's recommendations on May 20, 2015. An arbitrator decided the reasonable period of time for the United States to comply would expire on July 22, 2016.

2. Doha Development Agenda

At the WTO's Tenth Ministerial Conference, which was held in Nairobi from December 15-18, 2015, the United States joined other WTO Members in calling for the end of negotiations under the Doha Development Agenda given its lack of results after 14 years of negotiations. See 2015 Annual Report at II.2.

3. Environmental Goods Agreement

In 2015, the United States, along with 16 other WTO Members, engaged in plurilateral negotiations on an Environmental Goods Agreement ("EGA"). Discussion of the EGA was launched in 2014 by 14 WTO Members. See *Digest 2014* at 476.

4. WTO Accessions

Seychelles became the 161st WTO Member on April 26, 2015. Kazakhstan became the 162nd Member on November 30, 2016. Liberia and Afghanistan completed their negotiations at the end of 2015, and were invited to become the 163rd and 164th Members of the WTO at the WTO's Tenth Ministerial Conference in December 2015. See 2015 Annual Report at II.16, 99.

D. TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Trade Agreements

a. Trade Promotion Authority

On May 22, 2015, President Obama issued a statement on the Senate's passage of Trade Promotion Authority ("TPA") and Trade Adjustment Assistance ("TAA") legislation. Daily Comp. Pres. Docs. 2015 DCPD No. 00389, p. 1 (May 22, 2015). President Obama's statement includes the following:

Today's bipartisan Senate vote is an important step toward ensuring the United States can negotiate and enforce strong, high-standards trade agreements. If done right, these agreements are vital to expanding opportunities for the middle class, leveling the playing field for American workers, and establishing rules for the global economy that help our businesses grow and hire by selling goods made in America to the rest of the world. This trade promotion authority (TPA) legislation includes strong standards that will advance workers' rights, protect the environment, promote a free and open Internet, and it supports new robust measures to address unfair currency practices. The legislation also includes an important extension of trade adjustment assistance (TAA) to help all American workers participate in the global economy.

On May 23, 2015, Secretary Kerry issued a press statement welcoming Senate approval of the TPA bill. The press statement, available at <http://www.state.gov/secretary/remarks/2015/05/242785.htm>, calls the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership, which would be enabled by TPA, "the two most significant trade agreements in a generation."

On June 29, 2015, President Obama signed into law the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (P.L. 114-26), which includes TPA.

b. *Trans-Pacific Partnership*

On October 5, 2015, the negotiations of the Trans-Pacific Partnership ("TPP") agreement concluded successfully. President Obama's statement on the conclusion of negotiations includes the following:

This partnership levels the playing field for our farmers, ranchers, and manufacturers by eliminating more than 18,000 taxes that various countries put on our products. It includes the strongest commitments on labor and the environment of any trade agreement in history, and those commitments are enforceable, unlike in past agreements. It promotes a free and open Internet. It strengthens our strategic relationships with our partners and allies in a region that will be vital to the 21st century. It's an agreement that puts American workers first and will help middle class families get ahead.

Daily Comp. Pres. Docs. 2015 DCPD No. 00696 (Oct. 5, 2015).

Secretary Kerry issued a press statement, available at <http://www.state.gov/secretary/remarks/2015/10/247870.htm>, explaining the significance of the agreement. Secretary Kerry's statement is excerpted below. The full text of the agreement is available at <https://ustr.gov/trade-agreements/free-trade->

[agreements/trans-pacific-partnership/tpp-full-text](#). Further information is available at the USTR website at <https://ustr.gov/tpp/>.

* * * *

With today's successful conclusion of the Trans-Pacific Partnership negotiations, the United States and 11 other nations have taken a critical step forward in strengthening our economic ties and deepening our strategic relationships in the Asia-Pacific region.

This historic agreement links together countries that represent nearly 40 percent of global GDP. The TPP will spur economic growth and prosperity, enhance competitiveness, and bring jobs to American shores. It will provide new and meaningful access for American companies, large and small. And by setting high standards on labor, the environment, intellectual property, and a free and open Internet, this agreement will level the playing field for American businesses and workers.

The TPP will provide a near-term boost to the U.S. economy, and it will shape our economic and strategic relationships in the Asia-Pacific region long into the future.

I am proud of the work that our teams in Washington and at our embassies and consulates around the Pacific have done to bring these negotiations to a successful conclusion. I especially commend our outstanding Ambassador Michael Froman for his leadership and vision.

* * * *

On November 5, 2015, President Obama provided notice to Congress of the intention to enter into the Trans-Pacific Partnership Agreement. 80 Fed. Reg. 69,561 (Nov. 9, 2015). The notice, as published in the Federal Register, identifies the benefits of and parties to the Agreement:

... the Trans-Pacific Partnership (TPP) Agreement ...will generate export opportunities for U.S. manufacturers, service suppliers, farmers, ranchers, and businesses; help create jobs in the United States; and help American consumers save money while offering them more choices. I am negotiating to enter into the TPP Agreement with the following countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam; provided that those countries meet the market-access goals that we set out to achieve and agree to high-standard obligations, consistent with the Trade Priorities Act.

In a November 2015 statement, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/november/statement-ambassador-froman>, U.S. Trade Representative Michael Froman explained how the Agreement advances U.S. interests and values:

First and foremost, TPP will position Americans to compete and win in tomorrow's global economy. This is the first trade agreement to put a real focus on American small businesses who will gain powerful tools to help them export. This is the first trade agreement to put disciplines on state-owned enterprises to make sure that when they compete against our private firms, there's a level playing field. And this is the first trade agreement to take on the digital economy, ensuring that individuals and businesses in America and around the world will benefit from the expanding opportunities offered by a free and open Internet.

...Importantly, TPP is also the largest tax cut on American exports in a generation, slashing over 18,000 individual taxes on the products American manufacturers make, American farmers grow, and American innovators create. By selling more Made-in-America products around the world, we'll support more high-paying jobs here at home.

c. *Trans-Atlantic Trade and Investment Partnership*

Further rounds of negotiations of the Trans-Atlantic Trade and Investment Partnership ("T-TIP") were held in 2015. See Opening Remarks by U.S. and EU Chief Negotiators for the T-TIP Round Ten Press Conference, July 17, 2015, available at <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2015/july/opening-remarks-us-and-eu-chief>. See also Opening Remarks by U.S. and EU Chief Negotiators for the T-TIP Round Nine Press Conference, April 24, 2015, available at <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2015/april/opening-remarks-us-and-eu-chief>.

2. Trade Legislation and Trade Preferences

a. *Generalized System of Preferences*

The GSP program was renewed, effective July 29, 2015, by a provision in the Trade Preferences Extension Act of 2015 (Pub. L. 114-27). The Act gives the GSP retroactive effect between August 1, 2013 and July 28, 2015, when it had lapsed, and extends the GSP program through December 31, 2017. 80 Fed. Reg. 44,986 (July 28, 2015).

On September 30, 2015, President Obama notified Congress of his intent to terminate the designations of Seychelles, Uruguay, and Venezuela as "beneficiary developing countries," under the GSP program. Daily Comp. Pres. Docs. 2015 DCPD No. 00679 pp. 1-2 (Sept. 30, 2015). President Obama's message to Congress explains that the termination of these countries' designations under the GSP program complies with Section 502(e) of the Trade Act of 1974, as amended (the "1974 Act") (19 U.S.C. 2462(e)), which provides that if a beneficiary developing country has become a "high income" country, as defined by the official statistics of the World Bank, its designation

must be terminated. These countries' eligibility for trade benefits will end on January 1, 2017.

b. AGOA

The African Growth and Opportunity Act ("AGOA") was also reauthorized by a provision in the Trade Preferences Extension Act of 2015. On July 22, 2015, President Obama delivered remarks at a White House reception celebrating the reauthorization of AGOA. Daily Comp. Pres. Docs. 2015 Doc. No. 00517, pp. 1-2. His remarks are excerpted below.

* * * *

I want to thank everybody who is here for everything that you do to strengthen ties between Africa and the United States. Tonight I especially want to thank you because, with your help, we succeeded in achieving the long-term renewal of the African Growth and Opportunity Act. ...

* * * *

... Despite its many challenges—and we have to be clear eyed about all the challenges that the continent still faces—Africa is a place of incredible dynamism, some of the fastest growing markets in the world, extraordinary people, extraordinary resilience. And it has the potential to be the next center of global economic growth.

And that's why, as President, I have worked so hard to take our relationship with Africa to a new level. We have boosted U.S. exports. We have launched historic initiatives to promote trade and investment, health, agricultural development and food security, Power Africa to promote and expand electrification. We're empowering a new generation of young African leaders, including our inspiring Mandela Fellows...

* * * *

Now that it's been renewed, AGOA will be central to our efforts to boost the trade and investment that supports hundreds of thousands of jobs both in Africa and the United States, creating opportunities for all of us. And I'm especially pleased that AGOA will continue to encourage good governance and labor and human rights. That's something that we can be proud of.

We're going to have to keep on encouraging more American trade and investment in Africa. There's still a lot of misperceptions within the business community. And that's why, last year, the United States hosted its first U.S-Africa Business Forum.

Tonight I can announce that we will host the next business forum next year, and I look forward to working with all of you to help unleash the growth and opportunity that we know

Africa is capable of, progress that delivers more hope and more progress to Africans across the continent and more jobs and growth here in the United States.

* * * *

From August 24-27, 2015, the United States and Gabon co-hosted a forum on AGOA in Gabon. See August 19, 2015 State Department fact sheet, available at <http://www.state.gov/r/pa/pl/246222.htm>. The forum satisfies legislative requirements that the United States and participating AGOA countries engage in regular discussions on trade and investment policy. Private sector and civil society organizations, as well as government officials, participated in the forum. Side events at the forum included workshops conducted by the African Women Entrepreneurship Program (“AWEP”) to help African women entrepreneurs integrate into regional and global procurement supply chains, in accordance with the new AGOA legislation’s call for “promotion of the role of women in social and economic development.”

On September 30, 2015, President Obama provided notification to Congress of his intent to terminate the designation of Seychelles as a beneficiary sub-Saharan African country under AGOA. Daily Comp. Pres. Docs. 2015 Doc. No. 00680, p. 1 (Sep. 30, 2015). The President determined that, pursuant to section 502 of the Trade Act of 1974, Seychelles has become a “high income” country, making it ineligible for designation as a beneficiary sub-Saharan country. Seychelles becomes ineligible for benefits as a sub-Saharan country under AGOA effect January 1, 2017.

On October 30, 2015, President Obama notified the Congress of the United States of his intent to terminate the designation of Burundi as a beneficiary sub-Saharan African country under the AGOA Program. Daily Comp. Pres. Docs. 2015 DCPD No. 00774 (Oct. 30, 2015). In the notice to Congress, President Obama explained that the action was a result of Burundi’s failure to make progress toward establishing the rule of law and political pluralism, as required by section 104 of the AGOA (19 U.S.C. § 3701):

In particular, the continuing crackdown on opposition members, which has included assassinations, extra-judicial killings, arbitrary arrests, and torture, have worsened significantly during the election campaign that returned President Nkurunziza to power earlier this year. In addition, the Government of Burundi has blocked opposing parties from holding organizational meetings and campaigning throughout the electoral process. Police and armed youth militias with links to the ruling party have intimidated the opposition, contributing to nearly 200,000 refugees fleeing the country since April 2015. Accordingly, I intend to terminate the designation of Burundi as a beneficiary sub-Saharan African country under AGOA as of January 1, 2016.

3. Trade-related Arbitration and Litigation

Dominican Republic-Central America-United States Free Trade Agreement

In 2015, an arbitral panel established pursuant to the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”) undertook its review of claims by the United States that Guatemala was failing to adhere to its CAFTA-DR obligations regarding its labor laws. This is the first such case under the CAFTA-DR to go to an arbitral panel. The United States originally requested the establishment of a panel in 2011. See *Digest 2011* at 384. In 2013, the panel suspended its work at the request of the Parties to allow them to negotiate and implement an Enforcement Plan. See *Digest 2013* at 329-31. However, the United States requested that the panel resume its work in 2014 after engagement through the Enforcement Plan failed to effectively address concerns. See Federal Register Notice of CAFTA-DR Proceedings, 80 Fed. Reg. 4027 (Jan. 26, 2015). The United States filed its opening submission on November 3, 2014. Guatemala filed its first submission on February 2, 2015. The United States submitted its rebuttal on March 16, 2015. Guatemala made its rebuttal submission on April 27, 2015. Eight non-governmental entities made written submissions on April 27, 2015. Guatemala and the United States submitted comments on the written submissions of the non-governmental entities on May 11, 2015. The arbitral panel held hearings on June 2, 2015 in Guatemala City. The proceedings were suspended on November 4, 2015, when a panelist resigned from the panel, and resumed on November 27, 2015, with a new panelist. The panel’s final report is expected in 2016. Information about the dispute is available at <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr#>.

E. TAXATION

1. Tax Treaties

a. Protocol to Tax Treaty with Japan

On April 13, 2015, President Obama transmitted to the Senate, recommending its advice and consent to ratification, the Protocol Amending the Convention between the Government of the United States of America and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and a related agreement entered into by an exchange of notes (together the “proposed Protocol”), both signed on January 24, 2013, at Washington, together with correcting notes exchanged March 9 and March 29, 2013. Daily Comp. Pres. Docs. 2015 DCPD No. 00265 p. 1 (Apr. 13, 2015). His transmittal message includes the following:

The proposed Protocol was negotiated to bring U.S.-Japan tax treaty relations into closer conformity with current U.S. tax treaty policy. For example, the

proposed Protocol provides for an exemption from source-country withholding tax on all cross-border payments of interest, and updates the provisions of the existing Convention with respect to the mutual agreement procedure by incorporating mandatory arbitration of certain cases that the competent authorities of the United States and Japan have been unable to resolve after a reasonable period of time.

In November 2015, the Senate Foreign Relations Committee approved eight tax treaties and protocols pending in the Senate, including the Japan protocol. As of the end of 2015, a vote on the Senate floor had not been scheduled.

b. Tax Treaty with Vietnam

On July 7, 2015, in Washington, D.C., the governments of the United States and Vietnam signed an agreement on “the Avoidance of Double Taxation and the Avoidance of Fiscal Evasion with respect to Taxes of Income.” The two governments simultaneously signed a protocol to the agreement. The text of the U.S.-Vietnam tax treaty, including the protocol, is available at <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Vietnam-7-7-2015.pdf>. The treaty and protocol are not yet in force as of the end of 2015.

2. FATCA

The United States continued in 2015 to engage with jurisdictions around the world to improve international tax compliance and implement the Foreign Account Tax Compliance Act (“FATCA”). For background on FATCA, see *Digest 2012* at 413, *Digest 2013* at 358, and *Digest 2014* at 489. In 2015, the United States concluded 28 FATCA intergovernmental agreements (“IGAs”) with partner jurisdictions, bringing the total number of concluded agreements to 81, of which 56 were in force by the end of 2015. The United States has reached agreement in substance on FATCA IGAs with 31 other jurisdictions. A table listing the jurisdictions that are treated as if they have IGAs in effect, with links to the texts of the agreements, is available at <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>.

As discussed in Chapter 4, FATCA and the IGAs that facilitate FATCA implementation have been challenged in federal court. On September 29, 2015, the U.S. District Court for the Southern District of Ohio ruled in the government’s favor, denying plaintiffs’ motion for a preliminary injunction to block enforcement of FATCA, certain IGAs, and the Report of Foreign Bank and Financial Accounts (“FBAR”) administered by the United States Financial Crimes Enforcement Network (“FinCEN”). *Crawford et al. v. U.S. Dept. of the Treasury et al.*, No. 3:15-cv-250 (S.D. Ohio 2015). The court held that none of the plaintiffs had standing to challenge the executive’s decision to enter into IGAs as executive agreements. One plaintiff had standing, limited to Constitutional equal protection and excessive fine claims, but did not meet the

threshold for imposition of a preliminary injunction. The motion to dismiss the complaint was pending as of the end of 2015.

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

As discussed in *Digest 2014* at 490-92, the United States government appealed the decision of a federal district court that Validus Reinsurance, Ltd. (“Validus”) was not liable for excise taxes imposed by Internal Revenue Code (“I.R.C.”) § 4371 (26 U.S.C.) on premiums that Validus paid to foreign reinsurers under retrocession agreements. *Validus Reins., Ltd. v. United States*, No. 14-5081 (D.C. Cir.). On May 26, 2015, the U.S. Court of Appeals for the D.C. Circuit issued its decision, affirming the district court but on narrower grounds. The Court of Appeals found that the statute was ambiguous, but the ambiguity could be resolved by the presumption against extraterritoriality. Excerpts follow from the opinion of the Court of Appeals.

* * * *

Section 4371 of the Internal Revenue Code provides:

There is hereby imposed, on each policy of insurance, indemnity bond, annuity contract, or policy of reinsurance issued by any foreign insurer or reinsurer, a tax at the following rates:

(1) Casualty insurance and indemnity bonds. 4 cents on each dollar, or fractional part thereof, of the premium paid on the policy of casualty insurance or the indemnity bond, if issued to or for, or in the name of, an insured as defined in section 4372(d);

(2) Life insurance, sickness, and accident policies, and annuity contracts. 1 cent on each dollar, or fractional part thereof, of the premium paid on the policy of life, sickness, or accident insurance, or annuity contract; and

(3) Reinsurance. 1 cent on each dollar, or fractional part thereof, of the premium paid on the policy of reinsurance *covering any of the contracts taxable under paragraph (1) or (2)*.

26 U.S.C. § 4371 (emphasis added). This is one of four sections in subchapter A of chapter 34 on policies issued by foreign insurers. As relevant, section 4372 provides definitions of “insured” and “policy of reinsurance.” *Id.* §§ 4372(d), (f). Two exemptions are provided in section 4373, one for certain amounts “effectively connected with” trade or business within the United States and another for certain indemnity bonds. Section 4374 provides that liability for the excise tax is imposed on both the purchaser and seller when not the United States or its agencies or instrumentalities.

Section 4371 derives from an expansion of the excise tax on foreign insurance enacted during World War II as part of the Revenue Act of 1942 (“1942 Act”), Pub. L. No. 77–753, § 502, 56 Stat. 798, 955–56. The text of the 1942 statute made clear that its purpose was not only to raise revenues during a time of tremendous strain on the national fisc, *see* H.R. REP. NO. 77-2333, at 1–2 (1942), but also to help U.S. insurance companies compete with foreign insurers. The stamp tax of 4 cents for each dollar of premium was extended beyond marine and fire insurance policies to all kinds of insurance policies issued to domestic entities and individual residents by foreign insurers. *Compare* 26 U.S.C. § 1804 (1940), *with id.* §§ 1804(a)–(b) (Supp. II 1942). Congress also, for the first time, subjected reinsurance policies to the tax. *Compare id.* § 1804 (1940), *with id.* § 1804(c) (Supp. II 1942). The 1942 Act exempted from the tax policies “signed or countersigned by an officer or agent of the reinsurer in a State, Territory, or District of the United States within which such reinsurer is authorized to do business.” *Id.* § 1804(c) (Supp. II 1942); *see also id.* §§ 1804(a)–(b) (Supp. II 1942). In other words, the excise tax did not apply when insurance premiums were subject to U.S. income taxes, *see Neptune Mut. Ass’n, Ltd. of Berm. v. United States*, 862 F.2d 1546, 1549 (Fed. Cir. 1988); 61 CONG. REC. 7180–81 (1921) (discussing the predecessor to § 1804), an exemption carried forward in current section 4373(1). As the 1942 House Committee Report explains, the excise tax thereby “eliminate[s] an unwarranted competitive advantage now favoring foreign insurers.” H.R. REP. NO. 77-2333, at 61; *see also* 61 CONG. REC. 7180–81.

II.

“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

A.

At first glance, the plain text of section 4371 appears to extend the reach of the IRS Commissioner to any casualty and life insurance policy issued by a foreign insurer anywhere in the world. Read in conjunction with the statutory definitions, however, section 4371’s reach is more modest. Applying the definition of an “insured,” paragraph (1) of section 4371 taxes premiums paid on casualty insurance and indemnity bonds issued by foreign insurers to domestic entities or individual residents “against, or with respect to, hazards, risks, losses, or liabilities wholly or partly within the United States,” *see* 26 U.S.C. § 4372(d)(1); it also taxes premiums paid on such policies issued to nonresident individuals and foreign entities “engaged in a trade or business within the United States,” *see id.* § 4372(d)(2). Paragraph (2) taxes only those policies of life, sickness, or accident insurance, or annuity contracts “made, continued, or renewed with respect to the life or hazards to the person of a citizen or resident of the United States.” *See id.* § 4372(e). Paragraphs (1) and (2) thus tax only policies issued to persons with residence in, or commercial connections to, the United States, with regard to U.S.-based risks and liabilities.

Paragraph (3) taxes premiums paid on reinsurance policies “covering” such contracts. *Id.* § 4371(3). Section 4372 defines a “policy of reinsurance” to include “any . . . instrument . . . whereby a contract of reinsurance is made, continued, or renewed against, or with respect to, any of the hazards, risks, losses, or liabilities covered by contracts taxable under paragraph (1) or (2) of section 4371.” *Id.* § 4372(f). This statutory definition fits awkwardly into paragraph (3): section 4371(3) apparently taxes any “policy of reinsurance” issued with respect to U.S.-based risks and liabilities covered by a contract taxable under paragraph (1) or (2), covering a contract taxable under paragraph (1) or (2). This apparent redundancy is the focus of the parties’ dispute.

The parties offer two plausible interpretations of section 4371(3) based on the plain text; one would tax wholly foreign retrocessions, and the other would not. ...

* * * *

Neither party demonstrates that the word “covering,” standing alone, unambiguously should be interpreted according to that party’s preferred meaning. The government’s attempt to define “cover” as “to lie over” cannot be supported in the insurance context. ... On the other hand, Validus has not demonstrated that “covering” could mean only “*directly* indemnifying or compensating for.” The relevant definition of “cover” includes “to afford protection against or compensation or indemnification for.” WEBSTER’S, *supra*, at 524. A retrocession *indirectly* “affords protection against or compensation for” an original insurer’s contract with its policyholder. See *Transcon. Underwriters Agency, S. R. L. v. Am. Agency Underwriters*, 680 F.2d 298, 299 n.2 (3d Cir. 1982). The reinsurer “assigns” to the retrocessionaire “all or a portion of the risk which [the reinsurer] reinsures.” See *id.* Validus points to authorities indicating that most retrocessions do not directly indemnify the original insurer for any losses or give the original insurer any claim against the retrocessionaire. See *Travelers Indem. Co. v. Scor Reinsurance Co.*, 62 F.3d 74, 76 (2d Cir. 1995); *China Union Lines, Ltd. v. Am. Marine Underwriters, Inc.*, 755 F.2d 26, 30 (2d Cir. 1985); REINSURANCE 9, 20 (Robert W. Strain ed., rev. ed. 1997); H. ERNEST FEER, APPROACH TO REINSURANCE 10–11 (1951); Douglas R. Richmond, *Reinsurance Intermediaries: Law and Litigation*, 29 U. HAW. L. REV. 59, 59 (2006). Even though these sources show that some retrocessions do not directly cover the contracts described in paragraphs (1) and (2), they do not resolve whether Congress intended “covering” as used in paragraph (3) to mean only “directly covering” or “directly and indirectly covering.”

Looking beyond the dictionary definition of “cover[ing],” the statutory context does not resolve the interpretation of section 4371(3). The statutory definition of “policy of reinsurance” supports a broad application of the excise tax under section 4371(3). The definition extends, not to policies “covering” other insurance contracts, but to policies “made . . . with respect to” U.S.-based “hazards, risks, losses, or liabilities” covered by another insurance contract. 26 U.S.C. § 4372(f). Even if a retrocession triggered, ultimately, by a U.S.-based loss does not directly “cover” the original contract insuring that loss, it has been made “with respect to” such a loss. See XIII THE OXFORD ENGLISH DICTIONARY 732 (2d ed. 1989) (defining “with respect” as “with reference or regard to something” (emphasis omitted)); cf. *Coregis Ins. Co. v. Am. Health Found.*, 241 F.3d 123, 128–29 (2d Cir. 2001). Validus responds that the “sweeping interpretation” urged by the government is “foreclosed by the statute’s structure”: “The interplay of the statute’s definition of ‘reinsurance’ and its tax-imposing language shows that Congress defined reinsurance broadly to encompass all policies that relate to underlying U.S. risks, but taxed only those policies that ‘cover’ casualty and life insurance policies.” Appellee’s Br. 11.

Indeed, to interpret paragraph (3) to impose the excise tax on all policies of reinsurance issued with respect to risks covered by a contract taxable under paragraph (1) or (2) would be to read the “covering” clause out of the statute. ...

Exempting retrocessions is contrary to a stated congressional purpose that is apparent from the statutory text and context. By providing an exemption in section 4373(1), Congress imposed the excise tax only on the business of insurance companies not already subject to a U.S.

Section 4371, together with section 4373(1), thus operates to level the playing field between domestic and foreign insurance and reinsurance businesses. Validus's interpretation would create a distinction that limits Congress's leveling purpose: The excise tax would not apply where a U.S. reinsurance company purchases a retrocession from a foreign insurer. Because a retrocession is merely another kind of reinsurance, *i.e.*, "reinsurance for reinsurers," REINSURANCE, *supra*, at 19, Validus's interpretation of paragraph (3) would create a distinction between retrocessions and reinsurance issued by foreign entities to domestic insureds that would be at odds with a clear purpose of the statute. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 242–43 (1989); *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). Just as courts are obligated to avoid construing statutes to create superfluities when possible, so too must they avoid statutory interpretations that "bring about an anomalous result" when other interpretations are available. *Stewart*, 104 F.3d at 1388 (citing *United States v. Bergh*, 352 U.S. 40, 45 (1956)).

Because both parties offer plausible interpretations based on different readings of the statutory text, we conclude the text of section 4371 is ambiguous with regard to its application to wholly foreign retrocessions. This statutory ambiguity is resolved by the presumption against extraterritoriality.

B.

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil Co. ("Aramco")*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). The Supreme Court has instructed that a court must presume that a statute has no extraterritorial application "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *Aramco*, 499 U.S. at 248). Neither party maintains that retrocessions between wholly foreign parties are not extraterritorial, and the extraterritoriality of the retrocessions at issue is evident from the parties' joint stipulation of material facts. In looking, then, to the statutory text, context, purpose, and legislative history for a "clear indication" of Congress's intent, *Morrison*, 561 U.S. at 265; *see Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665–68 (2013); *Foley Bros.*, 336 U.S. at 285–88, the court necessarily avoids any case-by-case attempt to "divin[e] what Congress would have wanted if it had thought of the situation before the court" so as to "preserv[e] a stable background against which Congress can legislate with predictable effects," *Morrison*, 561 U.S. at 261 (footnote omitted). The government has identified no clear indication by Congress that it intended the excise tax to apply to wholly foreign retrocessions, and we have found none.

Validus has not challenged the application of the excise tax to the sale of reinsurance to a U.S. insurance corporation or a foreign insurance corporation doing business in the United States. *See Appellee's Br.* 5–6 (citing *American Bankers Ins. Co. of Fla. v. United States ("American Bankers II")*, 388 F.2d 304, 305 (5th Cir. 1968)). The government interprets the plain text to rebut the presumption against extraterritorial effect because it views the excise tax to have *only* extraterritorial effect, applying solely to transactions not "effectively connected with the conduct of a trade or business within the United States," 26 U.S.C. § 4373(1), and involving a foreign insurance company. But even if the excise tax applies to premiums paid by a U.S. insured to a foreign insurer or reinsurer, that does not resolve the issue presented by Validus's refund claims.

The government does not confront the Supreme Court's direction that "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms," *Morrison*, 561 U.S. at 265.

The wholly foreign retrocessions at issue are materially different from the reinsurance contracts in which there is privity of contract between the foreign reinsurer and a domestic (U.S.) individual or entity, or entity doing business in the United States. Applying the excise tax to retrocessions between wholly foreign insurers would extend the extraterritorial reach of section 4371 by allowing the tax to compound into perpetuity with the creation of every new reinsurance contract after the first-level reinsurance contract, despite the absence of a contractual or other legal relationship with any U.S. entity. "Under this 'cascading tax' theory, there is no limit to the number of times the United States can collect excise tax on retrocessions, provided they can ultimately be traced back, through any number of intermediate contracts, to U.S.-based risks." Appellee's Br. 7. Although government counsel stated during oral argument that the tax is unlikely to compound to exceed the amount a U.S. reinsurer would have to pay in U.S. income taxes, the possibility of a "cascading" tax so attenuated from any U.S. entity or entity conducting business in the United States nevertheless differentiates the tax the government proposes from that clearly authorized under section 4371. "[C]ourts must find clear and independent textual support — rather than relying on mere inference — to justify the nature and extent of each statutory application abroad." *Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 845 (9th Cir. 2012) (citing *Morrison*, 561 U.S. at 265).

The government maintains that section 4371(3) should be interpreted broadly in view of the imposition of the tax "on *each* policy of insurance . . . or policy of reinsurance issued by *any* foreign insurer," 26 U.S.C. § 4371 (emphasis added). Yet Congress's use of the words "each" and "any" is not a clear expression of its intent to assert extraterritorial jurisdiction. In *Kiobel*, the Supreme Court rejected an extraterritorial application of the Alien Tort Statute based on such language: "Nor does the fact that the text reaches '*any* civil action' suggest application to torts committed abroad; it is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality." 133 S. Ct. at 1665 (citations omitted); *see also United States v. Ali*, 718 F.3d 929, 935 (D.C. Cir. 2013). The text remains ambiguous; although the government's interpretation is plausible, plausibility does not rebut the presumption against extraterritoriality. *See Aramco*, 499 U.S. at 250–51; *see also Morrison*, 561 U.S. at 264.

Nor is the court persuaded that the statutory text, viewed in context, unambiguously directs the tax on foreign insurance policies to follow the U.S.-based risk, as the government contends. The definition of "policy of reinsurance" includes any policy "made . . . with respect to" U.S.-based "hazards, risks, losses, or liabilities." 26 U.S.C. § 4372(f). In the 1942 Act, the excise tax was imposed directly "[o]n each policy of reinsurance" issued by a foreign party "with respect to[] any of the hazards, risks, losses, or liabilities covered by contracts described." *Id.* § 1804(c) (Supp. II. 1942). When Congress "rearrange[d]" and "simplif[ied]" the excise tax in 1954, S. REP. NO. 83-1622, at 482 (1954)—expanding the definition section and adding the exemption section and the paragraph (3) "covering" clause, *see* Internal Revenue Code of 1954 ("1954 Act"), Pub. L. No. 83-591, 68A Stat. 1, 521–24—the committee reports state that Congress did not intend any substantive changes. *See* S.REP.NO.83-1622,at482;H.R.REP. NO. 83-1337, at A325 (1954). Since the 1954 Act, the excise tax provision has no longer taxed "each policy of reinsurance . . . made . . . with respect to" certain *risks*, 26 U.S.C. § 1804(c) (Supp. II. 1942), only "each . . . policy of reinsurance . . . covering" certain *contracts*, *id.* § 4371(3) (2012)

Moreover, even if the 1942 Act had remained unchanged, the text of the 1942 Act did not contain a clear indication that Congress intended to tax wholly foreign retrocessions. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 655 (1995), the Supreme Court refused “to extend” the term “relate to” “to the furthest stretch of its indeterminacy” to overcome the presumption against federal preemption of state law. Similarly, here, the breadth of the phrase “with respect to” does no more to rebut the presumption against extraterritoriality than do expansive words like “each” and “any.”

Nor does the legislative history of the excise tax supply a clear indication that Congress intended the broad interpretation urged by the government. The current version of the tax evolved from an excise tax on property insurance sold by foreign insurers to U.S. residents or corporations. *See* 26 U.S.C. § 1804 (1940). That tax excluded reinsurance and thus could not have applied to any reinsurance transaction between two foreign insurers, much less a retrocession. Reinsurance was added when Congress amended the excise tax in the 1942 Act. *See* 56 Stat. at 955–56. The legislative history is limited. The House Committee Report states: “It is believed that the revised provision will yield an appreciable amount of revenue, and at the same time eliminate an unwarranted competitive advantage now favoring foreign insurers.” H.R. REP. NO. 77-2333, at 61. In Senate Committee hearings, a representative of the House of Representatives Office of Legislative Counsel testified that “[t]he attempt here is to equalize the situation between domestic corporations engaged in casualty and other kinds of insurance and foreign corporations where the insurance is taken out in the United States but the policy is countersigned abroad.” *Hearings on H.R. 7378 Before the S. Comm. on Finance (“Hearings on H.R. 7378”)*, 77th Cong. 121 (1942) (statement of John O’Brien).

This history does not evince an unambiguous congressional intent to apply the excise tax to wholly foreign retrocessions, and some of it points the other way. Because the Internal Revenue Code of 1939 did not apply the excise tax to reinsurance, it is unlikely that Congress intended, without comment, to adopt the expansive interpretation of the 1942 tax that the government maintains was carried forward in the 1954 reorganization. This court has been skeptical of finding major changes in legislation that have passed unremarked upon in the legislative history. *See, e.g., Lamont v. Haig*, 590 F.2d 1124, 1129–30 & n.34 (D.C. Cir. 1978); *Laborers’ Int’l Union Local Union No. 1057 v. NLRB*, 567 F.2d 1006, 1012–13 & n.41 (D.C. Cir. 1977). The only relevant indication of Congress’s intent in the legislative history of the 1942 Act is the testimony from the House Office of Legislative Counsel that the excise tax was intended to reach “insurance . . . taken out *in the United States*,” *Hearings on H.R. 7378, supra*, at 121 (statement of John O’Brien) (emphasis added).

Even assuming that applying the excise tax as broadly as possible would serve Congress’s purposes to “yield an appreciable amount of revenue, and at the same time eliminate an unwarranted competitive advantage now favoring foreign insurers,” H.R. REP. NO. 77-2333, at 61, those purposes are served by taxing first-level reinsurance, as well as retrocessions purchased by U.S. parties. To conclude that Congress also intended a more expansive application of the tax to wholly foreign retrocessions would require more than general and generic statements of purpose, which enable the court to do only what the Supreme Court has instructed against: attempt to “divin[e] what Congress would have wanted if it had thought of the situation before the court,” *Morrison*, 561 U.S. at 261. “[N]o legislation pursues its purposes at all costs,” and “[t]he task of statutory interpretation cannot be reduced to a mechanical choice in which the interpretation that would advance the statute’s general purposes to a greater extent

must always prevail.” *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 495 (D.C. Cir. 2004) (quoting *Student Loan Mktg. Ass’n v. Riley*, 104 F.3d 397, 408 (D.C. Cir. 1997)); see also *Lamont*, 590 F.2d at 1130. The presumption against extraterritoriality gives this principle particular force.

* * * *

Upon considering the sources of statutory meaning, we conclude that under “the most faithful reading of the text,” *Morrison*, 561 U.S. at 265 (citation and internal quotation marks omitted), section 4371 does not apply to Validus’s wholly foreign retrocessions. Section 4371 is ambiguous with respect to its application to wholly foreign retrocessions. Neither the text, context, purpose, nor legislative history provide a clear indication of congressional intent to rebut the presumption against such expansive extraterritorial application. Accordingly, we affirm the grant of summary judgment, albeit on narrower grounds, to Validus on its refund claims.

* * * *

F. LOAN GUARANTEES

On May 18, 2015, the United States and Ukraine signed a second loan guarantee agreement, which provides for a United States guarantee of a \$1 billion issuance of Ukrainian sovereign debt. The agreement entered into force May 26, 2015. Annex II to the agreement specifies economic reform conditions precedent to the issuance of loan guarantees in the areas of macroeconomic stability and financial sector reform, the social safety net, energy sector reform, and anti-corruption reform. The United States previously provided a \$1 billion loan guarantee to Ukraine in May 2014.

On May 31, 2015, the United States and Jordan signed a third loan guarantee agreement, which entered into force June 24, 2015. Pursuant to this agreement, the United States guaranteed issuances of \$1.5 billion of Jordanian sovereign debt. Annex II to the agreement specifies economic reform conditions precedent to the issuance of guarantees “in the areas of macroeconomic stability, energy sector reform, financial sector reform, investment, debt sustainability, and fiscal transparency, as well as a plan and commitment to issue unenhanced sovereign debt”. The United States provided two similar loan guarantees to Jordan in 2013 and 2014 totaling \$2.25 billion.

The purpose of the loan guarantees for Ukraine and Jordan as set forth in Article I of the agreements is to reinforce “Ukraine’s [and Jordan’s] economic reform programs, as supported by the International Monetary Fund, USAID, and other members of the international community, support Ukraine’s [and Jordan’s] continued access to the capital markets, and provide external financing to Ukraine [and Jordan] at affordable rates.”

G. COMMUNICATIONS

1. World Summit on the Information Society

On December 16, 2015, the ten-year review of the World Summit on the Information Society concluded at a high-level meeting of the UN General Assembly. See State Department press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/12/250732.htm>; see also December 15, 2015 remarks at the WSIS+10 high level meeting by Under Secretary Novelli, available at <http://usun.state.gov/remarks/7053>. The United States welcomed the outcome document (U.N. Doc. A/RES/70/125) adopted by consensus at the conclusion of the two-year review process, which involved participation from the private sector, civil society, and technical and academic communities:

The outcome document ... charts a clear path for the expanding role of information and communications technologies (ICT), including the Internet, as drivers of development and indispensable platforms for the exercise of fundamental freedoms and human rights. It is yet another important step toward ensuring that our modern information society is people-centered and inclusive.

2. Internet Assigned Numbers Authority (“IANA”) Transition

As discussed in *Digest 2014* at 494-95, the National Telecommunications and Information Administration (“NTIA”) of the U.S. Department of Commerce is transitioning key Internet domain name functions to the global multistakeholder community. NTIA invited public input on two proposals for the planned transition: the IANA Stewardship Transition Plan and the Enhancements to Internet Corporation for Assigned Names and Numbers (ICANN) Accountability Related to the IANA Stewardship Transition. 80 Fed. Reg. 47,911 (Aug. 10, 2015). Excerpts follow (with footnotes omitted) from the background section of the notice inviting public comment.

* * * *

A July 1, 1997, Executive Memorandum directed the Secretary of Commerce to privatize the Internet’s domain name system (DNS) in a manner that increases competition and facilitates international participation in its management. To fulfill this Presidential Directive, the Department of Commerce issued a Statement of Policy on June 10, 1998, stating that the U.S. Government “is committed to a transition that will allow the private sector to take leadership for DNS management.” On March 14, 2014, NTIA announced its intent to complete the privatization of the DNS. In that announcement, NTIA called upon ICANN to convene a

multistakeholder process to develop the transition plan. While looking to stakeholders and those most directly served by the IANA functions to work through the technical details, NTIA established a clear framework to guide the discussion.

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

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

Consistent with the clear policy expressed in bipartisan resolutions of the U.S. Senate and House of Representatives—which affirmed the United States support for the multistakeholder model of Internet governance—NTIA stated that it will not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution. In response to NTIA’s announcement, the community mobilized two efforts. First, the IANA customer communities took responsibility to develop an IANA stewardship transition plan, coordinated by an IANA-Stewardship Coordination Group (ICG). Second, the community undertook to develop ICANN accountability enhancements deemed necessary prior to the transition of NTIA’s stewardship role. These accountability enhancements are being developed through a Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability).

* * * *

On August 17, 2015, NTIA announced that it had notified Congress of its intent to extend the IANA contract with ICANN for one year to September 30, 2016 in order to provide the multistakeholder community with additional time to complete the process of planning the IANA transition. See “An Update on the IANA Transition,” August 17, 2015, available at <http://www.ntia.doc.gov/blog/2015/update-iana-transition>.

3. World Radiocommunication Conference

On November 27, 2015, the 2015 World Radiocommunication Conference (“WRC-15”) concluded in Geneva. The WRC is a global treaty conference held every three to four years by the ITU, the United Nations-affiliated international organization for telecommunications. Each WRC reviews and, if necessary, revises the Radio Regulations, the international treaty that governs the allocation and use of radio-frequency spectrum and satellite orbital locations globally.

Among the outcomes of the four-week WRC-15 are agreements to identify additional spectrum bands for wireless broadband and approve the use of satellite links for Unmanned Aviation Systems (“UAS”). The State Department media note released at the end of WRC-15 is available at <http://www.state.gov/r/pa/prs/ps/2015/11/250120.htm> and highlights additional outcomes:

The WRC-15 identified approximately 250 megahertz of effectively globally harmonized spectrum for mobile broadband, and in the Americas, some countries will have access to more than 500 megahertz (MHz). The Conference also approved the use of selected fixed satellite service links for command and control of long-range UAS. These systems will be used for multiple aviation applications, from disaster relief to meteorology, wildlife management and pipeline monitoring.

In addition, the WRC-15 set an agenda for its next Conference, in 2019, that calls for studying additional bands above 6 GHz for expanded mobile broadband capacity, setting the stage for the next generation of wireless networks. The WRC-19 will also consider spectrum allocations for High-Altitude Platform Systems, which will enable lower-cost delivery of bandwidth for developing economies and remote areas around the globe. The Conference moved to approve a measure for global flight tracking and established an agenda item for WRC-19 that will comprehensively explore further technological and regulatory needs for flight tracking and management under the aegis of the developing Global Aeronautical Distress and Safety System.

Other key measures taken at WRC-15 included:

- Adopting a regulatory framework for public protection and disaster relief applications that will pave the way for harmonization of spectrum in the 700-800 MHz range globally.
- Approving an allocation for short-range radars in the 78 gigahertz (GHz) range. This will enable radars in automobiles that will help consumers around the world to avoid traffic accidents and save lives.
- Adding a global, primary Earth Exploration Satellite Service (EESS) allocation in the 7 GHz band, and extending the worldwide EESS allocation in the 9 GHz band for use by the National Aeronautics and Space Administration and other space agencies.
- Reducing regulatory restrictions on use of the 410-420 MHz band for space operations near orbiting vehicles – including the International Space Station.

4. *Weinstein v. Iran*: Attempt to attach Internet names and addresses

On December 29, 2015, the United States filed a brief as *amicus curiae* in the U.S. Court of Appeals for the D.C. Circuit in *Weinstein v. Iran*, No. 14-7193. The *Weinstein* plaintiffs attempted to execute on judgments they had obtained against Iran, North Korea, and Syria under sections 1605(a)(7) and 1605A of the Foreign Sovereign Immunities Act (“FSIA”). Specifically, they attempted to attach alleged property interests of those countries in the Internet’s global name and address system by serving writs of execution on the Internet Corporation for Assigned Names and Numbers (“ICANN”), a non-profit

California corporation that facilitates the technical operation of the Internet's name and address system. ICANN currently serves as the IANA, helping administer the authoritative root zone file, as well as coordinating the allocation of the pool of unique IP addresses. ICANN performs these functions under a contract with the NTIA, a component of the U.S. Department of Commerce. As described in this section *supra*, the Department of Commerce is in the process of transitioning its role in the domain name system to the global Internet community and strives to protect the multi-stakeholder approach to Internet governance.

As explained by the United States in its brief, the country-code top-level domains (known as "ccTLDs"), which are top-level domains associated with geographic regions, are not "property of" or "assets of" a foreign state within the meaning of those terms in the FSIA or the Terrorism Risk Insurance Act ("TRIA"). (The ccTLDs for Iran, Syria, and North Korea are .ir, .sy, and .kp, respectively.) For discussion of other attempted attachment efforts under the FSIA and TRIA, see Chapter 10. The U.S. brief in *Weinstein* is excerpted below (with most footnotes omitted) and available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

I. Country-Code Top-Level Domains Are Not "Property of" or "Assets of" a Foreign State Under the FSIA or TRIA

The judgment of the district court should be affirmed because country-code top-level domains are not the "property of" or "assets of" a foreign state under federal law. See 28 U.S.C. § 1610(a); TRIA § 201(a). It is far from clear that such domains can properly be characterized as "property" at all. But even if they could, country-code top-level domains are not the property "of" the foreign states under the FSIA or TRIA. They are therefore not properly subject to attachment here. See *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 938-40 (D.C. Cir. 2013).

A. Country-Code Top-Level Domains Are Not Naturally Characterized as "Property" or "Assets" Under Federal Law

The FSIA and TRIA authorize plaintiffs in certain circumstances to attach "property" or "assets." See 28 U.S.C. § 1610(a), (g)(1); TRIA § 201(a). But a country-code top-level domain, which is a root-level Internet naming convention, is merely a designation in cyberspace of the national affiliation of a subset of the global Internet community. That designation includes not only government entities, but also millions of private businesses and individuals. It is far from clear that this type of top-level domain can be understood in conventional property terms.

Although the right to designate its territory "Iran" is presumably valuable to the Iranian government, no one would suggest that the name "Iran" in an atlas or a newspaper—or even official publications—is itself the "property" of the Iranian government subject to attachment by creditors. This is true even though the name "Iran," as the English-language designation for one of the world's recognized sovereign states, serves the valuable identification function of denoting the national affiliation of a geographic region (as well as practical functions, such as facilitating the delivery of mail). In the same way, a country-code top-level domain serves the valuable

function of denoting a national affiliation in cyberspace, but it does not follow that it constitutes “property” merely because it has that valuable purpose.

At a minimum, there is no reason to believe that Congress intended the terms “property” and “assets” in Section 1610 of the FSIA or TRIA to encompass anything of this kind. In this Court, property ownership under these statutes is governed by federal common law. See *Heiser*, 735 F.3d at 940-41. For something as inchoate and unique as a country-code top-level domain, it also seems appropriate for federal common law to govern the threshold characterization of an interest as “property” or an “asset.” In the context of the global Internet, and considering the foreign policy implications of decisions under the FSIA and TRIA, “[t]he desirability of a uniform rule is plain.” *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); cf. H.R. Rep. No. 94-1487, at 13 (1976) (explaining that “uniformity in decision * * * is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences”).

A country-code top-level domain is unlike any conventional form of property. Generally, when evaluating the nature and extent of a novel asserted interest, a court considers “existing rules or understandings that stem from an independent source” to decide whether any interest has been “created” and how its “dimensions are defined.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); see also *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 765-66 (2005). The practice of participants in the system alleged to give rise to the asserted interests is also relevant to the inquiry. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 600-02 (1972).

Here, none of these sources suggests that country-code top-level domains constitute property. To the contrary, a foundational 1994 Internet governance policy statement, still regarded by the Internet community as authoritative, explicitly rejects efforts to assert property rights in such domains: “Concerns about ‘rights’ * * * are inappropriate. It is appropriate to be concerned about ‘responsibilities’ and ‘service’ to the community.” See RFC 1591, DNS Structure and Delegation 4-5 (Mar. 1994).¹⁰

The actual practice under which country-code top-level domains have been established and managed from their inception underscores that such domains are not the property of anyone. A country-code top-level domain is not “granted” to the government of a country; instead, the management of such a top-level domain is “delegat[ed]” to a local manager to “perform[] a public service on behalf of the Internet community” in the relevant region. . . . When considering requests to change country-code top-level domain managers, ICANN does not treat any person as the owner of that domain, but rather “take[s] into account a number of technical and public interest criteria” that “relate to the basic principles that the manager be a responsible and technically competent trustee of the domain on behalf of the national and global Internet communities.”

In these and other respects, country-code top-level domains are distinct from second-level domains, which are commonly acquired and alienated unilaterally by particular entities or individuals under the laws of a particular country and are therefore more naturally characterized as personal property. Indeed, in certain circumstances, federal law treats second-level domain-name registrations as property for some purposes. See, e.g., 15 U.S.C. § 1125(d)(2)

¹⁰ [Network Working Group, Internet Eng’g Task Force, Request for Comments: 1591, DNS Structure and Delegation,] <https://www.ietf.org/rfc/rfc1591.txt>.

(civil in rem action under trademark law). The Department of Justice also seeks and obtains forfeiture of second-level domain-name registrations under statutes providing for the forfeiture of “property.” See, e.g., 18 U.S.C. § 2323 (forfeiture of property used in trafficking of counterfeit goods). As plaintiffs recognize (Br. 32), however, second-level domains are “significantly different” from country-code top-level domains, which since the inception of the Internet have been governed by different principles.

It would be particularly strange to conceive of country-code top-level domains as “property” or “assets” under Section 1610 of the FSIA or TRIA. Congress enacted these statutes to permit plaintiffs to recover amounts owed to them under judgments against foreign states by attachment of the property of the judgment debtor. But a U.S. court has no meaningful way to enforce the attachment of a country-code top-level domain or ensure its transfer to a judgment creditor. Although ICANN is within the reach of U.S. courts, the global Internet exists without regard to U.S. law. As plaintiffs acknowledge (Br. 34), therefore, “any power that ICANN has over” country-code top-level domains “stems only from the fact that the global community allows it to play that role.” As a technological matter, nothing prevents an entity outside the United States from publishing its own root zone file and persuading the operators of the Internet’s name servers to treat that version as authoritative instead. And if that happened, any changes made to the current root file at the behest of a U.S. court would effectively become irrelevant.

As we have explained, some foreign states already oppose the multi-stakeholder model of Internet governance generally and ICANN in particular. It is not difficult to imagine that a court-ordered change to the authoritative root zone file at the behest of private plaintiffs would prompt members of the global Internet community to turn their backs on ICANN for good. Such a change would immediately be cited by the countries who advocate full governmental control over the domain name system as evidence that ICANN should not be administering the system. Recognizing this possibility, moreover, no rational company would “purchase” from plaintiffs the right to manage the country-code top-level domains associated with defendants. Cf. Reply Br. 33 (explaining that the plaintiffs hope “to license” for money “the operation of” the country-code top-level domains). Any attempted attachment would thus likely be fruitless in the end, because the putative “property” plaintiffs seek cannot meaningfully be used to offset a judgment. But the result would be devastating for ICANN, for the multi-stakeholder model of Internet governance, and for the freedom and stability of the Internet as a whole.

B. Country-Code Top-Level Domains Are Not Owned by a Foreign State Within the Meaning of the FSIA or TRIA

The FSIA and TRIA permit attachment only of property or assets “of” a judgment-debtor foreign state. *Heiser*, 735 F.3d at 938-40. These statutes allow attachment of property or assets in which the foreign state has an “ownership interest.” *Id.* at 941. This Court has rejected the notion that “ownership interests” under these statutes “include any interest in the property bundle.” *Id.* at 940. Rather, Congress contemplated that creditors may “attach assets in which foreign states have ‘beneficial ownership.’” *Id.* at 938 (quoting H.R. Rep. No. 110-477, at 1001 (2007) (Conf. Rep.)) (emphasis added). Whether a foreign state has such an interest is a question this Court resolves by reference to federal common law. *Id.* at 940-41.

This Court should affirm the district court’s judgment on the ground that the defendant states lack the necessary ownership interest in the country-code top-level domains at issue. The public record belies any claim that country-code top-level domains are owned by the countries

and territories to which they refer. To the contrary, a foundational policy document explains that “[c]oncerns about * * * ‘ownership’” of country-code top-level domains “are inappropriate.” RFC 1591, at 5.

If country-code top-level domains were property at all, these domains would be most analogous to the corpus of a public trust administered by ICANN for the benefit of the global Internet community. In effect, ICANN serves as a trustee of the Internet’s unique names and numbers in service to all Internet users. Each local manager of a country-code top-level domain, in turn, effectively functions as the local agent of ICANN in the relevant regional Internet community. It makes no difference for these purposes that, according to plaintiffs (Br. 12-15), the local managers of the .ir, .sy, and .kp domains include government instrumentalities. In their capacity as managers of country-code top-level domains, they exercise responsibility delegated from ICANN on behalf of the Internet community as a whole.

ICANN’s policies reflect this understanding. ICANN expressly treats the manager of each country-code top-level domain as a “trustee for the domain on behalf of the national and global Internet communities.”¹³ The manager of such a domain is “performing a public service on behalf of the Internet community.” RFC 1591, at 2. Other statements of Internet governance principles likewise describe the roles of ICANN and country-code top-level domain managers in terms of a trust relationship: “The designated manager is the trustee of the top-level domain.” RFC 1591, at 3-4; see also Gov’tl Advisory Comm., Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains § 5.1.1 (“The ccTLD Registry is a trustee for the delegated ccTLD, and has a duty to serve the local Internet community as well as the global Internet community.”). This approach reflects ICANN’s status under California law as a nonprofit “public benefit” corporation—an entity organized for the benefit of the public. See Cal. Corp. Code § 5110 et seq.

ICANN does not treat local managers of country-code top-level domains—or the associated sovereign states—as the “owners” of these domains. When making decisions about the management of such a domain, ICANN treats the views of the relevant government as important because the government is “an important part of the local Internet community.” But ICANN pointedly does not treat the relevant government’s views as dispositive. For example, although ICANN can and sometimes does “redelegate” the management of a particular country-code top-level domain to a different entity, it will not do so—even at the request of the relevant government—without “documentation indicating local Internet community support for the proposed manager.” Indeed, the consent of the relevant government is not required to make changes to the management of the domain. ICANN policies explain: “[I]t is expected that relevant local governments are consulted regarding a delegation or redelegation. It is not a requirement that they consent, but if they do not have an opinion, a statement of non-objection can be useful.” This enduring practice is impossible to reconcile with any claim of meaningful state ownership.

ICANN’s 2011 published report on the redelegation of the .sy domain—one of the domains that plaintiffs seek to attach—is typical. See IANA, Redelegation of the .SY Domain Representing the Syrian Arab Republic to the National Agency for Network Services (Jan. 7, 2011). The Syrian government requested in 2010 that ICANN redelegate the .sy domain to a new local manager. ICANN did not treat that request as dispositive merely because it came from the

¹³ <https://www.iana.org/help/cctld-delegation>.

Syrian government. Instead, ICANN analyzed various “public-interest criteria for eligibility,” including the views of “all ten of the private [Internet Service Providers] that operate in the country,” and stressed that the request would be considered in light of “ICANN’s core mission of ensuring the stable and secure operation of the Internet’s unique identifier systems.” *Ibid.*

When the roles of ICANN and the managers of country-code top-level domains are understood by analogy to trust principles, it is clear that the defendant foreign states have no beneficial ownership interest subject to attachment under the FSIA or TRIA. Under well-settled principles, the corpus of a trust is not subject to attachment to satisfy the debts of the trustee or a trustee’s agent. “If property is held in trust, the trustee has a non-beneficial interest.” 3 Restatement (Third) of Property § 24.1 cmt. c (2011); see also 2 Restatement (Third) of Trusts § 42 cmt. c (2003). Cf. *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 n.6 (D.C. Cir. 2001) (explaining that courts “often look to the * * * Restatement when deciding questions of federal common law”).

Applying these principles here is consistent with the judgments of the political branches “in ordering our relationships with other members of the international community.” Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-26 (1964) (explaining the rationale for treating “exclusively as an aspect of federal law” “legal problems affecting international relations”). As explained above, the Executive Branch and Congress have repeatedly expressed the commitment of the United States to the multi-stakeholder model of Internet governance and have emphasized the importance of this model to maintaining a stable, open, and decentralized Internet that is free from governmental control. Sovereign beneficial ownership of country-code top-level domains is anathema to this model and these goals.

* * * *

H. PRESIDENTIAL PERMITS FOR TRANSBOUNDARY INFRASTRUCTURE

1. Final Decision on the Application for the proposed Keystone XL Pipeline

On November 6, 2015, the Department of State announced the Secretary of State's determination under Executive Order 13337 that issuing a Presidential Permit to TransCanada Keystone Pipeline LP (“TransCanada”) for the proposed Keystone XL pipeline's border facilities would not serve the national interest, and denied the Permit application. This decision prohibits TransCanada from constructing, connecting, operating, and maintaining pipeline facilities at the border of the United States and Canada in Phillips County, Montana, for the export of crude oil from Canada to the United States. The Department’s Record of Decision and National Interest Determination can be found at <http://keystonepipeline-xl.state.gov/documents/organization/249450.pdf>.

2. *White Earth Nation v. Kerry*

On December 9, 2015, a U.S. district court issued its decision in *White Earth Nation v. Kerry*, No. 14-4726 (D. Minn. 2015), a case in which plaintiff Native American and

environmental groups argued that the State Department had issued new approvals for the construction of oil pipelines and permitted an increase in the flow of oil across the border without following National Environmental Policy Act (NEPA) procedures. The State Department responded that it had not approved any action by Enbridge and that therefore there was no agency action that is reviewable under the Administrative Procedure Act (“APA”) and no action that triggered the requirements of NEPA or the National Historic Preservation Act (“NHPA”). The State Department also argued more fundamentally that its implementation of Executive Order 13337 (which delegates to the Secretary of State the Presidential permitting of certain transboundary infrastructure) and the Department’s interpretation of existing Presidential permits for border facilities owned by Enbridge were conducted solely based on the President’s delegated authority. Thus, any actions by the State Department relating to Presidential permits for oil pipelines are Presidential actions, which cannot be reviewed under the APA. The court found for the Department based on the latter argument. Excerpts follow from the court’s opinion.

* * * *

It is well settled that Presidential actions are not agency actions that are reviewable under the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 80001 (1992); *Dalton v. Specter*, 511 U.S. 462, 476 (1994). Noting that the President is not explicitly excluded from or included within the APA’s purview, the Supreme Court held that “[o]ut of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA.” *Franklin*, 505 U.S. at 80001.

* * * *

In actions regarding different pipelines that crossed the international borders of Canada and the United States, courts have held that the State Department’s issuance of a Presidential Permit pursuant to Executive Order 13337 was Presidential action and therefore not subject to review under the APA. See *Sisseton Wahpeton Oyate v. U.S. Dep’t of State*, 659 F. Supp.2d 1071, 1082 (D.S.D. 2009); *Natural Res. Def. Council, Inc. v. U.S. Dep’t of State*, 658 F. Supp.2d 105, 113 (D. D.C. 2009). The courts found that the delegation of the President’s constitutional authority concerning international borders to the Secretary of State did not change the fundamentally Presidential nature of the action. *Sisseton*, 659 F. Supp.2d at 1081; *Natural Res. Def. Council*, 658 F. Supp.2d at 11213. In so finding, one court recognized that given the fact that the President has “complete, unfettered discretion over the permitting process” and that no statute curtails the President’s authority to issue or deny a permit, exposing such permitting decisions to judicial review would “run afoul of the separation of powers concerns that underlie the Supreme Court’s decisions in *Franklin* and *Dalton*.” *Natural Res. Def. Council*, 658 F. Supp.2d at 111. See also, *Detroit Int’l Bridge Co. v. Government of Canada et al.*, Civ. No. 10476, 2015 WL 5726601 *22 (D.D.C. Sept. 30, 2015) ...

* * * *

Although this case differs from *Sisseton Wahpeton and Natural Res. Def. Council* in that it involves the State Department's interpretation of a Presidential Permit rather than a determination on an initial application for a Presidential Permit, the Court finds both types of determinations are Presidential in nature and should not be subject to judicial review. Here, Enbridge reached out to the State Department to obtain confirmation that the Replacement Project for the border segment was consistent with the 1991 Permit covering Line 3 and that the Bypass Project was outside the scope of the Line 67 Permit, as the interconnections were outside the border segment. In responding to such inquiries, the State Department was carrying out the directives of the President as set forth in Executive Order 13337, which included maintenance issues on existing pipelines, and which defined the scope of the Permit "at the borders of the United States." See Exec. Order 13337 § 1(a) ("Secretary of State is designated and empowered to receive all applications for Presidential permits [] for the construction, connection, operation and maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country.") (emphasis added).

Accordingly, the Court finds that Plaintiffs' claims under the APA must fail as they are not based on agency action.

* * * *

I. OTHER ISSUES

1. Intellectual Property: Special 301 Report

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

USTR issued the 2015 Special 301 Report in April 2015. The Report is available at <https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf>. The 2015 Report lists the following countries on the Priority Watch List: Algeria; Argentina; Chile; China; Ecuador; India; Indonesia; Kuwait; Pakistan; Russia; Thailand; Ukraine; and Venezuela. Ecuador, Kuwait, and Ukraine were added in 2015. It lists the following on the Watch List: Barbados; Belarus; Bolivia; Brazil; Bulgaria; Canada; Colombia; Costa Rica; Dominican Republic; Egypt; Greece; Guatemala; Jamaica; Lebanon; Mexico; Paraguay; Peru; Romania; Tajikistan; Trinidad and Tobago; Turkey; Turkmenistan; Uzbekistan; and Vietnam. Finland was removed from the Watch List in 2015. See *Digest 2007* at 605–7 for additional background on the watch lists.

2. Corporate Responsibility Regimes

On March 18, 2015, the United States assumed the chairmanship of the Voluntary Principles on Security and Human Rights (“VPs”) Initiative at the closing of the 2015 annual plenary meeting in London. A March 15, 2015 State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/03/239476.htm>, explains:

In the VPs Initiative, governments, companies and non-governmental organizations work together to guide oil, gas, and mining companies in minimizing the risk of human rights abuses involving security providers when companies extract resources in some of the toughest parts of the world.

At the VPs Plenary Meeting, participants formally launched verification frameworks that will provide a credible and practical system to assess implementation of the Principles. These frameworks will help ensure that companies maintain high standards in their security operations when they do business in difficult parts of the world. Ensuring successful use of the verification frameworks will be a key priority for the U.S. Government as we enter our chairmanship.

In advance of the 2015 plenary, the United States released its third annual online VPs report, which is available at <http://www.state.gov/j/drl/rls/vprpt/2014/239362.htm>. For background on the VPs Initiative, see *Digest 2000* at 364-68. See also *Digest 2013* at 354-55 and *Digest 2012* at 409-10.

3. SEC Rules Implementing Dodd-Frank

As discussed in *Digest 2012* at 410-12, the U.S. Securities and Exchange Commission (“SEC”) adopted two final rules in 2012 that were mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). Rule 13p-1, adopted to implement Section 1502 of Dodd-Frank, requires certain public companies to publicly disclose their use of conflict minerals that originated in the Democratic Republic of the Congo (“DRC”) or an adjoining country. Rule 13q-1, adopted to implement Section 1504 of Dodd-Frank, the “Cardin-Lugar amendment,” requires companies engaged in the commercial development of oil, natural gas, or minerals to disclose payments made to governments for the commercial development of resources.

a. Section 1502—Conflict Minerals Rule

In 2015, a panel of the U.S. Court of Appeals for the D.C. Circuit reaffirmed upon rehearing in *National Association of Manufacturers v. SEC*, 800 F.3d 518, 530 (D.C. Cir.

2015), that 15 U.S.C. § 78m(p)(1)(A)(ii) & (E) and the SEC's final rule, 77 Fed. Reg. 56,362-65, violate the First Amendment of the U.S. Constitution "to the extent that the statute and rule require regulated entities to report to the [SEC] and to state on their website that any of their products have 'not been found to be 'DRC conflict free.'" The D.C. Circuit subsequently rejected the SEC's request for rehearing *en banc*.

b. Section 1504—Extractive Industries Rule

As discussed in *Digest 2013* at 357, a federal court vacated the rule implementing Section 1504 of Dodd-Frank and the SEC did not appeal that decision, determining to revise the rule. On November 13, 2015, Under Secretary Novelli wrote to Mary Jo White, Chair of the SEC, asking the Commission to "give priority to issuing as soon as possible a strong rule implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act." Under Secretary Novelli's letter is excerpted below and available at <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resource-extraction-issuers.shtml>.

* * * *

Section 1504 directly advances the United States' foreign policy interests in increasing transparency and reducing corruption in the oil, gas, and minerals sectors. Corruption and mismanagement of these resources can impede economic growth, reduce opportunities for U.S. trade and investment, divert critically needed funding from social services and other government activities, and contribute to instability and conflict. Transparency has long been widely identified as a key component of the fight against corruption in this sector. ...

I encourage the Commission to produce a strong Section 1504 rule that improves transparency by ensuring a sufficiently detailed level of information concerning payments from the extractive industry to foreign governments for the development of oil, natural gas, and minerals will be made public and accessible to civil society and investors. In the absence of this level of transparency, citizens have fewer means to hold their governments accountable, and accountability is a key component of reducing the risk of corruption.

Since the previous rule was vacated, other countries and regional organizations have moved forward with similar transparency measures, modeled on Section 1504. I applaud the EU's enactment of its Accounting and Transparency Directives and Canada's enactment of its Extractive Sector Transparency Measures Act. A Section 1504 rule compatible with these transparency measures would further advance the United States' foreign policy interests.

* * * *

4. Committee on Foreign Investments in the United States

As discussed in *Digest 2014* at 503-04, a federal appeals court remanded to the district court one of the claims brought by Ralls Corporation challenging the actions of the Committee on Foreign Investments in the United States (“CFIUS”) and the President. On November 4, 2015, the parties filed with the district court a stipulation of dismissal of the case. *Ralls Corp. v. CFIUS et al.*, No. 1:12-cv-01513-ABJ (D.D.C. 2015).

Cross References

Cyber crime, **Chapter 3.B.5.**

Crawford case regarding FATCA, **Chapter 4.B.3.**

Responsible business conduct, **Chapter 6.F.**

ILC's work on topic of most-favored-nation clauses, **Chapter 7.D.2.**

South China Sea and East China Sea, **Chapter 12.A.4.**

Freedom of navigation and overflight, **Chapter 12.A.5.**

Treaty on Transparency in Investor-State Arbitrations, **Chapter 15.A.2.**

International arbitration, **Chapter 15.C.1.**

International comity, **Chapter 15.C.3.**

Sanctions, **Chapter 16.A.**

Sanctions relating to activity in cyberspace, **Chapter 16.A.10.**

CHAPTER 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. Workshop on Maritime Boundary Delimitation Law and Practice

On August 3 and 4, 2015, with support and involvement from the U.S. Department of State, the Asia Foundation and the Centre for Strategic and International Studies (“CSIS”) co-sponsored a workshop in Indonesia that examined “Law and Best Practices for Maritime Boundary Delimitations.” The workshop allowed governmental and non-governmental participants from the United States, ASEAN states, and other states to discuss their nations’ practical experiences implementing international law as reflected in the UN Convention on the Law of the Sea (“LOS Convention” or, below, “UNCLOS”), and encouraged particular focus on Articles 74 and 83 on the delimitation of the exclusive economic zone (“EEZ”) and the continental shelf between states with opposite and adjacent coasts. Excerpts follow from the summary report of the workshop, which is also available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

Key findings and recommendations that can be drawn from the workshop include the following:

(1) All maritime boundary delimitation happens in the context of international legal rules. Most participants agreed that the law under UNCLOS regarding maritime boundary delimitation is clear, though some noted that it lacks specificity. For delimiting the EEZ and continental shelf, the key is to reach an agreement on the basis of international law in order to achieve an “equitable solution.”

(2) What constitutes an “equitable solution,” and what methodology is used to reach it, is largely up to the countries involved in negotiating a maritime boundary agreement, but there is a growing body of case law and state practice to refer to. Some contexts are relatively simple, and

some are more complex. When international courts and tribunals adjudicate maritime boundaries, they have coalesced around applying a “three-step method” that first involves drawing a provisional equidistance line between the relevant coasts, then determines whether there are any relevant circumstances that justify deviation of the line, and then checks its result with a test for disproportionality. The most important of the “relevant circumstances” is coastal geography, including issues like relative length and shape of coastlines and the effect of small islands.

(3) Many participants noted advantages of negotiation between claimants, as opposed to resorting to adjudication before a court or tribunal. In negotiation, for example, the countries have more control over the result and can generate creative options. Adjudication, however, also can have advantages, including a relatively predictable methodology, timely resolution of difficult issues, and an international imprimatur with binding effect that can help justify compromises to domestic stakeholders. Conciliation and other third-party procedures are also potentially useful options.

(4) In all the case studies, whether involving negotiation, adjudication, or other processes, the importance of making reasonable claims, grounded in international law, was emphasized. Positions that would be perceived internationally as unreasonable or without apparent legal basis are counterproductive and detrimental to national interests. Trust and credibility are critical to the successful resolution of maritime boundaries. It is also important to manage the expectation of domestic stakeholders with regard the range of feasible and legally plausible outcomes.

(5) International law also provides rules governing states’ activity pending delimitation of a maritime boundary, as reflected in UNCLOS articles 15, 74(3), and 83(3). With respect to the EEZ and continental shelf, for example, states are obligated to make every effort to enter into provisional arrangements of a practical nature and not to jeopardize or hamper the reaching of the final delimitation agreement. Provisional arrangements of a practical nature, while not a panacea, can take a variety of forms and cover a range of issues, and many useful examples of such arrangements exist.

(6) For complex government-to-government negotiations, national teams need multi-disciplinary perspectives—with input from lawyers, hydrologists, geologists, geographers, diplomats, regulators, etc. Team leaders should be well-versed in the legal and technical issues involved (including the determination of the outer limit of their nation’s maritime claim under the international law of the sea), and can be groomed through ongoing training. There is great value in countries’ providing or acquiring training to build a negotiating team and senior experts. Establishing a strong team of experts will greatly benefit a country’s interests and improve the chances of successfully concluding a maritime boundary agreement.

(7) Because of the multiplicity of skills required to successfully determine and negotiate a maritime boundary, increased capacity building, particularly in smaller, less developed nations is needed.

(8) There should be greater transparency in sharing information between countries. Such information sharing could help to bridge disagreements among countries in the region.

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There are a variety of approaches states might take in dealing with maritime boundaries, including:

- leave the boundary issue unresolved, provided that each side acts in accordance with international law with respect to the disputed area;
- attempt to negotiate a boundary agreement;
- attempt to negotiate provisional arrangements of a practical nature pending a boundary agreement (see UNCLOS articles 74(3) and 83(3));
- request the other party to agree to mediation by a third party;
- pursue conciliation under UNCLOS, part XV (articles 284 and 298);
- refer the issue to a court or tribunal, such as the ICJ, the International Tribunal on the Law of the Sea, or an arbitral tribunal, consistent with Part XV of UNCLOS, if the countries have consented to that either on an ad hoc basis or by virtue of being party to UNCLOS (to the extent the country has not opted out of such disputes under UNCLOS article 298(1)(a)(i)).

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2. 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 25th meeting of States Parties to the Law of the Sea Convention (“SPLOS”) at the United Nations, June 8-12, 2015. The U.S. Delegation intervened to make a statement about the role of SPLOS and to express its view that the International Tribunal for the Law of the Sea did not have jurisdiction under the Convention to issue a recent advisory opinion on fisheries-related rights and obligations of coastal States and flag States. For background on the March 2013 request by the Sub-Regional Fisheries Commission (“SRFC”) for an advisory opinion, see *Digest 2013* at 360-63. Relevant excerpts follow from the U.S. statement at the 25th meeting of States Parties.

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The delegation of 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 take this opportunity to thank the Chair of the Commission on the Limits of the Continental Shelf, the Secretary-General of the International Seabed Authority, and the President of the International Tribunal for the Law of the Sea for the reports and information provided by them to this meeting.

As we and others have stated in this and 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.

In that connection, we would like to comment briefly on the report from the President of the Tribunal with respect to the advisory opinion in case number 21.

At the outset, the United States wishes to commend the States that are members of the SRFC, and the SRFC itself, for their efforts to combat illegal, unreported and unregulated (IUU) fishing and acknowledge the scope of this challenge, particularly in the face of limited resources. IUU fishing undermines the goal of sustainable fisheries and deprives legitimate fishers and coastal States of the full benefits of their resources. Like many other States, the United States actively supports efforts to address problems of IUU fishing, including through the implementation of the numerous international instruments that have been negotiated and adopted in recent years for this purpose.

That being said, as we are all aware, the Seabed Disputes Chamber of ITLOS has authority to issue advisory opinions pursuant to Law of the Sea Convention, as set forth in paragraph 10 of Article 159 and Article 191. The United States has been of the view that the Law of the Sea Convention, including its Annex VI setting forth the Statute of the Tribunal, does not provide for any additional advisory opinion jurisdiction. While the Tribunal's statute does recognize that agreements other than the Law of the Sea Convention may confer certain jurisdiction upon ITLOS to render decisions relevant to those other agreements, that jurisdiction should not extend to general matters beyond the scope of those other agreements.

We were disappointed with the Tribunal's decision that as a full body it has advisory jurisdiction, as well as with its cursory justification of that decision. We believe this is the first case where an international tribunal has ever asserted advisory jurisdiction despite the fact that its constitutional agreements do not expressly provide for advisory jurisdiction. Moreover, even having decided there was advisory jurisdiction, the Tribunal in our view should have prudentially declined to exercise it—especially in this case, which concerned the provisions of the Law of the Sea Convention more than the provisions of the underlying regional fisheries agreement.

These jurisdictional concerns arise regardless of the substantive answers provided by the Tribunal in its advisory opinion. With respect to the underlying fisheries questions, the United States recognizes the challenges that developing States face in dealing with IUU fishing activities by foreign-flagged vessels in waters subject to their fisheries jurisdiction. The United States provides, and encourages other States and international organizations to provide, assistance to developing States in this regard through mechanisms such as capacity building initiatives, information sharing, and cooperative enforcement efforts. The United States has been working with the SRFC and its member States to provide targeted capacity building assistance to address IUU fishing issues, including through fisheries prosecution and enforcement and international fisheries law trainings. Notably, in July of this year, the United States, in cooperation with SRFC, will conduct an international fisheries law workshop to address many of the issues that gave rise to the request for an advisory opinion from the Tribunal.

3. Continental Shelf

On October 30, 2015, the U.S. Mission to the UN delivered two separate notes to the Commission on the Limits of the Continental Shelf (“CLCS”) regarding submissions made to the CLCS by the Russian Federation and by the Government of the Kingdom of Denmark together with the Government of Greenland. Excerpts follow, first from the U.S. note relating to the submission by the Russian Federation, and second from the U.S. note relating to the submission by the governments of Denmark and Greenland.

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The United Nations Convention on the Law of the Sea, including its Annex II, and the Rules of Procedure of the Commission, in particular Annex I thereto, provide that the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.

The United States has taken note of the reference in the Executive Summary of the partial revised submission regarding the “Agreement between the USSR and the USA of June 1, 1990, [in which] the Parties delimited the territorial sea, economic zones, and continental shelf in the Chukchi and Bering seas, as well as in the Arctic and Pacific oceans.” The United States confirms that the Agreement’s provisions, including with respect to the boundary line, have been provisionally applied by agreement of both governments since June 15, 1990, pursuant to an exchange of notes dated June 1, 1990. Pursuant to that exchange of notes, the two governments continue to abide by the terms of the 1990 Agreement.

With reference to the Executive Summary of the partial revised submission, the Government of the United States confirms that it does not object to the request made by the Russian Federation that the Commission consider the data and other material in the partial revised submission and make its recommendation on the basis of this information, to the extent that such recommendations are without prejudice to the establishment of the outer limits of the continental shelf by the United States of America, or to the delimitation of the continental shelf between the Russian Federation and the United States of America.

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The United States has taken note of the view expressed in the Executive Summary of the partial submission that the entitlement of the United States of America to continental shelf in the Arctic Ocean could overlap with the outer limits of the Northern Continental Shelf of Greenland.

With reference to the Executive Summary of the partial submission, the Government of the United States confirms that it does not object to the Kingdom of Denmark’s request that the Commission consider the data and other material in the partial submission and make its recommendation on the basis of this information, to the extent that such recommendations are without prejudice to the establishment of the outer limits of the continental shelf by the United States of America, or to any delimitation of the continental shelf between the Kingdom of Denmark and the United States of America.

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4. South China Sea and East China Sea

On May 13, 2015 Daniel Russel, Assistant Secretary of State for East Asian and Pacific Affairs, testified before the Senate Foreign Relations Committee on the subject of maritime issues in East Asia. His testimony, excerpted below and available at http://www.foreign.senate.gov/imo/media/doc/051315_REVISED_Russel_Testimony.pdf, includes discussion of the importance of international law to the maintenance of peace in the East and South China Seas.

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For nearly 70 years, the United States, along with our allies and partners, has helped to sustain in Asia a maritime regime, based on international law, which has underpinned the region's stability and remarkable economic growth. International law makes clear the legal basis on which states can legitimately assert their rights in the maritime domain or exploit marine resources. By promoting order in the seas, international law has been instrumental in safeguarding the rights and freedoms of all countries regardless of size or military strength. We have an abiding interest in freedom of navigation and overflight and other internationally lawful uses of the sea related to those freedoms in the East and South China Seas and around the world.

The East and South China Seas are important to global commerce and regional stability. Their economic and strategic significance means that the handling of territorial and maritime issues in these waters by various parties could have economic and security consequences for U.S. national interests. While disputes have existed for decades, tensions have increased considerably in the last several years. One of our concerns has been the possibility that a miscalculation or incident could touch off an escalatory cycle that would be difficult to defuse. The effects of a crisis would be felt around the world.

This gives the United States a vested interest in ensuring that territorial and maritime issues are managed peacefully. Our strategy aims to preserve space for diplomatic solutions, including by pressing all claimants to exercise restraint, maintain open channels of dialogue, lower rhetoric, behave responsibly at sea and in the air and acknowledge that the same rules and standards apply to all claimants, without regard for size or strength. We strongly oppose the threat of force or use of force or coercion by any claimant.

East China Sea

Let me begin with the situation in the East China Sea. Notwithstanding any competing sovereignty claims, Japan has administered the Senkaku Islands since the 1972 reversion of Okinawa to Japan. As such, they fall under Article V of the U.S.-Japan Security Treaty. With ships and aircraft operating in close proximity to the Senkakus, extreme caution is needed to reduce the risk of an accident or incident. We strongly discourage any actions in the East China Sea that could increase tensions and encourage the use of peaceful means and diplomacy. In this regard, we welcome the resumed high level dialogue between China and Japan and the restart of talks on crisis management mechanisms. We hope that this will translate into a more peaceful and stable environment in the East China Sea.

South China Sea

Disputes regarding sovereignty over land features and resource rights in the Asia-Pacific region, including the South China Sea, have been around for a long time. Some of these disputes have led to open conflict such as those over the Paracel Islands in 1974 and Johnson South Reef in 1988. While we have not witnessed another conflict like those in recent years, the increasing frequency of incidents in the South China Sea highlights the need for all countries to move quickly in finding peaceful, diplomatic approaches to address these disputes.

We know that this is possible. There are instances throughout the region where neighbors have peacefully resolved differences over overlapping maritime zones. Recent examples include Indonesia's and the Philippines' successful conclusion of negotiations to delimit the boundary between their respective exclusive economic zones (EEZs) and India's and Bangladesh's decision to accept the decision of an arbitral tribunal with regard to their overlapping EEZ in the Bay of Bengal. There have also been instances where claimants have agreed to shelve the disputes and find peaceful ways to manage resources in contested areas. In its approach to the East China Sea, Taiwan forged a landmark fishing agreement with Japan through cooperative dispute resolution. These examples should be emulated.

All disputes over claims in the South China Sea should be pursued, addressed, and resolved peacefully. In our view, there are several acceptable ways for claimants to handle these disputes. In the first instance, claimants should use negotiations to try and resolve the competing sovereignty claims over land features and competing claims to maritime resources. However, the fact remains that if every claimant continues to hold a position that their respective territorial and maritime claims are "indisputable," that leaves parties with very little room for compromise. In addition, mutually agreeable solutions to jointly manage or exploit marine resources are more difficult to find if not all claimants are basing their claims on the Law of the Sea.

Another reasonable option would be for claimants to submit their maritime claims to arbitration by a neutral third party to assess the validity of their claims. The Philippines, for example, is seeking clarification from an international tribunal on the validity of China's nine-dash line as a maritime claim under the United Nations Law of the Sea Convention, as well as greater clarity over what types of maritime entitlements certain geographic features in the South China Sea are actually allowed. This approach is not intended to resolve the underlying sovereignty dispute, but rather could help provide greater clarity to existing claims and open the path to other peaceful solutions.

With respect to resolving the claimants' underlying sovereignty disputes, a wide array of mutually-agreed third party dispute settlement mechanisms, including recourse to the International Court of Justice, would be available to them.

Short of actually resolving the disputes, there is another option which past Chinese leaders have called for—namely, a *modus vivendi* between the parties for an indefinite period or until a more favorable climate for negotiations could be established. In the case of the South China Sea, this could be achieved by any number of mechanisms, including, as a first step, a detailed and binding meaningful ASEAN-China Code of Conduct.

But for any claimant to advance its claims through the threat or use of force or by other forms of coercion is patently unacceptable.

In my testimony before the House Foreign Affairs Subcommittee on Asia and the Pacific in February 2014, I noted U.S. concern over an apparent pattern of behavior by China to assert its nine-dash line claim in the South China Sea, despite the objections of its neighbors and the lack of clarity of the claim itself. More than a year later, China continues to take actions that are

raising tensions and concerns throughout the region about its strategic intentions.

In particular, in the past year and a half China's massive land reclamation on and around formerly tiny features, some of which were under water, has created a number of artificial above-water features. Three of China's landfill areas are larger than the largest naturally formed island in the Spratly Islands. China is constructing facilities on these expanded outposts, including at least one air strip on Fiery Cross reef that looks to be the longest air strip in the Spratlys and capable of accommodating military aircraft. China is also undertaking land reclamation efforts in the Paracel Islands, which it currently occupies.

Under international law it is clear that no amount of dredging or construction will alter or enhance the legal strength of a nation's territorial claims. No matter how much sand you pile on a reef in the South China Sea, you can't manufacture sovereignty.

So my question is this: What does China intend to do with these outposts?

Beijing has offered multiple and sometimes contradictory explanations as to the purpose of expanding these outposts and constructing facilities, including enhancing its ability to provide disaster relief, environmental protection, search and rescue activities, meteorological and other scientific research, as well as other types of assistance to international users of the seas.

It is certainly true that other claimants have added reclaimed land, placed personnel, and conducted analogous civilian and even military activities from contested features. We have consistently called for a freeze on all such activity. But the scale of China's reclamation vastly outstrips that of any other claimant. In little more than a year, China has dredged and now occupies nearly four times the total area of the other five claimants combined.

Far from protecting the environment, reclamation has harmed ecosystems and coral reefs through intensive dredging of the sea bed. Given its military might, China also has the capability to project power from its outposts in a way that other claimants do not. And perhaps most importantly, these activities appear inconsistent with commitments under the 2002 ASEAN China Declaration on the Conduct of Parties in the South China Sea, which calls on all parties to forgo actions that "would complicate or escalate disputes."

More recently, Beijing indicated that it might utilize the islands for military purposes. The Chinese Foreign Ministry stated that the outposts would allow China to "better safeguard national territorial sovereignty and maritime rights and interests" and meet requirements for "military defense." These statements have created unease among neighbors, in light of China's overwhelming military advantage over other claimants and past incidents with other claimants. As the statement last week from the ASEAN Leaders Summit in Malaysia made clear, land reclamation in the South China Sea is eroding trust in the region and threatens to undermine peace, security, and stability in the South China Sea.

Apart from reclamation, the ambiguity and potential breadth of China's nine-dash line maritime claim also fuels anxiety in Southeast Asia. It is important that all claimants clarify their maritime claims on the basis of international law, as reflected in the United Nations Convention on the Law of the Sea. On April 29, Taiwan added its voice to the regional chorus by calling on "countries in the region to respect the principles and spirit of all relevant international law, including the Charter of the United Nations, and the United Nations Convention on the Law of the Sea."

The ASEAN claimant states have indicated that their South China Sea maritime claims derive from land features. Beijing, however, has yet to provide the international community with such a clarification of how its claims comport with international law. Removing ambiguity

goes a long way to reducing tensions and risks.

Simple common sense dictates that tensions and risks would also be reduced if all claimants commit to halt reclamation activities and negotiate the acceptable uses of reclaimed features as part of a regional Code of Conduct. Talks on a regional Code of Conduct over several years have been inconclusive, but we share the growing view in the region that a binding Code should be completed in time for the 2015 East Asia Summit in Malaysia.

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I would like to make two points regarding the Law of the Sea Convention. First, with respect to arbitration, although China has chosen not to participate in the case brought by the Philippines, the Law of the Sea Convention makes clear that “the absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.” It is equally clear under the Convention that a decision by the tribunal in the case will be legally binding on both China and the Philippines. The international community expects both the Philippines and China to respect the ruling, regardless of outcome.

Secondly, I respectfully urge the Senate to take up U.S. accession of the Law of the Sea Convention. Accession has been supported by every Republican and Democratic administration since it was transmitted to the Senate in 1994. It is supported by the U.S. military, by industry, environmental groups, and other stakeholders. I speak in the interests of U.S. foreign policy in the South China Sea in requesting Senate action to provide advice and consent to accede to the Convention. Doing so will help safeguard U.S. national security interests and provide additional credibility to U.S. efforts to hold other countries’ accountable to their obligations under this vitally important treaty.

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...For the President and Secretary of State on down, maritime issues remain at the top of this administration’s agenda with Beijing. We consistently raise our concerns directly with China’s leadership and urge China to manage and resolve differences with its neighbors peacefully and in accordance with international law. We also underscore that the United States will not hesitate to defend our national security interests and to honor our commitments to allies and partners in the Asia-Pacific.

Fundamentally, these maritime security issues are about rules, not rocks. The question is whether countries work to uphold international legal rules and standards, or whether they flout them. It’s about whether countries work together with others to uphold peace and stability, or use coercion and intimidation to secure their interests.

The peaceful management and resolution of disputes in the South China Sea is an issue of immense importance to the United States, the Asia-Pacific region, and the world. This is a key strategic challenge in the region. And I want to reaffirm here today that we will continue to champion respect for international law, freedom of navigation and overflight and other internationally lawful uses of the seas related to those freedoms, unimpeded lawful commerce, and the peaceful resolution of disputes.

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On August 6, 2015, Secretary Kerry delivered remarks at the meeting of the ASEAN Regional Forum (“ARF”) in Kuala Lumpur, Malaysia on maritime security and international threats. First, he discussed the comprehensive plan with Iran. Then he turned to the topic of maritime security in the South China Sea. Excerpts follow from that second portion of his address. The remarks in their entirety are available at <http://www.state.gov/secretary/remarks/2015/08/245758.htm>.

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Now, let me turn to an urgent regional priority the tensions caused by territorial and maritime disputes. With great respect to my friend and colleague Foreign Minister Wang, the United States and others have expressed concern to China over the pace and scope of its land reclamation efforts. And the construction of facilities for military purposes only raises tensions and the destabilizing risk of militarization by other claimant states.

Freedom of navigation and overflight are among the essential pillars of international maritime law. Despite assurances that these freedoms will be respected, we have seen warnings issued and restrictions attempted in recent months. Let me be clear: The United States will not accept restrictions on freedom of navigation and overflight, or other lawful uses of the sea. These are intrinsic rights that we all share. . . . The principle is clear: The rights of all nations must be respected.

To that end, I have urged all claimants to make a joint commitment to halt further land reclamation and construction of new facilities or militarization on disputed features. Such steps would lower tensions and create diplomatic space for a meaningful Code of Conduct to emerge by the time our leaders meet here in November.

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On July 21, 2015, Assistant Secretary Russel delivered remarks at the Fifth Annual South China Sea Conference at the Center for Strategic and International Studies in Washington, D.C. Assistant Secretary Russel’s remarks are excerpted below and available at <http://www.state.gov/p/eap/rls/rm/2015/07/245142.htm>.

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There are many types of investment the world, and Asia, needs in order to grow—investment in people, first and foremost; investment in business; in physical infrastructure, and just as important; investment in “cooperative capital”—the international law and order infrastructure that facilitates the interactions between countries, that advances regional economic integration, and helps states peacefully manage and settle disputes.

The U.S. makes balanced investments in all of these areas.

The last one, the international rules-based system, has been the ‘essential but underappreciated underpinning’ of global growth over the last 70 years. That’s especially true in

Asia, where many countries have grown—and continue to grow—their economies through international trade, especially trade with the U.S.

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But unfortunately, the situation in the South China Sea does not fit this cooperative pattern.

Now, the U.S. is not a claimant. As I've said here at CSIS, these maritime and territorial disputes are not intrinsically a U.S.-China issue. The issue is between China and its neighbors and—ultimately—it's an issue of what kind of power China will become. But for a variety of reasons, the competing claims and problematic behavior in the South China Sea have emerged as a serious area of friction in the U.S.-China relationship.

Let's take a step back and recall, as I'm sure you discussed this morning, that there is a history of competing assertions of sovereignty and jurisdiction in the South China Sea, and even violent conflicts in 1974 and 1988.

There are no angels here. ...

In [2002], all the claimants (and the ASEAN states) signed a Declaration of Conduct. In it, and on other occasions, they have committed “to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from ... inhabiting the presently uninhabited... features and to handle their differences in a constructive manner”.

In the Declaration of Conduct, they also committed to negotiate a Code of Conduct that would lay out and lock in responsible behavior. But in the ensuing 13 years, work on the Code has stalled, and the Declaration has not been sufficient to prevent confrontations or to help claimants resolve these disputes peacefully.

Recently, the level of concern in the region has escalated as the scale and speed of China's reclamation work has become public. The Chairman's statement at the ASEAN leaders' summit in April was unusually blunt, speaking of “serious concerns” about “land reclamation being undertaken in the South China Sea, which has eroded trust and confidence and may undermine peace, security and stability....”

While China's statement on June 16 that it would stop reclamation work “soon” was presumably intended to reassure, its effect was in fact alarming since the statement went on to warn that China would construct military facilities on these reclaimed outposts.

So we are pushing the parties to revive the spirit of cooperation embodied in the 2002 Declaration of Conduct.

We see a broad consensus within ASEAN on a path forward to reduce tensions and promote peaceful handling of these disputes. And we support ASEAN's efforts to expeditiously conclude an effective, rigorous Code of Conduct that builds on the Declaration by translating its cooperative spirit into specific “do's and don'ts.”

But to make this happen, the parties need to create room for diplomacy.

In the famous words of Rich Armitage's Dictum Number 1, “when you find yourself in a hole—stop digging.” That is the advice we are giving to all the claimants: lower the temperature and create breathing room by: stopping land reclamation on South China Sea features; stopping construction of new facilities; and stopping militarization of existing facilities.

These are steps the parties could commit to immediately; steps that would cost them nothing; steps that would significantly reduce risks; steps that would open the door to eventual resolution of the disputes.

Secretary Kerry has made this point to Chinese leaders and to the other claimants, and will be meeting with his counterparts early next month in Malaysia at the ASEAN Regional Forum, or ARF, to push for progress on this important priority.

Now, steps to exercise restraint through a moratorium and a Code of Conduct will create diplomatic space and help keep the peace, but they won't address the question of maritime boundaries or sovereignty over land features.

So what's the way forward?

When it comes to competing claims, two of the main peaceful paths available to claimants are negotiations and arbitration.

Countries across the region in fact have resolved maritime and territorial disputes peacefully and cooperatively, whether through direct negotiations or through third-party dispute settlement mechanisms.

Just a few examples: Indonesia and the Philippines recently agreed on their maritime boundary; Malaysia and Singapore used international court and tribunal proceedings to resolve disputes concerning the Singapore Strait; and the International Tribunal for the Law of the Sea delimited the maritime boundary between Bangladesh and Burma.

A common thread runs through the maritime boundary disputes that have been resolved peacefully: the parties asserted maritime claims based on land features, and were prepared to resolve those disputes in accordance with international law.

This is why we've consistently called on all claimants to clarify the scope of their claims in the South China Sea, in accordance with international law as reflected in the 1982 Law of the Sea Convention. Doing so would narrow the differences and offer the basis for negotiations and cooperative solutions.

Regrettably, I don't know anyone in the region who believes that a negotiated settlement between China and other claimants is attainable in the current atmosphere.

And the multiple competing claims in some parts of the South China Sea make negotiations that much more difficult.

And then there is the absolutist political position taken by some claimants who insist that their own claims are "indisputable" and represent territory—however distant from their shores—that was "entrusted to them by ancestors" and who vow never to relinquish "one inch."

What about arbitration? As this audience knows, there currently is an arbitration case pending under the Law of the Sea Convention between the Philippines and China.

At the heart of the case is the question of the so-called "Nine Dash Line" and whether that has a legal basis under the international law of the sea. It also asks what maritime entitlements, if any, are generated by features that China occupies? In other words, regardless of whose jurisdiction it may fall under, would Mischief Reef, for example, be entitled to a 12 nautical mile territorial sea? A 200 nm exclusive economic zone? A continental shelf?

Now, it's important to note that the Tribunal is not being asked—and is not authorized to rule—on the question of sovereignty over disputed land features. Everyone recognizes that the sovereignty issue is beyond the Tribunal's jurisdiction. Claimants would need to agree to bring that sort of sovereignty dispute before a court or tribunal, typically the ICJ.

But under the Law of the Sea Convention, the Tribunal is authorized to first determine whether it has jurisdiction under the Convention over any of the Philippines' claims in the case and, if it does, whether the Philippines' arguments have merit.

The United States, of course, is not a party to this arbitration and does not take a position on the merits of the case. But when they became parties to the Convention, both the Philippines and China agreed to its compulsory dispute settlement regime.

Under this regime, the decision of the arbitral tribunal is legally binding on the parties to the dispute. It's a treaty. In keeping with the rule of law, both the Philippines and China are obligated to abide by whatever decision may be rendered in the case, whether they like it or not.

Now China has argued that the tribunal lacks jurisdiction, and the tribunal has specifically considered this issue in recent hearings in The Hague, looking very carefully at a position paper published by China. But if the Tribunal concludes that it in fact has jurisdiction in this case, it will proceed to the merits, including potentially the question of the legality of China's "Nine-Dash Line."

Should it then rule that the "Nine-Dash Line" is not consistent with the Law of the Sea Convention, and particularly if the Tribunal ruled that the features cited in the case do not generate EEZ or continental shelf entitlements, the scope of the overlapping maritime claims—and hopefully the points of friction—would be significantly reduced.

But it's also important to recognize that even in this outcome, important sovereignty and boundary issues would remain unresolved.

This is as good a time as any to acknowledge (as China has often pointed out) that the United States has not acceded to the Law of the Sea Convention, although accession has been supported by every Republican and Democratic administration since the Convention was signed and sent to the Senate in 1994. It is supported by the U.S. military, by industry, environmental groups, and other stakeholders.

For the United States to secure the benefits of accession, the Senate has to provide its advice and consent, as I hope it ultimately will.

But even as we encourage the parties to work for long-term solutions, we are obligated to protect U.S. interests. Let me take a moment to examine what some of those interests are:

- Protecting unimpeded freedom of navigation and overflight and other lawful uses of the sea by all, not just the U.S. Navy;
- Honoring our alliance and security commitments, and retaining the full confidence of our partners and the region in the United States;
- Aiding the development of effective regional institutions, including a unified ASEAN;
- Promoting responsible marine environmental practices;
- Fostering China's peaceful rise in a manner that promotes economic growth and regional stability, including through consistency with international law and standards.
- And more generally, an international order based on compliance with international law and the peaceful of disputes without the threat or use of force.

As a practical matter, in addition to our support for principles such as the rule of law, we are taking steps to help all countries in the region cooperate on maritime issues. For example, we're investing in the maritime domain awareness capabilities of coastal states in the region.

This allows countries to protect safety at sea and respond to threats such as piracy, marine pollution and illegal trafficking. Maritime awareness also advances transparency, in line with our

call to all claimants to be more open and transparent about their capabilities, actions, and intentions at sea.

The U.S. military's freedom of navigation operations are another element of a global policy to promote compliance with the international law of the sea.

Our goal is to ensure that not only can the U.S. Navy or Air Force exercise their navigational rights and freedoms, but ships and planes from even the smallest countries are also able to enjoy those rights without risk. The principles underlying unimpeded lawful commerce apply to vessels from countries around the globe.

And under international law, all countries—not just the United States—enjoy the rights, freedoms, and lawful uses of the sea that our diplomacy and the U.S. military's freedom of navigation operations help protect.

For us, it's not about the rocks and shoals in the South China Sea or the resources in and under it, it's about rules and it's about the kind of neighborhood we all want to live in. So we will continue to defend the rules, and encourage others to do so as well. We will also encourage all countries to apply principles of good neighborliness to avoid dangerous confrontations.

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As discussed in *Digest 2014* at 520 and mentioned in Assistant Secretary Russel's remarks excerpted above, the Republic of the Philippines is pursuing arbitration regarding China's maritime claims and actions in the South China Sea. At the State Department's daily press briefing on October 29, 2015, the United States reiterated that it does not take a position in the arbitration, but supports the peaceful resolution of disputes through international legal mechanisms such as arbitration. See daily press briefing, available at <http://www.state.gov/r/pa/prs/dpb/2015/10/248963.htm#CHINA>.

Specifically, in response to the decision on jurisdiction by the arbitral tribunal, the Department spokesperson said:

[W]e take note of today's unanimous decision by the arbitral tribunal in the case brought by the Philippines against China under the 1982 Law of the Sea Convention. Although we are in the process of reviewing this lengthy decision by the tribunal, we note that it appears that arbitration will proceed to be considered on its merits.

... I would just add that in accordance with the terms of the Law of the Sea Convention, the decision of the tribunal will be legally binding on both the Philippines and China.

On November 4, 2015, Assistant Secretary Russel again spoke on the South China Sea as part of an update on U.S.-Asia policy at the Asia Society in New York. His remarks are excerpted below and available at <http://www.state.gov/p/eap/rls/rm/2015/11/249201.htm>.

* * * *

The South China Sea is in the headlines. China, Vietnam, the Philippines, Malaysia, Brunei and Taiwan all contest the sovereignty of many of the land features there.

Tensions are running high. Nationalism is one important factor in the mix—no country wants to budge. But there are other factors as well, since sovereignty over islands generates legal entitlements over the adjacent seas. The South China Sea is a rich fishing ground that also holds potentially significant hydrocarbon reserves.

Now, the U.S. doesn't have a claim, and we don't endorse any one sovereignty claim over another. We simply insist that all claims, territorial and maritime, be made based on international law, and that differences be addressed peacefully through diplomatic or legal means. This means no violence, no coercion, no threats.

We also insist that behavior by all countries respect unimpeded lawful commerce and be consistent with international law, including long-standing, universal principles such as freedom of navigation and the peaceful resolution of disputes.

This is not an abstraction for us: first of all, these are vital shipping lanes, carrying over half the world's merchant shipping tonnage.

Second, Southeast Asia is an important driver of growth, and a crisis there would seriously harm the fragile global economy.

Third, some of the affected countries are U.S. treaty allies and close friends.

But there's an over-arching reason why we care—and that's because we are committed to a stable, peaceful system of international rules that protects the rights of all countries, big or small. This is a point that President Obama has made again and again in his meetings with Chinese and other leaders.

But China, in 2014, suddenly launched a massive building spree in the contested waters—devastating the coral reefs, alarming the neighbors, infuriating the other claimants, and raising real concerns about China's intentions. And in fact, the Chinese military has at times warned U.S. and other ships and planes in the region that they should not enter China's so-called "security zone." So the recent transit of a U.S. Navy ship near several of the disputed features serves as a reminder that international law applies to the South China Sea just like everywhere else.

Now, during his visit, President Xi Jinping took a major step forward at the press conference in the Rose Garden with President Obama, when he stated unequivocally: "China has no intention of militarizing its islands in the Spratlys."

If China follows through on this pledge, we expect the other claimants to follow suit. And even though none of them have even a fraction of China's military muscle or land reclamation, it's important that everyone play by the same rules.

Another major development soon after the visit was the decision, by the arbitral tribunal under the Law of the Sea Convention, that it has jurisdiction over a case brought by the Philippines evaluating China's maritime actions and claims in the South China Sea, including the so-called "9-dash line."

This case won't address the question of sovereignty (i.e. who owns which island), but by applying the international law of the sea, it has the potential to resolve some important differences over the rights and entitlements of the claimants to the South China Sea maritime space and its resources.

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5. Freedoms of Navigation and Overflight

a. *Cuba*

On March 20, 2015, the Cuban Interests Section of the Embassy of Switzerland in Cuba delivered a diplomatic note on behalf of the U.S. Department of State regarding the proposed conduct of marine scientific research by the National Oceanic and Atmospheric Administration (“NOAA”) vessel *Nancy Foster*. The diplomatic note requested Cuba’s consent to the conduct of research by the *Nancy Foster* in Cuban waters, with participation by Cuban investigators, during April through June 2015. The following excerpt from the note clarifies that Cuba could not require notification or its consent to the extent a ship was exercising the right of innocent passage rather than conducting marine scientific research.

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To the extent Decree 189 of the Council of Ministers of the Republic of Cuba and Diplomatic Note RS 324 address any ship in innocent passage and seek to condition the exercise of this right on the giving of prior notification to, or the receipt of prior permission from the coastal State, they are contrary to international law. As part of its global freedom of navigation policy, the United States protests excessive maritime claims of countries around the world. The U.S. government’s objections to Decree 189 should not be viewed as relating only to Cuba; this approach is principled and longstanding, and it applies worldwide.

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b. *Nicaragua*

On January 15, 2015, the United States delivered a note in response to a September 13, 2014 note from Nicaragua regarding military surveys being conducted by the United States in Nicaragua’s claimed exclusive economic zone (“EEZ”). Nicaragua expressed disagreement with the U.S. view that conducting military surveys in the EEZ is consistent with international law as reflected in the Law of the Sea Convention. The January 15, 2015 U.S. note follows.

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The United States notes the views expressed by the Republic of Nicaragua that it disagrees with some of the United States’ views on the conduct of military survey operations in the exclusive economic zone. The United States reaffirms that international law as reflected in the Law of the Sea Convention provides that in exercising their rights and performing their duties under the law

of the sea, States shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations. The United States also reaffirms that States exercising their rights and performing their duties under the law of the sea in the exclusive economic zone shall have due regard to the rights and duties of coastal States. But as the United States has consistently stated, these requirements do not prohibit or require coastal State consent for military surveys in an exclusive economic zone.

The United States reiterates that USNS Pathfinder's activities are separate and distinct from "marine scientific research" governed by the provisions of Part XIII of the Law of the Sea Convention. The United States notes Nicaragua's view that any activity carried out for the purposes of collecting data on the marine environment, irrespective of the purpose for collecting the data, must be authorized and regulated by Nicaragua in light of its sovereign rights. The United States respectfully disagrees with this view, and notes that military surveys do not concern a coastal State's sovereign rights regarding the economic exploration and exploitation of resources in the exclusive economic zone.

Additionally, international law as reflected in the Law of the Sea Convention distinguishes between research and survey activities. The United States notes that Article 19(2)(j), for example, includes "research or survey activities" as acts that are inconsistent with innocent passage in the territorial sea. Article 21(1)(g) recognizes coastal State authority to adopt laws and regulations relating to innocent passage through the territorial sea in respect of "marine scientific research and hydrographic surveys." Similarly, Article 40, entitled "Research and Survey Activities," provides that in transit passage through straits used for international navigation, foreign ships, including "marine scientific research and hydrographic survey ships," may not carry out "any research or survey activities" without the prior authorization of the States bordering straits. Article 54 reflects that the same rule, and, thus, the same distinction between research and survey activities, applies to ships engaged in archipelagic sea lanes passage. While Part XIII of the Law of the Sea Convention regulates "marine scientific research" and requires coastal State consent for "marine scientific research" in the exclusive economic zone, it does not refer to "survey" activities at all.

Thus, while the Law of the Sea Convention addresses survey activities during passage in the territorial sea, international straits and archipelagic sea lanes, it does not place constraints on survey activities in the exclusive economic zone in the way that research activities are limited. Rather, the conduct of military surveys in the exclusive economic zone is an exercise of the freedoms of navigation and other internationally lawful uses of the sea related to those freedoms, which international law as reflected in Article 58 of the Law of the Sea Convention guarantees to all States. As reflected in Article 56 of the Law of the Sea Convention, coastal States must show due regard for other States' exercise of these rights in the exclusive economic zone.

The United States notes further Nicaragua's observations in the context of recalling the decision by the International Court of Justice of November 19, 2012, which is binding on the States Parties to that decision, and respects Nicaragua's views. The positions reflected in this note apply with respect to any coastal State. The United States has long followed a freedom of navigation policy that challenges, both diplomatically and operationally, maritime claims asserted by coastal States throughout the world if such claims are inconsistent with the law of the sea. The activities of USNS Pathfinder and the U.S. diplomatic notes regarding this matter are consistent with that long-standing U.S. freedom of navigation policy.

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c. *Russia—Northern Sea Route*

On May 29, 2015, the United States delivered a diplomatic note to the Russian Federation regarding its Northern Sea Route (“NSR”) regulatory scheme, which had been subject to legislative changes in 2012 and new regulations issued in 2013. The note presents U.S. objections to aspects of the scheme that are inconsistent with international law, including: requirements to obtain Russia’s permission to enter and transit the exclusive economic zone and territorial sea; persistent characterization of international straits that form part of the NSR as internal waters; and the lack of any express exemption for sovereign immune vessels. The note also encourages Russia to submit relevant aspects of the scheme to the International Maritime Organization (“IMO”) for consideration and adoption. The text of the diplomatic note to the Russian Federation follows.

* * * *

The Government of the United States of America notes the Government of the Russian Federation has adopted legislation and regulations for the purpose of regulating maritime traffic through the area described as the Northern Sea Route. The United States notes its support for the navigational safety and environmental protection objectives of this Northern Sea Route scheme and commends the Russian Federation interest in promoting the safety of navigation and protection of the marine environment in the Arctic. As conditions in the Arctic continue to change and the volume of shipping traffic increases, Arctic coastal States need to consider ways to best protect and preserve this sensitive region.

The United States advises, however, of its concern that the Northern Sea Route scheme is inconsistent with important law of the sea principles related to navigation rights and freedoms and recommends that the Russian Federation submit its Northern Sea Route scheme to the International Maritime Organization (IMO) for adoption.

As a preliminary matter, to the extent that the Northern Sea Route scheme continues the view of the Russian Federation that certain straits used for international navigation in the Northern Sea Route are internal waters of the Russian Federation, the United States renews its previous objections to that characterization. Also, the United States notes that the legislation characterizes the Northern Sea Route as a historically established national transport communication route. The United States does not consider such a term or concept to be established under international law.

The United States also requests clarification from the Russian Federation about the scope of the Northern Sea Route. The eastern limit of the Route is described as the parallel to Cape Dezhnev and the Bering Strait; the United States seeks clarification whether the Route extends into and through the Bering Strait. Also, the new laws and regulations appear to limit the northern extent of the Route to the outer limits of what the Russian Federation claims as its

exclusive economic zone. The United States requests confirmation that the Route does not extend beyond these northern limits into areas of high seas.

Among our concerns about the Northern Sea Route scheme, it purports to require Russian Federation permission for foreign-flagged vessels to enter and transit areas that are within Russia's claimed exclusive economic zone and territorial sea and only on prior notification to Russia through an application for a transit permit and certification of adequate insurance. In the view of the United States, this is not consistent with freedom of navigation within the exclusive economic zone, the right of innocent passage in the territorial sea, and the right of transit passage through straits used for international navigation.

The United States understands that the Northern Sea Route scheme is based on Article 234 of the Law of the Sea Convention (the Convention). While Article 234 allows coastal States to adopt and enforce certain laws and regulations in ice-covered areas within the limits of their exclusive economic zones, these laws and regulations must be for the prevention, reduction and control of marine pollution from vessels, must be non-discriminatory, and must have due regard to navigation. A unilateral, coastal State requirement for prior notification and permission to transit these areas does not meet the condition set forth in Article 234 of having due regard to navigation. The United States does not consider that Article 234 justifies a coastal State requirement for prior notification or permission to exercise navigation rights and freedoms.

Moreover, the United States questions the scope of the Northern Sea Route area and whether that entire area is ice-covered for most of the year, particularly in the western portion of the Route, in order for Article 234 to serve as the international legal basis for the Northern Sea Route scheme. As conditions in the Arctic continue to change, the use of Article 234 as the basis for the scheme may grow progressively even more untenable.

Additionally, the Northern Sea Route scheme does not seem to provide an express exemption for sovereign immune vessels. As the Russian Federation is aware, Article 236 of the Convention provides that the provisions of the Convention regarding the protection and preservation of the marine environment (including Article 234) do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. The United States requests that the Russian Federation confirm that the Northern Sea Route scheme shall not apply to sovereign immune vessels.

The Northern Sea Route scheme contains provisions for the use of Russian icebreakers and ice pilots. It is unclear whether those provisions are mandatory or if there is discretion on the part of the flag State regarding the use of these services. The United States requests that the Russian Federation clarify these provisions on Russian icebreakers and ice pilots. If the provisions are mandatory rather than optional, the United States does not believe that Article 234 provides authority for a coastal State to establish such requirements. Additionally, it does not seem that the Northern Sea Route scheme allows for the use of a foreign-flagged icebreaker. If this is so, then the provision would appear to be inconsistent with the non-discrimination aspects of Article 234. Also, the charges that are levied for icebreakers and ice pilots may not be supportable under Article 234 and, in any event, cause concern about their relation to the cost of services actually provided. Moreover, the provisions in the scheme to use routes prescribed by the Northern Sea Route Administration, use icebreakers and ice pilots, and abide by other related measures, particularly in straits used for international navigation, are measures that must be approved and adopted by the IMO.

In the view of the United States, the relevant provisions of the Northern Sea Route scheme should be proposed to and adopted by the IMO to provide a solid legal foundation and broad international acceptance. This could be done without prejudice to the Russian Federation's views or those of the United States about Article 234 and whether IMO adoption is necessary from a legal perspective. The United States would welcome the opportunity to work with the Russian Federation and with others at the IMO to favorably consider and adopt an appropriate proposal.

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d. Spratly Islands

On December 21, 2015, U.S. Secretary of Defense Ash Carter sent a letter to Senator John McCain in response to a November 9, 2015 letter requesting further information about freedom of navigation operations ("FONOPs") conducted in the Spratly Islands. Excerpts follow from Secretary Carter's letter to Senator McCain. The letter is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

As you know, our Freedom of Navigation Operations (FONOPs) are conducted in full accordance with international law. They are one aspect of our broader strategy to support an open and inclusive international security architecture founded on international law and standards. This system has benefited all nations in the Asia-Pacific for decades and will be critical to maintaining regional stability and prosperity for the foreseeable future.

On October 27, 2015, the U.S. Navy destroyer *USS Lassen* (DDG 82) conducted a FONOP in the South China Sea by transiting inside 12 nautical miles of five maritime features in the Spratly Islands—Subi Reef, Northeast Cay, Southwest Cay, South Reef, and Sandy Cay—which are claimed by China, Taiwan, Vietnam, and the Philippines. No claimants were notified prior to the transit, which is consistent with our normal processes and with international law.

The operation was part of an ongoing practice of FONOPs that we have conducted around the world and will continue to conduct in the future. It was the seventh FONOP we have conducted in the South China Sea since 2011 and one of many that we have conducted around the world in the past year. In that sense, it was a normal and routine operation.

The United States does not take a position on which nation has the superior sovereignty claims over each land feature in the Spratly Islands. Thus, the operation did not challenge any country's claims of sovereignty over land features, as that is not the purpose or function of a FONOP. Rather, this FONOP challenged attempts by claimants to restrict navigation rights and freedoms around features they claim, including policies by some claimants requiring prior permission or notification of transits within territorial seas. Such restrictions contravene the rights and freedoms afforded all countries under international law as reflected in the Law of the Sea (LOS) Convention, and the FONOP demonstrated that we will continue to fly, sail, and operate wherever international law allows.

The FONOP involved a continuous and expeditious transit that is consistent with both the right of innocent passage, which only applies in a territorial sea, and with the high seas freedom of navigation that applies beyond any territorial sea. With respect to Subi Reef, the claimants have not clarified whether they believe a territorial sea surrounds it, but one thing is clear: under the law of the sea, China’s land reclamation cannot create a legal entitlement to a territorial sea, and does not change our legal ability to navigate near it in this manner. We believe that Subi Reef, before China turned it into an artificial island, was a low-tide elevation and that it therefore cannot generate its own entitlement to a territorial sea. However, if it is located within 12 nautical miles of another geographic feature that is entitled to a territorial sea—as might be the case with Sandy Cay—then the low-water line on Subi Reef could be used as the baseline for measuring Sandy Cay’s territorial sea. In other words, in those circumstances, Subi Reef could be surrounded by a 12-nautical mile-territorial sea despite being submerged at high tide in its natural state. Given the factual uncertainty, we conducted the FONOP in a manner that is lawful under all possible scenarios to preserve U.S. options should the factual ambiguities be resolved, disputes settled, and clarity on maritime claims reached.

The specific excessive maritime claims challenged in this case are less important than the need to demonstrate that countries cannot restrict navigational rights and freedoms around islands and reclaimed features contrary to international law as reflected in the LOS Convention. We will continue to demonstrate as much by exercising the rights, freedoms and lawful uses of the seas all around the world, and the South China Sea will be no exception.

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6. Maritime Security and Law Enforcement

a. Ghana

The United States and Ghana entered into another temporary maritime law enforcement or “shiprider” agreement in 2015 to support exercises conducted pursuant to the African Maritime Law Enforcement Partnership (“AMLEP”). See *Digest 2014* at 546 regarding the temporary agreement entered into in 2014. The 2015 agreement was effected via an exchange of notes, which concluded on February 2, 2015.

b. Vanuatu

The United States and Vanuatu entered into a temporary agreement concerning cooperation to suppress illicit transnational maritime activity, effective from November 2, 2015 (when it was signed) through November 30, 2015.

c. G7 Foreign Ministers Declaration on Maritime Security

On April 15, 2015, the Foreign Ministers of the G7 countries issued a Declaration on Maritime Security at their meeting in Lubeck, Germany. The Declaration is excerpted below and available at http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Meldungen/2015/150415_G7_Maritime_Security.html?n=479796.

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We, the Foreign Ministers of Canada, France, Germany, Italy, Japan, the United Kingdom, the United States of America and the High Representative of the European Union, are convinced that we can comprehensively counter threats to maritime security only if we follow a cooperative, rules-based, cross-sector approach and coordinate our actions nationally, regionally and globally. We are persuaded that lasting maritime security can only be achieved if we join forces in order to strengthen maritime governance in pursuit of rules-based, sustainable use of seas and oceans.

We reiterate our commitment to the freedoms of navigation and overflight and other internationally lawful uses of the high seas and the exclusive economic zones as well as to the related rights and freedoms in other maritime zones, including the rights of innocent passage, transit passage and archipelagic sea lanes passage consistent with international law. We further reiterate our commitment to unimpeded lawful commerce, the safety and security of seafarers and passengers, and the conservation and sustainable use of natural and marine resources including marine biodiversity.

We are committed to maintaining a maritime order based upon the principles of international law, in particular as reflected in the United Nations Convention on the Law of the Sea (UNCLOS). We continue to observe the situation in the East and South China Seas and are concerned by any unilateral actions, such as large-scale land reclamation, which change the status quo and increase tensions. We strongly oppose any attempt to assert territorial or maritime claims through the use of intimidation, coercion or force. We call on all states to pursue the peaceful management or settlement of maritime disputes in accordance with international law, including through internationally recognized legal dispute settlement mechanisms, and to fully implement any decisions rendered by the relevant courts and tribunals which are binding on them. We underline the importance of coastal states refraining from unilateral actions that cause permanent physical change to the marine environment in areas pending final delimitation.

We firmly condemn acts of piracy and armed robbery at sea, transnational organized crime and terrorism in the maritime domain, contraband trade, trafficking of human beings, smuggling of migrants, trafficking of weapons and narcotics, illegal, unreported and unregulated (IUU) fishing, trafficking in protected species of wild fauna and flora, and other illegal maritime activities. These constitute serious and intolerable threats to the life and wellbeing of passengers and crews on board ships, to marine biodiversity and food security, to the rule of law and to freedom of navigation and lawful trade and transport. They pose major risks to the stability and development of coastal states in areas prone to piracy and other forms of maritime crime and maritime terrorist activity. We oppose the deliberate obstruction of sea lanes aimed at

interrupting trade, traffic and tourism, as well as threats against critical sea-borne infrastructure and against energy supply security in the maritime domain.

The development of standards for safe navigation, protection of the marine environment, communication, and operation of maritime shipping has long been an area of international cooperation. We call upon governments, port authorities, shipping companies, ship owners, operators, shipmasters and crews to apply and implement existing law and guidance in order to increase maritime safety and security, such as the International Convention for the Safety of Life at Sea (SOLAS), the International Ship and Port Facility Security Code (ISPS), the International Convention for the Prevention of Pollution from Ships (MARPOL) and the International Maritime Organization's (IMO) Guidance to ship owners, ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships. We call on ship owners, ship operators, shipmasters and crews to report any criminal act at sea immediately in order to prevent future attacks and to improve data collection.

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We support the establishment of functioning regional mechanisms of cooperation on enhanced maritime security. National and regional ownership and responsibility are key to improving maritime security in critical areas. We particularly underline the importance of regional agreements and instruments such as the Asia-Pacific Code for Unplanned Encounters at Sea, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden ("Djibouti Code of Conduct") and the Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships and Illicit Maritime Activity in West and Central Africa ("Yaoundé Code of Conduct"). We call for the acceleration of work on a comprehensive Code of Conduct in the South China Sea and, in the interim, emphasize our support for the 2002 ASEAN Declaration on the Conduct of Parties in the South China Sea. We highlight the constructive role of practical confidence-building measures, such as the establishment of direct links of communication in cases of crisis and efforts to establish guiding principles and rules to govern activities, such as the ASEAN – China talks on a Code of Conduct on the South China Sea. We encourage States to do their utmost to implement their commitments, and we intend to assist them within the scope of our abilities and regional priorities. We furthermore welcome initiatives on maritime security in relevant fora, such as the East Asia Summit, the ASEAN Regional Forum, the EU-ASEAN cooperation, and regionally based Coast Guard Forums.

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d. *Spanish interdiction of a U.S.-flagged sailing vessel*

On May 11, 2015, the United States government, responding to a request from the Kingdom of Spain through their respective Competent National Authorities under Article 17 of the 1988 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, informed Spanish authorities that the United States granted permission to the Kingdom of Spain "to stop, board, and search [a particular U.S.-flagged sailing vessel] provided that such action is taken seaward of the territorial sea of

any State.” The Kingdom of Spain had requested permission on May 8, 2015 to board and inspect the vessel based on information obtained by Spain’s Center of Intelligence against Organized Crime (“CITCO”) that the vessel was trafficking drugs. On May 14, 2015, CITCO conveyed the results of its inspection, notifying the United States of the seizure of drugs and the detention of three individuals aboard the vessel.

On May 14, 2015, the U.S. Competent Authority responded to Spain and offered to “consider a request made by diplomatic note from the Kingdom of Spain for the United States to waive primary jurisdiction over the vessel, its cargo, and the persons aboard.” The May 14, 2015 U.S. note reiterated that the United States had not authorized taking the vessel to a Spanish port and urged that “the Kingdom of Spain keep the vessel seaward of the territorial sea of any State.”

In response to communications from Spain claiming that it was “jurisdictionally competent to prosecute” the vessel’s crew and was taking it to a Spanish port, the United States delivered a diplomatic note through its embassy in Spain on May 26, 2015, emphasizing Spain’s lack of authority without further permission to exercise jurisdiction over the vessel and its crew. The U.S. note states:

Consistent with international law as reflected in Article 92 of the United Nations Convention on the Law of the Sea, the United States exercises exclusive jurisdiction over United States-flagged vessels operating on the high seas.

...Unless the United States waives jurisdiction over the [sailing vessel in question] for the purpose of prosecuting the crew of this vessel, any prosecution of the crew is inconsistent with international law and interferes with the exclusive jurisdiction of the United States over the [vessel].

The earlier permission granted by the United States to the Government of the Kingdom of Spain with respect to the [vessel] did not include permission to direct the vessel into a port or waters under Spain’s jurisdiction. The United States has the honor to refer to its letter dated May 14, 2015 through its competent national authority under the 1988 Convention, which furthermore expressly requested that the vessel be kept seaward of the territorial sea of any State. Nevertheless, the United States understands that the vessel may now be in a Spanish port. To the extent the Kingdom of Spain has acted beyond the authorization provided by the United States, as the vessel’s flag State with exclusive jurisdiction over the vessel on the high seas, the United States strongly objects.

The Embassy wishes to inform the Ministry that the United States would expeditiously consider a request from the Government of the Kingdom of Spain that the United States waive its primary jurisdiction over the [vessel], its cargo, and the persons aboard should such a request be received.

In a note delivered July 13, 2015, the United States further stated:

Confirmation of registry and flag State permission to board and search a vessel operating in an area beyond national jurisdiction, or to detain its crew pending a determination by the flag State regarding appropriate action, is not a waiver nor does it imply a waiver by the flag State of its primary right to exercise jurisdiction over the vessel for the purposes of criminal prosecution or in any other regard. Moreover, under international law the exclusive jurisdiction of the United States over the [sailing vessel] is not subject to any time limits.

This July 13 note also stated that the United States would construe recent communications from Spanish authorities as a request for the United States to waive its right of primary jurisdiction over the vessel its cargo and crew. In that July 13 note, the United States waived its right of primary jurisdiction, stating its understanding that the case would be prosecuted by Spanish authorities. The note asks that the Kingdom of Spain prevent future misunderstandings by expressly requesting the United States waive its primary jurisdiction and act within the scope of authorization provided in the course of future cooperation in suppressing illicit traffic by sea.*

B. OUTER SPACE

1. Space Situational Awareness

On May 12, 2015, Mallory Stewart, Deputy Assistant Secretary of State for the Bureau of Arms Control, Verification and Compliance, addressed a conference on space situational awareness. She spoke on the topic of promoting space security and sustainability. Her remarks are excerpted below and available at <http://www.state.gov/t/avc/rls/2015/242325.htm#>.

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Many of the speakers we will hear from today will provide detailed assessments of the risks we are facing in space—risks from on-orbit collisions and from the rise in man-made debris—risks that are larger than any one country can tackle alone. But space has unique attributes that further complicate our ability to address these risks. Specifically, with the rise in technological capabilities, irresponsible actors in space, non-state actors, and the exponential increase in space use, actions in space will be even more difficult to attribute to any party, and thus accountability for negligent or irresponsible actions will be more difficult to attain.

That is why diplomacy—in addition to technology—is so important. The U.S. State Department has been tasked by President Obama with expanding international cooperation to

* Editor's note: Spain subsequently asked for consent to prosecute the crew of the sailing vessel in question and the United States confirmed U.S. consent.

address the challenges we face in the outer space domain. We are working closely with countries around the world to highlight the necessity of strengthening the long-term sustainability, stability, safety, and security of space. This international cooperation—such as sharing space situational awareness or sharing best practices or appropriate norms of behavior in space—is crucial to preventing a “wild-West” environment, and contributes in important ways to a safe and secure space environment.

Today I will briefly discuss some of the challenges we are facing and then discuss what we are doing through international cooperation and collaboration to tackle those challenges.

Challenges to the Space Environment

As this audience well knows, orbital debris is one of the greatest challenges facing the world’s continuing usage of space. There are now more than 20,000 man-made objects large enough to be tracked in various Earth orbits—from operational satellites, to parts of rocket bodies, to other pieces of debris resulting from more than half-a-century of space launches. And there are many more objects, too small to be tracked, that still present a threat to human spaceflight and robotic missions. We are all well aware of the recent incidents of collisions and near-collisions between spacecraft, including the need to maneuver the International Space Station to avoid debris. In addition to the direct economic impact of these actions, the resulting orbital debris from natural, man-made, and directed collisions adds to the overall debris levels in critical orbits.

At the same time, compounding the orbital debris from unintentional actions, there is a steep increase in debris from intentional or negligent actions in space. The U.S. Government is particularly concerned about such irresponsible behavior in space increasing the threat to satellites and making future peaceful space use and exploration more difficult.

Such irresponsible behavior specifically includes the development and use of anti-satellite (ASAT) weapons. Even in the development phase, the debris generated by testing of anti-satellite capabilities creates hazards for all spacefaring actors. Indeed, thousands of pieces of debris from the destructive 2007 Chinese anti-satellite test continue to endanger space assets of all nations, including China itself. Because of the altitude of this debris, it is estimated that 50 percent of this debris could still be in orbit 20 years after the 2007 event.

Despite the potential for debris, and the serious international concern voiced by the United States and others, countries continue to develop their ASAT and other debris-generating space control technologies. As Director of National Intelligence James Clapper noted in recent congressional testimony, “Russian leaders openly assert that the Russian armed forces have antisatellite weapons and conduct antisatellite research.” Although the Chinese have not tested a debris-generating ASAT since 2007, they did conduct a non-destructive test of this system in July 2014.

These Russian and Chinese tests have not created debris, but they remain of concern to us. The United States believes that such destructive capabilities are both destabilizing and a threat to the long-term security and sustainability of the outer space environment. Moreover, in an environment in which attribution is obscured, there are often limited means to prevent or address the destructive effect or any resulting debris generated from these weaponized capabilities.

A related issue is the challenge of ensuring that we have situational awareness of the space environment. A long-standing principle of U.S. space policy is that all nations have the right to explore and use space for peaceful purposes, and for the benefit of all humanity, in accordance with international law. Strengthening stability depends on having awareness and

understanding as to who is using the space environment, for what purposes, and under what conditions. And again, the inherent attribution and accountability hurdles that are exacerbated in space, when the actor or intent behind a threat is obscured, make the need for situational awareness in space that much greater.

The U.S. National Space Policy directs us to collaborate with other nations, the private sector, and intergovernmental organizations to improve our shared space situational awareness—in other words, to improve our collective ability rapidly to detect, warn of, characterize, and attribute natural and man-made disturbances to space systems. Having this information as early as possible and as accurately as possible is critical for safe human spaceflight, ensuring a stable global economy, pursuing responsible behavior in space, as well as deterring irresponsible behavior.

Having information that enables us to achieve space situational awareness (SSA) and understanding is necessary *but insufficient* unless we can take steps to avoid the perceived threats. In other words, the challenges of increasing debris in space and the growing complexities of responsible, as well as irresponsible, space operations lead to another challenge, that of collision avoidance. To deal with this challenge, we seek to improve our ability to share information, not only with other space-faring nations but also with the commercial space sector. International cooperation on SSA is greatly beneficial, as international partnerships bring the resources, capabilities, and geographical advantages to enhance SSA upon which we increasingly depend. International cooperation enables us not only to improve our space object databases, but also to pursue common international data standards and data integrity measures.

Responding to These Challenges

The United States takes these issues seriously, and our National Space Policy reflects the importance we attach to addressing these challenges. The Department of State, in cooperation with our interagency colleagues, has been actively working with our allies and partners around the globe to preserve the long-term security and sustainability of the space environment.

A large part of our international cooperation—in accordance with the President's National Space Policy guidance—involves transparency and confidence-building measures (TCBMs) to encourage responsible actions in, and the peaceful use of, space. TCBMs are “top-down,” pragmatic, voluntary actions, and a means by which governments can address challenges and share information with the aim of creating mutual understanding and reducing tensions. Examples of bilateral space-related TCBMs include dialogues on national security space policies and strategies, expert visits to military satellite flight control centers, and discussions on mechanisms for information exchanges on natural and debris hazards. Examples of multilateral space-related TCBMs include joint resolutions and commitments on space security, the prevention of debris-generating activities, and adoption of international norms or “codes of conduct”.

At a very basic level, our international efforts involve outreach, cooperation, and norms development. I will briefly speak about each of these.

Engaging International Partners

Outreach is often the first step in transparency and confidence building, and we engage in outreach efforts both multilaterally and bilaterally. We have established 13 formal Space Security Dialogues on a bilateral basis to discuss these issues with foreign countries, and numerous less-formalized dialogues with international and domestic partners. These dialogues allow in-depth conversations about the collective challenges we face, and encourage

collaborative brainstorming on how we can work together to develop and implement solutions to these issues.

Outreach also involves notifications, and currently the United States provides notifications to other government and commercial satellite operators of potential conjunctions through cooperative relationships and the web site space-track.org. But outreach also involves agreement and cooperation. The Department of State also works with the Department of Defense on the dissemination of orbital tracking information, including predictions of potentially hazardous conjunctions between orbiting objects, through space situational awareness (SSA) cooperation agreements.

Cooperation within the Interagency

The Department of State is working with the Department of Defense's (DoD's) U.S. Strategic Command (USSTRATCOM) to implement its first SSA Sharing Strategy that promotes sharing more information on a more timely basis with the broadest range of partners in an interactive, exchange-based way with satellite owners and operators. The foundations for these cooperative efforts are those SSA sharing agreements and arrangements that provide for enhanced exchanges of unclassified information. To date, DoD has signed 11 SSA sharing agreements and arrangements with national governments and international intergovernmental organizations, and 47 with commercial entities.

Beyond these foundational agreements and arrangements, State is working with USSTRATCOM and others in DoD to foster the development of routine operational partnerships, creating a true data-sharing environment that extends to the robust sharing of international data. These efforts support broader U.S. efforts to ensure that data from sensors and spacecraft operated by allies and other governmental and private sector sources can be aggregated and processed into actionable information.

Finally, in addition to outreach and cooperation, the adoption of norms of responsible behavior is instrumental to our space policy:

The United States continues to lead the development and adoption of international standards to minimize debris, building upon the foundation of the U.N. Space Debris Mitigation Guidelines. The United States has been engaged for more than three years in a multilateral study of the long-term sustainability of outer space activities within the Scientific and Technical Subcommittee of the U.N. Committee on the Peaceful Uses of Outer Space, or UNCOPUOS. Scheduled for completion in 2016, this effort is examining the feasibility of voluntary "best practices guidelines" to help reduce operational risks to all space systems.

In addition, the United States supports a number of multilateral initiatives to establish consensus guidelines—"rules of the road"—for responsible space activities that support U.S. and international security interests. For example:

- Assistant Secretary Frank Rose served as the U.S. expert for the United Nations Group of Governmental Experts (GGE) study of outer space transparency and confidence-building measures. That group published a consensus report in 2013 endorsing voluntary, non-legally binding TCBMs to strengthen sustainability and security in space.
- Additionally, for the past several years the United States has worked with the European Union and other nations to advance an International Code of Conduct for Outer Space Activities. We will participate in negotiations this year and hopefully develop a Code of Conduct that enhances the security and sustainability of space. This Code is a voluntary, "top-down" commitment that complements and expands upon the approach of the UNCOPUOS efforts to develop long-term sustainability guidelines. The Code could help

solidify safe operational practices, reduce the chance of collisions or other harmful interference with nations' activities, contribute to our awareness of the space environment through notifications, and strengthen stability in space by helping establish norms for responsible behavior in space.

Among the draft Code's most important commitments is for subscribers to refrain from any action that brings about, directly or indirectly, damage, or destruction, unless required in self-defense, of space objects, and a commitment to minimize, to the greatest extent possible, the creation of space debris, in particular, the creation of long-lived space debris.

Conclusion

Solving foreign policy problems today requires us to think both regionally and globally, to see the intersections and connections linking nations and regions, and to bring people together as partners to solve shared problems. Partnership implies shared responsibility and shared commitment. We have made it clear in our bilateral and multilateral dialogues with other nations that solving the challenges of orbital debris, situational awareness, collision avoidance, and responsible, as well as irresponsible behavior, and peaceful behavior in space are the responsibilities of all who are or will be engaged in space activities. This includes not only "established" space-faring nations, but also those countries just beginning to explore and use space. Although we are on our way technologically to resolving some of these challenges, issues of attribution, accountability, and transparency remain.

* * * *

Deputy Assistant Secretary Stewart also addressed the 2015 Space Resiliency Summit in Alexandria, Virginia on December 9, 2015. Her remarks on promoting space security and sustainability are excerpted below and available at <http://www.state.gov/t/avc/rls/2015/250567.htm>.

* * * *

... Today, I will describe several of the U.S. diplomatic efforts that are aimed at achieving the most stable, secure, and sustainable space environment for the resiliency of all peaceful uses of space.

Protecting the national security of the United States and its allies by preventing conflict from extending into space and avoiding or deterring purposeful interference with our space systems is a major goal of our diplomatic engagements. This goal is described in the 2010 U.S. National Space Policy, which makes clear that it is not in anyone's interest for armed conflict to extend into space. The 2010 Policy also states that purposeful interference with space systems, including supporting infrastructure, will be considered an infringement of a nation's rights.

There are two main diplomatic approaches to achieving this goal: (1) we are strengthening space cooperation and information sharing with allies and partners to enhance collective space situational awareness and maximize the interoperability and redundancy of our space assets, and (2) we are encouraging the development of "best practices" and norms of responsible behavior in the space faring community to enhance resiliency through the prevention of mishaps, misperceptions, and the chances of miscalculation.

The first category of our diplomatic engagement strives to gain international support for common ends, including sharing space-derived information to support ongoing operations. It also prepares the way for closer military-to-military cooperation to address mutual threats and to develop capabilities with shared compatibility standards (and thus greater redundancy in the event of a failure). One mechanism we use to discuss cooperative approaches with our allies and space partners is through space security dialogues. The State Department currently has 15 bilateral and multilateral dialogues around the world. These dialogues address each side's understanding of the threat, and include discussions of our respective diplomatic and national security goals. Such discussions are critical in developing common positions on issues such as the benefits and challenges of transfers of dual-use technologies or on the development of common positions related to rules of behavior in outer space.

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A final example of this type of diplomatic engagement, for which the State Department and the Department of Defense work in tandem, is the expansion of Space Situational Awareness, or SSA, through SSA information sharing agreements and arrangements with foreign partners. International cooperation on SSA is crucial, as international partnerships multiply capabilities, expertise, and geographical advantages. Furthermore, international cooperation enables us to improve our space object databases and pursue common international data standards and data integrity measures. To date, the United States has signed 11 bilateral SSA agreements and arrangements with national governments and international intergovernmental organizations, and 51 with commercial entities. And we will continue to pursue opportunities for cooperation on SSA with other nations and nongovernmental space operators around the world. The more we can establish a collective picture of what is happening in space, the more secure we can be in the safety of our own assets.

The second category of the State Department's diplomatic engagement includes the promotion of the responsible use of outer space. Specifically, we aim to further enhance space resiliency through the multilateral development and implementation of voluntary guidelines for space activities. These guidelines can include, for example, establishing appropriate communication and consultation mechanisms and national regulatory frameworks, providing contact information for information exchanges among space owners and operators, and implementing practical measures to eliminate harmful radiofrequency interference.

We use diplomatic engagement in this way to reduce the chances for conflict extending into space through the promotion of international norms of behavior, both bilaterally and multilaterally. ...

In this regard, we see diplomacy as having an important role in responding to the development of anti-satellite weapons developments that threaten the outer space environment. Responding both privately and publicly to tests of anti-satellite systems is a critical component of our diplomatic strategy. ...

Working with our Allies and partners, we can use diplomacy to prevent the development of destabilizing threats to the long-term security and sustainability of outer space.

It is clear that no one nation can develop norms of behavior on its own, but it is also clear, given the growing man-made threats facing the space environment, that we need to move quickly to achieve consensus on what such norms should entail. That is why we are pursuing pragmatic and timely measures such as ...TCBMs in order to enhance strategic stability in space.

TCBMs can occur as voluntary national commitments, or through bilateral, regional, or multilateral cooperation. Bilateral TCBMs can include dialogues on national security space policies and strategies, expert visits to satellite flight control centers, and discussions on mechanisms for information exchanges regarding natural and man-made debris hazards—and the United States is doing all of these. Multilateral, space-related TCBMs can include joint resolutions and commitments on space security, the prevention of debris-generating activities, and adoption of international norms of the aforementioned responsible behavior. The United States is also working with our partners and allies to pursue such multilateral TCBMs.

For example, in 2013, the US helped achieve the consensus report of the UN Group of Governmental Experts (GGE) on outer space TCBMs. This report recommended a number of TCBMs that offer a solid starting point for addressing challenges to space security and sustainability. The GGE report also provides useful criteria for the consideration of new TCBM concepts and proposals. The United States and many others have encouraged UN Member States to implement these recommendations, as soon as practicable.

It is noteworthy that ...COPUOS and the UN General Assembly's First and Fourth Committees deliberated this year on the GGE recommendations. In these deliberations, the United States highlighted the importance of continued progress on pragmatic efforts within the UN system, including the Conference on Disarmament, the UN Disarmament Commission, and the COPUOS Working Group on Long-term Sustainability (LTS) of Outer Space Activities. The LTS Working Group is developing a series of practical, non-legally binding guidelines for spaceflight safety, and an added benefit is that these often technical exchanges serve to build capacity and expertise on spaceflight safety in newer spacefaring nations.

Finally, I want to note that these two areas of U.S. diplomatic engagement also work together to support the resilience of our space architecture in another way: they can deter bad actors. By expanding space situational awareness and the redundancy (and thus decreased vulnerability) of our space capabilities on the one hand, and by developing greater TCBMs, including norms of responsible behavior such as notifications and mitigation of intentional debris on the other, we enhance our ability to both deter interference with our space assets, but also to attribute any such interference to specific actors. Attribution is critical to understanding whether a problematic space event is due to natural or man-made causes, accidental or intentional. If the latter, attribution may enable the international community to quickly hold a space actor accountable for its actions, further increasing stability of the space environment and deterring future disruptions.

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2. UN General Assembly First and Fourth Committees

On October 22, 2015, Frank Rose, Assistant Secretary of State for the Bureau of Arms Control, Verification and Compliance, delivered remarks on behalf of the U.S. delegation at a joint ad hoc meeting of the 70th UN General Assembly First and Fourth Committees to address possible challenges to space security and sustainability. His remarks are excerpted below and available at <http://www.state.gov/t/avc/rls/2015/248673.htm>.

* * * *

Fifty-two years ago, at the beginning of the Space Age, the United Nations General Assembly adopted the “Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space,” or Principles Declaration. This Declaration laid out the key principle that outer space is free for exploration and use by all States on the basis of equality and in accordance with international law. Just over three years later, these and other elements of the Principles Declaration formed the core for the 1967 Outer Space Treaty, which remains the foundation of the international legal framework for space activities.

Today, we find more than 60 nations and numerous government consortia, scientists, and commercial firms accessing and operating satellites for countless economic, scientific, educational, and social purposes. This situation has elevated international space systems and activities to a global scale—that is, they are of benefit not only to their immediate users, owners, and operators, but also to the global economy and security environment.

In this dynamic environment, how do we address the challenges associated with orbital congestion, collision avoidance, and the continued development by some nations of destructive counterspace capabilities?

It is clear that no one nation can address these challenges alone. Therefore, international cooperation to address the challenges can, and must, occur through practical means. Under the capable chairmanship of Ambassador Victor Vasiliev of Russia, the July 2013 consensus report of the ...GGE on ...TCBMs in Outer Space Activities recommended a range of measures to enhance stability in space in the form of national commitments as well as through bilateral, regional and multilateral cooperation. That report offers a solid starting point for discussions on addressing challenges to space security and sustainability, and also provides useful criteria for the consideration of new TCBM concepts and proposals.

The report endorsed efforts “to encourage responsible actions in, and the peaceful use of, outer space.” In this regard, the United States has, for example, pursued a range of bilateral space security exchanges and offers support to all spacefaring nations to reduce the chances of accidental satellite collisions. The report also recommended that States review and implement, on a voluntary basis, the specific TCBMs contained in the report. The United States is already implementing many of these measures, including information exchanges, risk reduction notifications, contacts and visits, international cooperation, outreach, and coordination.

The United States also supports efforts in multiple fora to translate GGE recommendations into results by encouraging responsible actions by all nations in their peaceful use of outer space. In particular, the United States was pleased to join Russia and China in co-sponsoring General Assembly Resolutions 68/50 and 69/38. We are also pleased to be co-sponsoring another TCBMs resolution this year in the First Committee. These resolutions encourage Member States to review and implement, to the greatest extent practicable, the proposed TCBMs contained in the GGE report, and to refer the report’s recommendations for consideration by the Conference on Disarmament, the UN Disarmament Commission, and the UN Committee on the Peaceful Uses of Outer Space (COPUOS). Now the international community should focus on practical and pragmatic forms of international cooperation that advance the GGE report’s recommendations.

It is particularly noteworthy that, during its June 2015 session in Vienna, COPUOS considered the GGE report’s recommendations, including a review of submissions by its members. The U.S. submission highlighted its implementation of the TCBMs contained in the

GGE report, in particular those with relevance to the work of the Committee's working group on long-term sustainability of outer space activities.

... COPUOS also remains the primary multilateral forum for the continued consideration of other forms of international cooperation seeking to ensure the sustainable use of outer space in support of sustainable development here on Earth.

The United States also supports improved coordination on the implementation of space TCBMs across the United Nations system. These efforts should ensure that the Secretariat's Office of Disarmament Affairs and the Office for Outer Space Affairs work closely with other UN agencies to ensure that existing resources are applied effectively to advance the goals of space security and sustainability.

...[A] secure and sustainable outer space environment is vital for every nation, for its security, foreign policy, and global economic interests and for enhancing the daily lives of its citizens.

Meeting the challenges of orbital congestion, collision avoidance, and responsible and peaceful behavior in space is the responsibility of all that are engaged in space activities. We must work together to do more to protect our long-term interests by safeguarding against risks that could harm the space environment and could disrupt space-derived services on which the international community depends.

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On November 3, 2015, Ambassador Robert A. Wood, U.S. Permanent Representative to the Conference on Disarmament, delivered the U.S. explanation of vote at the 70th UN General Assembly First Committee on the resolution entitled "No First Placement of Weapons in Outer Space." Ambassador Wood's statement is excerpted below and available at <http://usun.state.gov/remarks/6953>.

* * * *

Mr. Chairman, my delegation will vote "No" on draft resolution L.47, "No first placement of weapons in outer space" ("NFP"). In considering the Russian Federation's NFP initiative, the United States took seriously the criteria for evaluating space-related transparency and confidence-building measures, TCBMs, that were established in the 2013 consensus report of the ... GGE, study of outer space TCBMs. That study was later endorsed by the full General Assembly in Resolutions 68/50 and 69/38, both of which the United States co-sponsored with Russia and China, as well as a resolution that is being considered this year in the First Committee. As the GGE report stated, non-legally binding TCBMs for outer space activities should: 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; be able to be effectively confirmed by other parties in their application, either independently or collectively; and finally, reduce or even eliminate the causes of mistrust, misunderstanding, and miscalculation with regard to the activities and intentions of States.

In applying the GGE's consensus criteria, the United States finds that Russia's NFP initiative contains a number of significant problems: first, the NFP initiative does not adequately define what constitutes a "weapon in outer space." As a result, States will not have any mutual

understanding of the operative terminology. Second, it would not be possible to effectively confirm a State's political commitment "not to be the first to place weapons in outer space." Thus, the application and efficacy of the proposed measure could not be demonstrated.

Third, the NFP initiative focuses exclusively on space-based weapons. It is silent with regard to terrestrially-based anti-satellite weapons, and thus could contribute to increasing, not reducing, mistrust and miscalculations.

To date, the NFP initiative's proponents—including Russia—have not explained, and did not explain during the First Committee's Thematic Discussion, how the NFP initiative is consistent with the GGE's TCBM criteria, nor how such an initiative enhances stability in outer space when it is silent with regard to terrestrially-based ASAT weapons.

Given these problems and the absence of a satisfactory explanation by the NFP initiative's proponents, the United States has determined that the NFP initiative fails to satisfy the GGE's consensus criteria for a valid TCBM. Thus, the NFP initiative is problematic and unlikely to be timely, equitable, or effective in addressing the challenges we face in sustaining the outer space environment for future generations.

Therefore, as we did last year, 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 believes it is not in the international community's interest to engage in a space weapons arms race. Such a race would not bode well for the long-term sustainability of the space environment. Indeed, U.S. efforts, bilaterally as well as multilaterally, seek to *prevent* conflict from extending into space. To that end, the United States continues to engage in sustained dialogue to identify, develop, and implement tangible TCBMs that are consistent with the recommendations of the 2013 GGE report.

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3. Sustainability and Security of Outer Space Environment

Assistant Secretary Rose addressed the 31st Space Symposium in Colorado Springs, Colorado on April 16, 2015. His remarks on using diplomacy to advance the long-term sustainability and security of the outer space environment are excerpted below and available at <http://www.state.gov/t/avc/rls/2015/240761.htm>.

* * * *

This morning I would like to discuss steps the United States is taking diplomatically, in concert with international partners to address the growing threats to space security.

* * * *

Strengthening Our Deterrent Posture

First, we use diplomacy to gain the support of our allies and friends. We have established numerous space security dialogues with our Allies and Partners. These dialogues help them understand the threat, as well as our diplomatic and national security goals, which is critical in

persuading them to stand by our side, often in the face of tremendous pressure from our adversaries. ... Furthermore, our Department's leadership has also carried our message in numerous bilateral and multilateral dialogues.

Diplomacy also prepares the way for closer military-to-military cooperation and allied investment in capabilities compatible with U.S. systems. We work very closely with our interagency colleagues in the Department of Defense to make sure our efforts are synchronized so that investments by our allies and friends contribute to strengthening the resilience of our space architectures and contribute to Space Mission Assurance. ...

Promoting the Responsible Use of Outer Space

Second, we use diplomacy to promote the responsible use of outer space and especially strategic restraint in the development of anti-satellite weapons.

Diplomacy has an important role in responding to the development of anti-satellite weapons developments that threaten the outer space environment. Responding both privately and publicly to tests of anti-satellite systems is a critical component of our diplomatic strategy....

The Department of State is also using diplomacy to reduce the chances for conflict extending into space through the promotion of responsible international norms of behavior, both bilaterally and multilaterally. Norms matter because they help define boundaries and distinguish good behavior from bad behavior.

For example, we have discussed preventing mishaps and reducing potentially destabilizing misperceptions or miscalculations with China.

In addition, and very importantly, through bilateral and multilateral dialogue and diplomatic engagement we seek to identify areas of mutual interest and hopefully reach agreement on how to prevent those interests from being harmed in peacetime, and in conflict.

...

Simply stated, if the United States and the Soviet Union could find areas of mutual interest in the realm of nuclear deterrence and chemical weapons—with the tensions and stakes as high as they were—then in today's climate we should be able to find areas of mutual interest among all space-faring nations regarding space security.

Indeed, I would argue that it is reasonable to assume that most nations, if not all nations, would find it to be in their national interest to prevent conflict from extending into space, knowing that such conflict would degrade the sustainability of the space environment, hinder future space-based scientific activities, and potentially reduce the quality of life for everybody on Earth if the benefits of space-based applications were eroded. Convincing other nations, including China and Russia, of this objective is the role of diplomacy.

The United States and China have already implemented some bilateral ...TCBMs to prevent the generation of additional debris in space. As part of the 2014 U.S.-China Strategic and Economic Dialogue, led by Secretary of State John Kerry, we reached agreement on the establishment of e-mail contact between China and the United States for the transmission of space object conjunction warnings. Not only does this communication help prevent collision between objects in space, it will help to develop trust and understanding between the United States and China.

Over the past few years the United States has also supported a number of multilateral initiatives that should reduce the chances of mishaps, misperceptions and potential miscalculations. Multilateral TCBMs are means by which governments can address challenges and share information with the aim of creating mutual understanding and reducing tensions.

Through TCBMs we can increase familiarity and trust and encourage openness among space actors.

One of the key efforts that we have been pursuing is working with the European Union to advance a non-legally binding International Code of Conduct for Outer Space Activities. The Code would establish guidelines to reduce the risks of debris-generating events and to strengthen the long-term sustainability and security of the space environment. Among the draft Code's most important provisions is a commitment for the subscribing States to refrain from any action—unless such action is justified by exceptions spelled out in the draft Code—that brings about, directly or indirectly, damage or destruction of space objects. We view the draft Code as a potential first step in establishing TCBMs for space.

The State Department is also leading U.S. efforts in the framework of the ...UNCOPUOS to move forward in the development of a draft set of guidelines for sustainable space operations to include ways to prevent the generation of space debris.

Another important recent effort was the United Nations ...GGE study of outer space transparency and confidence-building measures. That UN group, for which I served as the U.S. expert, published a consensus report in July 2013 endorsing voluntary, non-legally binding TCBMs to strengthen sustainability and security in space. The United States subsequently co-sponsored a resolution with Russia and China referring the GGE report's recommendations for consideration by the relevant entities and organizations of the United Nations system.

These diplomatic efforts contribute to reducing misperceptions and miscalculations and help lower the chance of conflict extending into space.

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In contrast, Russia's and China's diplomatic efforts to pursue legally binding treaties and other measures do not reduce the chances for mishaps, misunderstanding or miscalculation and provide little or no verification capability to make sure that everyone is playing by the same rules. Moreover, their diplomatic efforts do not address very real, near-term space security threats such as terrestrial-based anti-satellite weapons like the one China tested in 2007.

To be more specific, Russia and China continue to press for a "Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects," known as the PPWT. Russia also is making concerted diplomatic efforts to gain adherents to its pledge of "No First Placement" of weapons in outer space. These two documents are fundamentally flawed. They do not address the threat of terrestrially-based ASAT capabilities, and they contain no verification provisions. Yet, at the same time, these proposals may gain some support internationally because many countries are attracted, naturally, to the idea of preventing the weaponization of space. As a diplomat, it is my job to explain why support for these Russian and Chinese proposals is misplaced and may even be counterproductive, while offering pragmatic alternatives, such as TCBMs, which demonstrate U.S. leadership and help shape the international space security agenda.

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4. Proposed Legally Binding Instruments on Space Security

On November 30, 2015, Assistant Secretary Rose spoke at the 3rd ASEAN Regional Forum (“ARF”) Workshop on Space Security, Session II: Enhancement for Space Security through Arms Control Measures, Including Legally-Binding Instruments, held in Beijing. Mr. Rose’s speech refers to the proposed Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects (“PPWT”); and the “no first placement of weapons in outer space” initiative (“NFP”). The Assistant Secretary’s remarks are excerpted below and available at <http://www.state.gov/t/avc/rls/2015/250231.htm>.

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First, let’s look at the broad challenges associated with arms control in outer space: verification; scope; and the ability to address the most pressing and existing threats.

The verification challenge is a serious one: How does one verify and monitor that limitations on space weapons are being enforced? Assuming we identify an effective methodology for verification, does the technology to rigorously apply this methodology even exist?

A second key challenge is determining the scope of space arms control measures. For example, just what is a “space weapon?” Many space assets are potentially dual-use, making it impossible to determine if they constitute a weapon. If one satellite collides with another satellite, destroying the latter, is the first satellite a weapon? Even if the former satellite was constructed with completely benign intentions and the collision accidental, the fact remains that it has now destroyed another space asset. This key definitional problem remains unsolved.

A third key challenge is ensuring that any arms control measures equitably address the most pressing and existing threats. Some governments have recommended that we focus our attention on the placement of weapons in outer space. While the Soviet Union did indeed produce, place, and test weapons in outer space, we think that focusing on a recurrence of such deployments is a misprioritization. The most pressing and existing threat to outer space systems is actually terrestrially-based anti-satellite weapons, which exist, have been tested, and have already damaged the space environment. The continued development of such weapons, and their potential use in a conflict, should be of grave concern to all governments. Due to high impact speed in space, even sub-millimeter debris poses a realistic threat to human spaceflight and robotic missions.

Recent Proposals Fundamentally Flawed

Having examined some of the key challenges associated with space arms control, I would like to consider how these challenges have been addressed in some of the measures discussed earlier during this Session, notably the PPWT and NFP.

First, with regards to the verification challenge, the PPWT contains no integral verification regime to help monitor and verify the limitation on the placement of weapons in space. The United States could not support an approach in which verification provisions were determined only through subsequent negotiations of an “additional protocol.” In addition, as the United States has pointed out, it is not possible with existing technologies and/or cooperative

measures to effectively verify these proposals. Nor does the development of such technology appear to be imminent. The authors of the latest draft PPWT have admitted as much in official Conference on Disarmament documents. The NFP also lacks any effective confirmation features, rendering it impossible to demonstrate the efficacy of such a proposal.

Second, on the scope issue, the PPWT again has serious problems. Typically, arms control treaties that prohibit the deployment of a class of weapon also prohibit the possession, testing, production, and stockpiling of such weapons to prevent a country from rapidly breaking out of such treaties. The PPWT contains no such prohibitions and thus a Party could develop a readily deployable space-based weapons break-out capability. The NFP is also silent on this particular scoping issue. Moreover, since it does not define a “weapon in outer space,” states lack any mutual understanding of the operative terminology of such a pledge.

And third, the draft PPWT fails to address the most pressing and existing threat to outer space systems: terrestrially-based anti-satellite weapon systems. There is no prohibition on the research, development, testing, production, storage, or deployment of terrestrially-based anti-satellite weapons; thus such capabilities could be used to substitute for, and perform the functions of, space-based weapons. Unlike more hypothetical threats that some speakers have suggested we focus on, terrestrially-based anti-satellite systems have actually been tested in recent years. We cannot allow such a weapon to be retained, as our Russian colleagues have argued, as a “hedge” against cheating in the PPWT. The NFP proposal shares these same weaknesses.

The Way Ahead

Given the fundamental flaws contained in these two proposals, my fellow participants will not be surprised to find out that the United States does not support either initiative and does not see them as an acceptable basis for negotiation in the Conference on Disarmament or in any other forum. However, I would like to point out that the United States is not opposed to space arms control agreements in principle. Indeed, as the U.S. National Space Policy makes clear, “[t]he United States will consider proposals and concepts for arms control measures if they are equitable, effectively verifiable, and enhance the national security of the United States and its allies.” Furthermore, we believe that it is not in the international community’s interest to engage in a space weapons arms race; indeed, our efforts are aimed at preventing conflict from extending into space.

Instead of focusing on fundamentally flawed proposals, we would instead offer a pragmatic way ahead in order to address some of the urgent challenges that we all face, especially in the area of space debris. We believe that way is through the creation and implementation of pragmatic and near-term transparency and confidence-building measures, or TCBMs, that can encourage responsible actions in, and the peaceful use of, space. Unlike inadequate proposals, TCBMs can make a real difference in the near term, and such pragmatic measures can lead to greater mutual understanding and reduce tensions.

As I mentioned during my opening remarks earlier today, one promising area is the important work being done in the UN ...COPUOS, on the development of new international long-term sustainability, or LTS, guidelines. The agreed work plan for the COPUOS working group on LTS is near completion, and we look forward to joining other COPUOS delegations to reach consensus on a clear and practical set of guidelines in 2016. I look forward to hearing Dr. Peter Martinez of South Africa, who is the Chair of the Working Group on LTS, present tomorrow on this important effort.

Another promising area on space TCBMs is the continued implementation of the recommendations of the UN GGE study of TCBMs. The 2013 GGE report, which was later endorsed by consensus by the UN General Assembly, highlighted the importance of voluntary, non-legally binding TCBMs to strengthen stability in space. Such TCBMs can include the adoption of the previously-mentioned LTS guidelines in COPUOS, which can serve as a foundation for other TCBMs.

A third promising area is international cooperation on space situational awareness, or SSA, which can help contribute to a more comprehensive picture of what is transpiring in space and ensure the safety, sustainability, stability, and security of the space environment. We see opportunities for cooperation on SSA with other governments and nongovernmental space operators around the globe. Such cooperation on SSA is very important, as international partnerships bring resources, capabilities, and geographical advantages. ...

One regional example of our cooperation in this area is our ongoing coordination with our Chinese co-hosts on orbital collisions. The Chinese Ministry of Foreign Affairs has provided the United States with email contact information for the appropriate Chinese entity responsible for spacecraft operations and conjunction assessment, allowing this organization to receive Close Approach Notifications directly from the U.S. Department of Defense. This lays the groundwork for a much faster process for sharing information, which reduces the probability of, and facilitates effective responses to, orbital collisions, orbital break-ups and other events that might increase the probability of accidental collisions in outer space.

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5. International Law in Context of Outer Space Activities

On November 30, 2015, Robert Friedman, Attorney-Adviser in the State Department's Office of the Legal Adviser, delivered remarks at the 3rd ARF Workshop on Space Security in Beijing, on the subject of international law in the context of outer space activities. Mr. Friedman's remarks are excerpted below.

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I want to briefly address three interconnected topics this afternoon: first, the importance of understanding *existing* international law as it applies to activities in outer space; second, the importance of *supplementing* existing international law with measures to build trust and confidence and enhance stability; and third, the importance of ensuring that any *new* international law in the area of arms control in outer space is effective and verifiable.

Existing International Law as it Applies to Outer Space Activities

International law is central to the conduct of outer space activities. The U.S. National Space Policy declares that the United States will adhere to, and proposes that other nations recognize and adhere to, several basic principles. One of these core principles is that all nations have the right to explore and use space for peaceful purposes, and for the benefit of all humanity, in accordance with international law.

The U.S. National Space Policy also reaffirms States' inherent right of individual or collective self-defense, which is recognized in Article 51 of the United Nations Charter.

The cornerstone of the United States' view is that there is nothing unique about outer space that would prevent existing international law from applying to the same extent it would apply elsewhere—including with respect to States' inherent right of individual or collective of self-defense. In particular, existing bodies of international law such as the international law governing States' use of force in international relations and the law of armed conflict apply, without distinction, to State conduct in all domains, including outer space.

The proposition that this existing international law applies to State conduct in outer space is not new. Indeed, the applicability of these principles is well-established. For example, the 1967 Outer Space Treaty (OST) is a foundational document, joined by virtually all space-faring States. It establishes certain critical legal concepts, including: that the exploration and use of outer space “shall be carried out for the benefit and in the interests of all countries”; and that international law, including the Charter of the United Nations, applies in outer space to the same extent it applies elsewhere.

The inherent right of self-defense is also recognized in the draft Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force Against Outer Space Objects (PPWT), which states that “nothing in the Treaty shall impair the States Parties' inherent right to individual or collective self-defense, as recognized in Article 51 of the Charter of the United Nations.”

While the United States welcomes this affirmation of the right of self-defense in space, the overall PPWT remains a fundamentally flawed proposal for a host of reasons, including, as noted in prior U.S. commentary, the PPWT draft recognizes self-defense as an exception to the prohibition on the use of force, but does not explicitly recognize that a use of force could also be authorized by the UN Security Council under Chapter VII of the UN Charter. Furthermore, the PPWT has no integral verification regime to help monitor and verify the limitation on the placement of weapons in space.

In the context of PPWT, some have also raised the prospect of specifically defining the “use or threat of force” and narrowly tailoring those instances when the use of force in self-defense would be justified in connection with the conduct of outer space activities.

However, a determination of whether specific events—whether in land, air, sea, cyberspace or outer space—constitute an actual or imminent armed attack sufficient to trigger a State's inherent right of self-defense is necessarily a case-by-case, fact-specific inquiry. States have generally not sought to define precisely or state conclusively what situations would constitute “armed attacks” in other domains, and there is no reason outer space should be different. Further, the concept of “use of force” or “threat of force” is not explicitly defined under international law, and attempting to negotiate an agreed definition would likely prove impossible.

Because the existing bodies of international law governing States' use of force in international relations and the conduct of hostilities in armed conflict apply to State conduct in all domains, including outer space, the United States believes the current international legal framework governing self-defense and armed conflict in outer space is sufficient.

Separate from the exercise of their inherent right of self-defense, States may in certain circumstances take actions that do not rise to the level of a use of force under international law in response to situations in outer space. In all cases, however, any actions taken by a State must be consistent with its obligations under international law, including obligations under customary

international law, the Outer Space Treaty and other space-related treaties, applicable arms control agreements, the International Telecommunications Union Constitution and Radio Regulations, and any other applicable international agreements.

One example of the importance of placing international law at the forefront of the conduct of outer space activities is Article IX of the Outer Space Treaty which directs that States shall conduct all activities in outer space with due regard to the corresponding interests of all other States Parties to the Treaty.

Supplementing Existing International Law through Measures to Build Confidence

While the PPWT has flaws, that's not to say there aren't effective ways to supplement existing international law in space. One important tool is non-legally binding transparency and confidence building measures, which can build trust and predictability in States' exploration and use of outer space.

Promoting transparency and confidence building measures in no way represents an abandonment of the rule of law. Quite the opposite is true. Non-legally binding arrangements between States can play an important role in reinforcing and strengthening the rule of law in the outer space legal system. Non-legally binding arrangements can fill the gaps in a legal framework by addressing specific or technical activities that are not addressed in an existing legal regime or contemporary or evolving developments that require flexibility.

Alternatively, States may wish to employ non-legally binding arrangements as a near-term bridge until the often lengthy and complex process is completed to negotiate and ratify a legally-binding agreement. Multilateral treaties take time to negotiate and often involve the completion of a patchwork of domestic procedures before entering into force, even when participating States strongly believe in the underlying goals. Non-binding arrangements often can be constructed more quickly. Exploring the utility of non-legally binding arrangements should not be construed as a resistance to the critically important functions of international lawmaking, simply as a call for crafting an arrangement that will best achieve the desired cooperative outcome.

Specifically, transparency and confidence building measures can actually serve to enable States to better plan their actions without running afoul of existing international law.

Indeed, principles such as those set down in legally-binding international treaties like the Outer Space Treaty and the Liability Convention are critically important in establishing benchmarks for the rule of law in outer space. At the same time, States need to know the rules of the road that they will be expected to follow in highly technical and often evolving areas such as orbital debris mitigation and space situational awareness.

Thus, transparency and confidence building measures actually contribute to the rule of law because they allow States to plan their own actions in accordance with relevant technical rules and guidelines—like the Space Debris Mitigation Guidelines—while providing a basis for predicting the actions of others. In addition, non-legally binding instruments can provide important flexibility in the outer space system while still supporting adherence to the rule of law.

Moreover, use of outer space for exploration, science, and commerce is still at an early stage, and space technology is rapidly advancing. As a consequence, it's important to explore rules of the road that can be adapted to quickly address this changing environment and such flexibility can more easily be achieved through non-legally binding instruments.

Some have suggested an incompatibility between the goal of re-affirming the applicability of principles of international law in the conduct of outer space activities and U.S. approaches to develop non-legally binding transparency and confidence building measures.

In my view there is no incompatibility. Indeed, there are numerous examples of States re-affirming their commitment to the United Nations Charter in non-legally binding political commitments, including codes of conduct. For example, 137 States subscribe to the Hague Code of Conduct Against Ballistic Missile Proliferation that expressly re-affirms their commitment to the United Nations Charter. The United States believes that it is acceptable to include references to, for example, States' inherent right of self-defense, in both legally-binding agreements and non-legally binding political commitments.

As space becomes increasingly contested, exchanges on States' views on national space policies and strategies and affirmation of the applicability of international law in outer space can serve as important transparency and confidence building measures that enhance stability.

The United States supports developing non-legally-binding political commitments in order to build trust and confidence and begin to establish sensible rules of the road for the benefit of all nations. Such measures are not intended to change existing international law, and they would not do so. Rather, these efforts are designed to help maintain the long-term sustainability, safety, stability, and security of outer space by establishing guidelines for the responsible use of space, all within the framework of existing international law.

Arms Control and Verification in Outer Space

The last element I'd like to touch on is the importance of ensuring that any new international law in the area of arms control and verification in outer space is effective and meaningful. The United States has said in numerous fora that it will consider concepts and proposals for outer space arms control measures if they are effectively verifiable, equitable, and enhance the national security of all, including the United States and its allies. To date, the United States has not seen a space-related arms control proposal that meets these criteria.

First, the United States could only support a legally-binding arms control agreement if there was an integral verification regime to help monitor and verify the limitation imposed in the agreement. Specifically, the United States has maintained that it is not possible with existing technologies and cooperative measures to effectively verify an agreement banning space-based weapons.

Verification is critically important because it is the essential process whereby one country assesses whether another country is complying with an arms control agreement. Such a regime would accomplish a number of objectives, including permitting the countries to detect evidence that violations might have occurred and deter violations of the treaty.

To verify compliance, a country must determine whether the activities of another country are within the bounds established by the limits and obligations in the agreement. A verifiable legally-binding arms control treaty contains a host of constraints and provisions designed to deter violations, to make potential violations more complicated and more expensive, or to make their detection timelier. Without effective verification, the arms control regime lacks stability and the parties to the treaty lack confidence in its integrity.

Finally, an arms control agreement in outer space must equitably address the most pressing, existing threats in the field. In the outer space system, this means addressing terrestrially-based anti-satellite weapon systems. Such an arms control agreement would need to prohibit the research, development, testing, production storage or deployment of terrestrial-based anti-satellite weapons so that such capabilities could not be used to substitute for, and perform the functions of, space-based weapons.

The United States remains interested in working with all current and emerging space-faring nations to promote concrete and pragmatic measures that will provide for stability in

space. Thank you for the opportunity to speak this afternoon and I look forward to the range of important issues that will be addressed during this workshop.

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6. Cooperation Arrangement with the EU

On October 19, 2015, the State Department announced that the United States and the European Union had signed a cooperation arrangement on Copernicus Earth observation data. See October 19, 2015 State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/10/248336.htm>, and excerpted below.

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The United States and the European Commission signed the “Copernicus Cooperation Arrangement” which will facilitate data sharing from the Copernicus constellation of Sentinel Earth Observation satellites among a broad spectrum of users on both sides of the Atlantic. U.S. Deputy Assistant Secretary of State for Science, Space and Health Jonathan Margolis and European Commission Director for Space Policy, Copernicus and Defence Philippe Brunet signed the arrangement in Washington, D.C., on October 16.

The arrangement articulates a shared U.S.-EU vision to pursue full, free, and open data policies for government Earth observation satellites. Such policies foster greater scientific discovery and encourage innovation in applications and value added services for the benefit of society at large.

The arrangement will allow experts from U.S. agencies, including the National Aeronautics and Space Administration (NASA), National Oceanic and Atmospheric Administration (NOAA), and the U.S. Geological Survey (USGS), to pursue cooperative data sharing activities with European counterparts, including the European Commission, the European Space Agency (ESA), and the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT). This cooperation will enhance data access, validation, and quality control as well as satellite system compatibility, interoperability, and instrument inter-calibration.

Today’s signing will help the United States and the European Union realize the full value of Earth Observation satellites for civil, commercial, and scientific applications in the public and private sectors, including climate change research, weather forecasting, ocean and atmospheric monitoring, land use management, and the management and mitigation of natural disasters. For example, oil spill detection in the Gulf of Mexico has already been enhanced by the cooperative use of the Copernicus constellation's Sentinel 1A data.

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Cross References

Counter-narcotics, **Chapter 3.B.2.**

Arms control, **Chapter 19.C.**

CHAPTER 13

Environment and Other Transnational Scientific Issues

A. LAND AND AIR POLLUTION AND RELATED ISSUES

1. Climate Change

a. *UN Framework Convention on Climate Change*

The 21st Conference of the Parties (“COP-21”) of the United Nations Framework Convention on Climate Change (“FCCC”) concluded in Paris on December 12, 2015 with the signing of a new climate agreement. The lead-up to COP-21 included several key steps in preparation for concluding an agreement. On March 31, 2015, the United States formally submitted its commitment to cut emissions by 26 to 28 percent from 2005 levels in 2025. See March 31, 2015 press statement by Secretary Kerry, available at <http://www.state.gov/secretary/remarks/2015/03/240007.htm>.

In anticipation of COP-21, Secretary Kerry published an op-ed in the *Financial Times* on October 29, 2015, entitled “Paris Climate Conference is a Rare Opportunity—Grab It.” Secretary Kerry’s piece is available at <http://www.state.gov/secretary/remarks/2015/10/248954.htm>. Secretary Kerry noted that:

The U.S. has ... helped to define an approach grounded in nationally determined greenhouse gas reduction targets, so all countries can take actions appropriate to their specific circumstances. To date, more than 150 countries—representing about 85 per cent of the world’s total emissions—have submitted their contributions. This stands in stark contrast to the top-down, regulatory approach taken under the Kyoto protocol—which, in the end, reflected commitments from only a small subset of nations.

On November 30, 2015, President Obama addressed the opening of COP-21 in Paris. President Obama's remarks are excerpted below and available at <https://www.whitehouse.gov/the-press-office/2015/11/30/remarks-president-obama-first-session-cop21>.

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I've come here personally, as the leader of the world's largest economy and the second-largest emitter, to say that the United States of America not only recognizes our role in creating this problem, we embrace our responsibility to do something about it.

Over the last seven years, we've made ambitious investments in clean energy, and ambitious reductions in our carbon emissions. We've multiplied wind power threefold, and solar power more than twentyfold, helping create parts of America where these clean power sources are finally cheaper than dirtier, conventional power. We've invested in energy efficiency in every way imaginable. We've said no to infrastructure that would pull high-carbon fossil fuels from the ground, and we've said yes to the first-ever set of national standards limiting the amount of carbon pollution our power plants can release into the sky.

The advances we've made have helped drive our economic output to all-time highs, and drive our carbon pollution to its lowest levels in nearly two decades.

But the good news is this is not an American trend alone. Last year, the global economy grew while global carbon emissions from burning fossil fuels stayed flat. And what this means can't be overstated. We have broken the old arguments for inaction. We have proved that strong economic growth and a safer environment no longer have to conflict with one another; they can work in concert with one another.

And that should give us hope. One of the enemies that we'll be fighting at this conference is cynicism, the notion we can't do anything about climate change. Our progress should give us hope during these two weeks—hope that is rooted in collective action.

Earlier this month in Dubai, after years of delay, the world agreed to work together to cut the super-pollutants known as HFCs. That's progress. Already, prior to Paris, more than 180 countries representing nearly 95 percent of global emissions have put forward their own climate targets. That is progress. For our part, America is on track to reach the emissions targets that I set six years ago in Copenhagen—we will reduce our carbon emissions in the range of 17 percent below 2005 levels by 2020. And that's why, last year, I set a new target: America will reduce our emissions 26 to 28 percent below 2005 levels within 10 years from now.

So our task here in Paris is to turn these achievements into an enduring framework for human progress—not a stopgap solution, but a long-term strategy that gives the world confidence in a low-carbon future.

Here, in Paris, let's secure an agreement that builds in ambition, where progress paves the way for regularly updated targets—targets that are not set for each of us but by each of us, taking into account the differences that each nation is facing.

Here in Paris, let's agree to a strong system of transparency that gives each of us the confidence that all of us are meeting our commitments. And let's make sure that the countries who don't yet have the full capacity to report on their targets receive the support that they need.

Here in Paris, let's reaffirm our commitment that resources will be there for countries willing to do their part to skip the dirty phase of development. And I recognize this will not be easy. It will take a commitment to innovation and the capital to continue driving down the cost of clean energy. And that's why, this afternoon, I'll join many of you to announce an historic joint effort to accelerate public and private clean energy innovation on a global scale.

Here in Paris, let's also make sure that these resources flow to the countries that need help preparing for the impacts of climate change that we can no longer avoid. We know the truth that many nations have contributed little to climate change but will be the first to feel its most destructive effects. For some, particularly island nations—whose leaders I'll meet with tomorrow—climate change is a threat to their very existence. And that's why today, in concert with other nations, America confirms our strong and ongoing commitment to the Least Developed Countries Fund. And tomorrow, we'll pledge new contributions to risk insurance initiatives that help vulnerable populations rebuild stronger after climate-related disasters.

And finally, here in Paris, let's show businesses and investors that the global economy is on a firm path towards a low-carbon future. If we put the right rules and incentives in place, we'll unleash the creative power of our best scientists and engineers and entrepreneurs to deploy clean energy technologies and the new jobs and new opportunities that they create all around the world. There are hundreds of billions of dollars ready to deploy to countries around the world if they get the signal that we mean business this time. Let's send that signal.

That's what we seek in these next two weeks. Not simply an agreement to roll back the pollution we put into our skies, but an agreement that helps us lift people from poverty without condemning the next generation to a planet that's beyond its capacity to repair. Here, in Paris, we can show the world what is possible when we come together, united in common effort and by a common purpose.

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On December 12, 2015, COP-21 concluded with the signing of the Paris Agreement to Combat Climate Change. Ambassador Power released a statement on the agreement, which follows and is available at <http://usun.state.gov/remarks/7042>.

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These past two weeks in Paris, the world came together to discuss climate change, one of the most important issues of our time and an issue on which the fate of future generations will hinge. With the agreement signed today, we have put aside differences to reach an accord that will benefit us all. If each country represented in COP21 fulfills its commitments, our children's children will look back on the Paris agreement as a watershed moment.

There is no corner of the world or group of people climate change does not affect, and no one country—or subset of countries—can solve it alone. Through their remarkable and tireless work these past two weeks, our negotiating teams proved that a truly global response can be mobilized. I congratulate all involved in the negotiations for their endurance through long and contentious days and nights of talks. They have achieved an ambitious and durable agreement—

one that elevates our collective level of commitment and provides the structure to track our progress.

In the years ahead, combatting climate change will require countless individual actions by countless individual players. This agreement makes each of these more likely—and thus is a major step toward allowing our generation to be remembered less as a bystander to climate change and its devastating economic, security, and social effects, than as a generation that made hard choices so as to bring about a more stable and secure world.

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Secretary Kerry's remarks at the closing plenary of COP-21 highlight some of the achievements reached in the new climate agreement. His remarks are excerpted below and available at <http://www.state.gov/secretary/remarks/2015/12/250584.htm>.

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This is a tremendous victory for all of our citizens—not for any one country or any one bloc, but for everybody here who has worked so hard to bring us across the finish line. It's a victory for all of the planet and for future generations. We have set a course here. The world has come together around an agreement that will empower us to chart a new path for our planet—a smart and responsible path, a sustainable path. And extraordinarily, we are 196 delegations, 186 plans. That is a remarkable global commitment.

We have reached an agreement that, while everybody here understands there are things here and there that everybody doesn't like, it will help the world prepare for the impacts of climate change that are already here and also for those we know are now headed our way inevitably. And we have reached an agreement that, fully implemented, will help us transition to a global clean energy economy and ultimately prevent the worst, most devastating consequences of climate change from ever happening.

We are sending literally a critical message to the global marketplace. Many of us here know that it won't be governments that actually make the decision or find the product, the new technology, the saving grace of this challenge. It will be the genius of the American spirit. It will be business unleashed because of 186 nations saying to global business in one loud voice: We need to move in this direction. And that will move investment. That will create new, greater research and development, and the next great product will come that will change our lives.

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On behalf of the United States, I can say categorically that while, yes, we think this is in our interest, as I think every nation here does, much more importantly this is in the interest of every nation on Earth. We've taken a critical step forward, and there is no question but that what we do next, how we implement our targets, how we build this agreement, how we build it out for each of our nations and how we strengthen it in the time ahead—that is what will determine

whether we're actually able to address one of the most complex challenges humankind has ever faced.

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Secretary Kerry also delivered remarks to the press at the conclusion of COP-21 on December 12, 2015 in Paris on the signing of the Paris Agreement. His remarks, excerpted below, are available at <http://www.state.gov/secretary/remarks/2015/12/250590.htm>.

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...[T]he world has come together today around an agreement that will not do everything we need to do to deliver on the promise of 2 degrees, but will do everything to kick the process into gear. And when you have 186 countries that show up with commitments to reduce their emissions, even though they're varying kinds and doing it in various ways, lots of countries are serious—including one country that at the end, for instance, raised some objections to this agreement, but has already moved to a very significant percentage of its economy into alternative renewable energy. So some people resist because not enough is being done fast enough.

I think that we've reached an agreement here that is the strongest, most ambitious global climate change agreement ever negotiated. And many of us here in Paris have recognized that we were going to have to do that in order to send a signal to the marketplace that can change the direction that the world is on with respect to dependency on carbon fossil fuels.

So this agreement does have the ability to succeed in its implementation where other agreements have fallen short, because they weren't global. They didn't include everybody. They didn't have this kind of momentum behind them. And the bottom line is that this agreement recognizes that we are going to have to begin to change the way we power our planet, the way we power things, whether it's transportation or buildings, create electricity that everybody draws on.

So these are pretty bold goals, and I think setting an ambitious target of keeping the global warming below 2 degrees centigrade and even aiming to try to hit something lower than that, including 1.5, is a worthy goal. And who knows what happens in the future?

So the first reason this is a strong agreement is ambition. The second reason this is a strong agreement is that it's flexible. It does allow different countries to do what they're able to do, reflecting their national capacity and their economies, their capabilities—and all of those things are very, very important.

I think that the third reason this is a significantly different agreement is it brings an unprecedented level of transparency to the entire effort. Why is the transparency important? Because the transparency in this agreement will shed light on what every country is doing to keep its commitments. And it helps everybody to share experience, to share technologies, to share best practices. So the transparency that is in here is legally binding, and that's a way that we can turn to people and say, look, even these less-developed countries, even a near-developed country who has been an opponent of this has agreed to sign up and begin to shed light on their

nation's emissions levels, their strategies, their reductions—all of those will be reported in the context of this.

...[T]here is a periodic review every five years, but even every two years there's a review of some of the material that's been put in. ... I think it's the only way we're going to know where the world stands, and that's very significant. We now have a credible system shared by everybody because it's the rules of the convention and the IPCC so that we're able to know where the world is heading.

Then the fourth reason this is different from others is that this one, because of its global nature with 186 countries with participating plans, absolutely sends a distinct message to the marketplace. And that message is: Hey, you better take notice. A whole bunch of companies came here—big companies, like Wal-Mart, GE, Google, and Apple, and a bunch of companies signed on to making sure the products they produce are produced from a virtuous cycle of fuel and sustainably, and that even the way they power their plants is going to be done so. That will begin to shift the entire marketplace. Analysts on Wall Street will begin to look at whether or not people are meeting standards. People will begin to make judgments. CEOs will begin to be asked the question: How are you doing for your shareholders relative to your responsibilities to live up to this?

It's a sea change, and I think that's very, very important. And I trust personally the private sector ultimately will deliver on this, because countless entrepreneurs will be attracting capital for R&D, for investment. And we've triggered that by adding to our own R&D, putting it up to about twice the level.

And so my sense is that – I'm not going to go through the details, but we've increased our adaptation investments in this effort. We've increased our commitment to the Mission Innovation, which will take our R&D up from 5 billion to 10 billion. When you add that to the President's Climate Action Assistance Plan, which provides help to about 120 countries to help to embrace climate change practices—we're committed to working with the World Bank to help change the way it actually funds some of these kinds of initiatives. We think we can do better.

And I think the final virtue of this agreement—there are other virtues, but the final important one that I want to just single out right now is that it—as we keep an eye on the targets with the review process, this agreement allows us to change those targets, to—and you hear one country announce tonight that they're already committing to change, France, in 2020. I'm confident others will follow. And technologies are going to force that kind of change. There'll be a ...huge amount of technology advantage created here. And I think that's going to make all the difference in the world in the long run.

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President Obama's remarks after the adoption of the Paris Agreement are excerpted below. Daily Comp. Pres. Docs. 2015 DCPD No. 00885, pp. 1-3 (Dec. 12, 2015).

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Two weeks ago, in Paris, I said before the world that we needed a strong global agreement to accomplish this goal—an enduring agreement that reduces global carbon pollution and sets the world on a course to a low-carbon future.

A few hours ago, we succeeded. We came together around the strong agreement the world needed. We met the moment.

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Today, the American people can be proud—because this historic agreement is a tribute to American leadership. Over the past seven years, we’ve transformed the United States into the global leader in fighting climate change. In 2009, we helped salvage a chaotic Copenhagen Summit and established the principle that all countries had a role to play in combating climate change. We then led by example, with historic investments in growing industries like wind and solar, creating a new and steady stream of middle-class jobs. We’ve set the first-ever nationwide standards to limit the amount of carbon pollution power plants can dump into the air our children breathe. From Alaska to the Gulf Coast to the Great Plains, we’ve partnered with local leaders who are working to help their communities protect themselves from some of the most immediate impacts of a changing climate.

Now, skeptics said these actions would kill jobs. Instead, we’ve seen the longest streak of private-sector job creation in our history. We’ve driven our economic output to all-time highs while driving our carbon pollution down to its lowest level in nearly two decades. And then, with our historic joint announcement with China last year, we showed it was possible to bridge the old divides between developed and developing nations that had stymied global progress for so long. That accomplishment encouraged dozens and dozens of other nations to set their own ambitious climate targets. And that was the foundation for success in Paris. Because no nation, not even one as powerful as ours, can solve this challenge alone. And no country, no matter how small, can sit on the sidelines. All of us had to solve it together.

Now, no agreement is perfect, including this one. Negotiations that involve nearly 200 nations are always challenging. Even if all the initial targets set in Paris are met, we’ll only be part of the way there when it comes to reducing carbon from the atmosphere. So we cannot be complacent because of today’s agreement. The problem is not solved because of this accord. But make no mistake, the Paris agreement establishes the enduring framework the world needs to solve the climate crisis. It creates the mechanism, the architecture, for us to continually tackle this problem in an effective way.

This agreement is ambitious, with every nation setting and committing to their own specific targets, even as we take into account differences among nations. We’ll have a strong system of transparency, including periodic reviews and independent assessments, to help hold every country accountable for meeting its commitments. As technology advances, this agreement allows progress to pave the way for even more ambitious targets over time. And we have secured a broader commitment to support the most vulnerable countries as they pursue cleaner economic growth.

In short, this agreement will mean less of the carbon pollution that threatens our planet, and more of the jobs and economic growth driven by low-carbon investment. Full implementation of this agreement will help delay or avoid some of the worst consequences of

climate change, and will pave the way for even more progress, in successive stages, over the coming years.

Moreover, this agreement sends a powerful signal that the world is firmly committed to a low-carbon future. And that has the potential to unleash investment and innovation in clean energy at a scale we have never seen before. The targets we've set are bold. And by empowering businesses, scientists, engineers, workers, and the private sector—investors—to work together, this agreement represents the best chance we've had to save the one planet that we've got.

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b. *Joint Action with Other Countries*

As discussed in *Digest 2014* at 560-62, the U.S.-China Climate Change Working Group (“CCWG”) provided a context for the United States and China to commit to reduce pollution jointly. The United States and China made further commitments in 2015, as did other countries leading up to COP-21 in Paris. U.S.-China cooperation was particularly critical to the success of the negotiations in Paris. On July 1, 2015, Secretary Kerry issued a press statement highlighting commitments made by China, the Republic of Korea, Iceland, and Serbia, as well as the initiation of U.S.-Brazil climate cooperation. The press statement is excerpted below and available at <http://www.state.gov/secretary/remarks/2015/07/244536.htm>.

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Leaders from around the world are signaling loud and clear that taking action to address climate change is a top priority. As an important step, China, the Republic of Korea, Serbia, and Iceland all formally submitted their greenhouse gas emissions targets this week to the United Nations Framework Convention on Climate Change.

Just last week, I convened the U.S.-China Strategic and Economic Dialogue with Secretary of the Treasury Jack Lew, during which cooperation on climate change was a key area of discussion. China's submission this week delivers on those discussions and the commitment made during our historic joint announcement on climate change last November.

Our two Presidents stood together then—as leaders of the world's two largest economies—and pledged to take decisive steps to combat the global threat we know we can't wait any longer to address. We look forward to continued robust conversations with China in the coming months on remaining issues under negotiation as we head towards the Paris Conference of Parties in December.

Also this week, the U.S. and Brazil—the two countries with the most absolute emissions reductions in the world since 2005—released a joint statement establishing a joint climate

change working group and outlining key areas of cooperation on climate change, with Brazil committing to new renewable energy and sustainable land use goals.

As the alarming impacts of climate change grow more and more frequent, world leaders are working domestically and internationally to enact the changes needed to stave off the worst effects.

These efforts are all the more important as we work globally to set a new pathway forward to decrease harmful emissions and transform to low-carbon economies.

The targets announced this week—in addition to those from the U.S., EU, Mexico, Canada, Switzerland, Norway, Russia, and Japan—represent more than two-thirds of global greenhouse gas emissions.

While much work remains to be done to secure a durable climate agreement in Paris, I commend these leaders for helping to build momentum towards this goal.

I encourage more countries to come forward with ambitious commitments as we draw closer to this critical meeting.

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On September 25, 2015, the United States and China issued a Joint Presidential Statement on Climate Change, available at <https://www.whitehouse.gov/the-press-office/2015/09/25/us-china-joint-presidential-statement-climate-change>. Secretary Kerry's press statement on the Joint Presidential Statement on Climate Change is available at <http://www.state.gov/secretary/remarks/2015/09/247296.htm>. Secretary Kerry's statement references the extensive dialogue on climate change between U.S. and Chinese officials in the period between the joint announcement in November 2014 of targets to reduce emissions and leading up to and through COP-21 in Paris in December 2015. As Secretary Kerry's statement emphasizes, addressing climate change at COP-21 would not have been possible without U.S.-China cooperation.

2. Sustainable Development

a. Financing for Development: Addis Ababa Action Agenda

On July 16, 2015, the United States delivered an explanation of position on the framework reached at the conclusion of the Third International Conference on Financing for Development ("FFD"), held in Addis Ababa, Ethiopia, July 13-16, 2015. Deputy Assistant Secretary of Treasury Alexia Latortue delivered the statement, excerpted below. U.N. Doc. A/CONF.227/9*. The outcome document of the conference, referred to as the Addis Ababa Action Agenda, is available at http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf.

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Today is an important milestone for guiding development efforts for the years ahead and towards our key objective of ending extreme poverty and helping those countries most in need. This was a good-faith effort by all. Together, we kept our eyes on our common goal and worked hard to forge a new global partnership in promoting sustainable development. We have come together to deepen our collective commitment to end extreme poverty, promote inclusive growth and provide the means to implement our ambitious post-2015 development agenda. We would like to underscore the importance the United States attaches to the financing for development process and how inspired we are by the fact that all of us were able to work together to build a shared vision across nations about how to effectively invest in sustainable development. Now comes the hard work of implementing the framework we have agreed to in order to deliver on the ambitious goals before us. Addis is a celebration of our collective success on behalf of citizens around the world, and Ethiopia has been a wonderful host for this celebration.

We take this opportunity to make important points of clarification on the outcome document for the Addis Ababa financing for development conference, with the understanding that this non-binding document does not create rights or obligations under international law.

First, the United States has long-standing concerns regarding the topic of the right to development. The right to development continues to lack any kind of an agreed international understanding. As we have repeatedly stated, any related discussion needs to focus on aspects of development that relate to human rights — universal rights that are held and enjoyed by individuals, and which every individual may demand from his or her own Government.

Second, the United States has long promoted consensual, orderly sovereign debt restructuring efforts within a framework of contractual certainty. In this regard, the United States supports the recent work of the International Capital Market Association, endorsed by the International Monetary Fund, to enhance contractual certainty in the context of restructuring efforts. As we have previously stated, if renegotiation of contractual terms become necessary, the United States expects that both sides — creditors and sovereign debtors alike — should work in a cooperative manner to negotiate a voluntary, consensual resolution, but that restructuring negotiations must take place within a framework where creditors and debtors can seek recourse to the courts to enforce contractual terms.

Third, the United States firmly considers that strong protection and enforcement of intellectual property rights provides critical incentives needed to drive the innovation that will address the health, environmental and development challenges of today and tomorrow. Such protection is also an essential component of any international technology cooperation effort aimed at addressing those challenges through the facilitation of access to, and dissemination of, such technologies. The United States understands, with respect to the outcome document, that references to transfer of, or access to, technology are 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. The United States notes that work is being done in other international forums to address issues pertaining to traditional knowledge, and underscores the importance of regulatory and legal environments that do not negatively affect innovation and development. The language in the document on technology transfer and on traditional knowledge does not, from the United States perspective, serve as a precedent for future negotiated documents, including

any documents relating to the sustainable development goals or the Conference of Parties of the United Nations Framework Convention on Climate Change, or any other negotiation in or outside of the United Nations system, including bilateral and multilateral agreements.

With these clarifications, we are pleased to join consensus on the adoption of the Addis Ababa Action Agenda.

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b. 2030 Agenda for Sustainable Development

On August 2, 2015, intergovernmental negotiations on the Post-2015 Development Agenda concluded at the UN in New York. Tony Pipa, U.S. Special Coordinator for the Post-2015 Development Agenda, delivered remarks at the close of negotiations. Mr. Pipa's concluding remarks are excerpted below and available at <http://www.state.gov/p/io/rm/245615.htm>. On June 22, 2015, Mr. Pipa delivered a general statement on behalf of the United States during the negotiations, which is available at <http://www.state.gov/p/io/rm/244173.htm>. For input from the United States on the political declaration that was negotiated, see Mr. Pipa's statement on July 21, 2015, available at <http://www.state.gov/p/io/rm/245126.htm>. Mr. Pipa also delivered remarks on July 23, 2015 on means of implementation during the post-2015 intergovernmental negotiations, available at <http://www.state.gov/p/io/rm/245252.htm>. His July 24, 2015 statement on follow up and review during the post-2015 intergovernmental negotiations is available at <http://www.state.gov/p/io/rm/245320.htm>. For Mr. Pipa's July 28, 2015 statement on means of implementation during the post-2015 intergovernmental negotiations, see <http://www.state.gov/p/io/rm/245435.htm>. Secretary Kerry's press statement on the conclusion of the Post-2015 Development Agenda is available at <http://www.state.gov/secretary/remarks/2015/08/245594.htm>.

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We are pleased to join consensus on this visionary, transformative and ambitious agenda. Like any effort such as this, we recognize that it represents a fine political balance and includes compromises—and like others, we think there are things in this document that can be improved.

At a later date, we will provide additional views on the text. Today, we wish only to say to all gathered here: well done and thank you, and congratulations. The ambition reflected in this outcome and the conclusion of these deliberations reaffirms the transformative nature of the multilateral system, and underscores the power of what is possible through collective endeavor.

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It is a commitment that ensures any girl or any boy born today, in any place on this planet, is a birth and an entrance into a world full of hope: that her or his life will be free of poverty and hunger; full of opportunity and prosperity; free of violence and discrimination; and lived in harmony with the planet.

All of that language, by the way, is somewhere in this outcome document.

This delegation has been privileged to have worked with all of you to bring this document to life, with all your delegations, and with both of you, Mr. Co-Facilitators, and we are impressed with the wide-ranging vision of sustainable development and collective action that it represents.

The United States is pleased to join this consensus and stands ready to adopt this agenda. We look forward to working collectively and in partnership with others and all of you here to put it into action. Thank you.

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On August 3, 2015, Ambassador Samantha Power, U.S. Permanent Representative to the UN, issued a statement on the 2030 Agenda for Sustainable Development. Her statement is excerpted below and available at <http://usun.state.gov/remarks/6788>.

* * * *

After more than three years of intense negotiations, the world has finally agreed on an ambitious and transformative 2030 Agenda for Sustainable Development—the first global development agenda to be fully negotiated by member states.

While the new agenda is a worthy successor to the Millennium Development Goals, it is far more comprehensive, addressing economic, social, and environmental dimensions of sustainable development in a holistic and integrated manner. The new agenda is universal and applicable to every country. It requires all of us to commit to eradicating extreme poverty, fighting inequality, empowering women and girls, protecting our natural resources, improving governance, encouraging sustainable and inclusive economic growth, and focusing our collective efforts to ensure that those most in need get an equal chance in life. We would like to thank the co-facilitators, Ambassador Donoghue of Ireland and Ambassador Kamau of Kenya, for their leadership and perseverance, and the delegations themselves for the tenacity, flexibility, and tremendous dedication they showed to reach consensus.

If we act to meet the promise of this Sustainable Development Agenda, we will together build a world in which no child will grow up in extreme poverty. Small-scale rural farmers will find easier access to loans and markets so they can grow their businesses and support their families. Poor children who previously were invisible will be able to obtain legal identification and be counted by their governments. Millions of girls will be spared the damage caused by child marriage and female genital mutilation. And developing countries will be able to access the financing and expertise they need to expand their economies and industrialize in a clean and sustainable way.

As difficult as these three years of often-grueling negotiations have proven, the truly hard part now lies before us. Our ability to deliver on the transformational benefits of this agenda will turn on whether we shoulder our collective responsibility to achieve results. We look forward to working with governments, civil society, academia, the private sector, the scientific community, and citizens around the world to implement this agreement. We must translate the bold promise of this historic consensus into better lives for people everywhere.

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As discussed in Chapter 4, Mr. Pipa’s further explanation of position, delivered on September 1, 2015, more precisely identifies U.S. views on particular provisions in the text of the 2030 Agenda. Excerpts from that statement appear in Chapter 4 and additional excerpts appear below. The full text of Mr. Pipa’s September 1 statement is available at <http://usun.state.gov/remarks/6833>.

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In supporting this document we reaffirm our long-standing commitment to both international development and the promotion of human rights. However, we must reiterate the concerns of the United States regarding the topic of a “right to development,” which are long-standing and well known; it does not have an agreed international meaning, and any related discussion needs to focus on aspects of development related to human rights, which are universal rights held and enjoyed by all individuals and which every individual may demand from his or her own government.

As we have said many times, the U.S. remains as committed as ever to assisting the most vulnerable on a path to achievement of this agenda. At the same time, we collectively recognize that this is a universal Agenda, requiring action by all. We underscore here that, by its terms, paragraph 12 reaffirms the principle of common but differentiated responsibilities only as it was originally set out in principle 7 of the Rio Declaration on Environment and Development, where it was explicitly limited to certain types of global environmental degradation. The reaffirmation of principle 7 in this limited context does not imply, and the United States does not accept, that this principle has relevance or application to the broad range of issues addressed in this Agenda, or to sustainable development as a whole.

With respect to paragraph 28 and targets 8.4 and 12.1, the United States views resource efficiency to be at the core of sustainable consumption and production (SCP), and we interpret these provisions to speak to the need to enhance national policies aimed at fostering resource efficiency and sustainability in a manner appropriate to each country’s national circumstances. We further understand these provisions to reaffirm the universal approach to SCP that recognizes some flexibility is needed in implementation. These provisions highlight the special leadership role of developed countries in promoting the exchange of best practices on SCP implementation, based on our experience with environmental protection policies and actions, and our technical expertise and capabilities.

The United States firmly considers strong protection and enforcement of intellectual property rights as providing critical incentives needed to produce innovation that will enable us to address the health, environment, and development challenges of today and tomorrow. In that respect, the United States understands that references to transfer of, or access to, technology 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 would now like to make some additional points on specific language or targets in our Agenda: with respect to Paragraph 44 and targets 10.6 and 16.8, the United States interprets this language to refer to the effectiveness of developing country representation and voice under current UN institutional models, and not to governance or other changes within the International Financial Institutions, including the IMF and World Bank Group.

We note that the term “equitable” is used in multiple contexts in the Agenda, including Goal 4 and target 6.2. While the United States fully endorses the importance of universal access to safe drinking water, sanitation, and education, 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.

Concerning the reference to “equal rights to economic resources” in Target 1.4, the United States understands this to mean that laws regarding ownership, inheritance and other property rights should be non-discriminatory and that those rights should be protected in a non-discriminatory manner.

We understand Target 8.7 to refer to the *unlawful* recruitment and use of child soldiers, which can also be a form of human trafficking.

With respect to target 15.3, the United States recognizes the concept of land degradation neutrality at the national and sub-national level only and understands that efforts in furthering this target would be comprised of efforts at the national level, which would not entail any international administration, under the UN Convention to Combat Desertification or otherwise.

Regarding the references to access and benefit-sharing in Targets 2.5 and 15.6, the United States understands “as internationally agreed” to mean as agreed in international instruments for parties to those instruments. Implementation of these targets should take into consideration the important role of stakeholders and be conducted on mutually agreed terms, and we do not read these targets to suggest any relationship between intellectual property protections and ABS policies.

Regarding the reference to foreign occupation in Paragraph 35, we reaffirm our abiding commitment to a comprehensive and lasting peace based on a two-state solution 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 toward a more sustainable future.

In this spirit, we—alongside so many of you in this room—look ahead with anticipation to the implementation of this Agenda. Adopting this agenda—at this early stage—is a remarkable accomplishment, and one that we have used to motivate tangible and powerful actions to match our ambitions.

The Addis Ababa Action Agenda, adopted at the Third International Conference on Financing for Development in July of this year, is a strong starting point for our efforts. The

Addis Agenda provides us with an ambitious, comprehensive, and modern framework for achieving the Sustainable Development Goals, containing more than 100 concrete measures and taking us collectively further than we have gone before on the full range of means of implementation topics. Indeed, we note that the 2030 Agenda recognizes that the Addis Agenda provides the context for both the interpretation and implementation of the MOI targets and underscores that these targets can be achieved through the implementation of the Addis Agenda.

In the context of implementation, we particularly welcome the emphasis the 2030 Agenda places on a few, central cross-cutting themes and drivers of progress. While some may have goals associated with them, we note them here for the power inherent in their underlying and cross-cutting quality.

Inequality: we all know well the history—despite stimulating remarkable progress, the MDGs let large pockets of key populations and even whole countries (e.g. conflict-affected and fragile states) slip through the cracks. This Agenda’s emphasis on “leaving no one behind”—on ensuring progress for the most vulnerable—is a notable and critical change. We are pleased to see it, and welcome its specific emphasis on inclusion of all groups and all people, including LGBTI.

Gender equality and the empowerment of women and girls is integral to achieving success with this Agenda, and to that, in particular, the recognition of women’s sexual and reproductive health and reproductive rights, and its importance to development, is crucial.

Science, technology, innovation, and data: each will be critical to accelerating progress in order to achieve the SDGs. New approaches and innovations will increase the impact and decrease the cost of interventions across this Agenda.

Good governance and the rule of law: to achieve our ambitions, we will need institutions at all levels that are effective, transparent, accountable, and democratic.

Sustainability: the SDGs ensures focus on long-term development and locking in progress by integrating sustainability in all three dimensions: environmental, social, and economic. Well-crafted goals and targets in areas like climate-smart agriculture, renewable energy, healthy oceans, natural resource management, and disaster risk reduction within these goal areas will help protect reversal of development gains. And sustainable development relies on preventing and mitigating conflict and violent extremism, promoting open, resilient, and democratic societies, and local ownership, and advancing inclusive economic growth.

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On September 27, 2015, President Obama delivered remarks at the closing session of the UN Sustainable Development Summit. Daily Comp. Pres. Docs. 2015 DCPD No. 00654, pp. 1-4 (Sept. 27, 2015). President Obama’s remarks are excerpted below.

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Because the world came together in an unprecedented effort, the global hunger rate has already been slashed. Tens of millions of more boys and girls are today in school. Prevention and treatment of measles and malaria and tuberculosis have saved nearly 60 million lives. HIV/AIDS

infections and deaths have plummeted. And more than 1 billion people have lifted themselves up from extreme poverty—1 billion.

The entire world can take enormous pride in these historic achievements. And so let the skeptics and cynics know: development works. Investing in public health works. We can break the cycle of poverty. People and nations can rise into prosperity. Despite the cruelties of our world and the ravages of disease, millions of lives can be saved if we are focused and if we work together. Cynicism is our enemy. A belief, a capacity in the dignity of every individual, and a recognition that we, each of us, can play a small part to play in lifting up people all around the world—that is the message that we are sending here today. And because of the work of so many who are assembled here today, we can point to past success. And yet we are also here today because we understand that our work is nowhere near done. We can take pride in what we've accomplished, but we cannot be complacent.

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And so today we commit ourselves to new sustainable development goals, including our goal of ending extreme poverty in our world. We do so understanding how difficult the task may be. We suffer no illusions of the challenges ahead. But we understand this is something that we must commit ourselves to. Because in doing so, we recognize that our most basic bond—our common humanity—compels us to act. An impoverished child in a distant slum or a neighborhood not that far from here is just as equal, just as worthy, as any of our children, as any of us, as any head of government or leader in this great hall.

We reaffirm that supporting development is not charity, but is instead one of the smartest investments we can make in our own future. After all, it is a lack of development—when people have no education and no jobs and no hope, a feeling that their basic human dignity is being violated—that helps fuel so much of the tensions and conflict and instability in our world.

And I profoundly believe that many of the conflicts, the refugee crises, the military interventions over the years might have been avoided if nations had truly invested in the lives of their people and if the wealthiest nations on Earth were better partners in working with those that are trying to lift themselves up. ...

I'm here to say that in this work, the United States will continue to be your partner. Five years ago, I pledged here that America would remain the global leader in development, and the United States Government, in fact, remains the single largest donor of development assistance, including in global health. In times of crisis—from Ebola to Syria—we are the largest provider of humanitarian aid. In times of disaster and crisis, the world can count on the friendship and generosity of the American people.

The question before us, though, as an international community, is how do we meet these new goals that we've set today? How can we do our work better? How can we stretch our resources and our funding more effectively? How can donor countries be smarter? And how can recipient countries do more with what they receive? We have to learn from the past to see where we succeeded so that we can duplicate that success and to understand where we've fallen short and correct those shortcomings.

And we start by understanding that this next chapter of development cannot fall victim to the old divides between developed nations and developing ones. Poverty, growing inequality,

exists in all of our nations, and all of our nations have work to do. And that includes here in the United States.

That's why, after a terrible recession, my administration has worked to keep millions of families from falling into poverty. That's why we've brought quality, affordable health care to more than 17 million Americans. Here in this country, the wealthiest nation on Earth, we're still working every day to perfect our Union and to be more equal and more just and to treat the most vulnerable members of our society with value and concern.

And that's why today I am committing the United States to achieving the sustainable development goals. And as long as I am President, and well after I'm done being President, I will keep fighting for the education and housing and health care and jobs that reduce inequality and create opportunity here in the United States and around the world. Because this is not just the job of politicians, this is work for all of us.

Now, this next chapter of development cannot just be about what governments spend, it has to harness the unprecedented resources of our interconnected world. In just a few short years—in the areas of health and food security and energy—my administration has committed and helped mobilize more than a hundred billion dollars to promote development and save lives. More than \$100 billion. And guided by the new consensus we reached in Addis, I'm calling on others to join us. More governments, more institutions, more businesses, more philanthropies, more NGOs, more faith communities, more citizens—we all need to step up with the will and the resources and the coordination to achieve our goals. This must be the work of the world.

At the same time, this next chapter of development must focus not simply on the dollars we spend, but on the results that we achieve. And this demands new technologies and approaches, accountability, data, behavioral science—understanding that there are—there's lessons that we have learned, best practices on how people actually live so that we can dramatically improve outcomes. It means breaking cycles of dependence by helping people become more self-sufficient, not just giving people fish, but teaching them how to fish. That's the purpose of development.

Rather than just sending food during famine—although we have to do that to avert starvation—we also have to bring new techniques and new seeds and new technologies to more farmers so they can boost their yields and increase their incomes, feed more people and lift countless millions out of poverty. Rather than just respond to outbreaks like Ebola—although we have to do that, and we have—let's also strengthen public health systems and advance global health security to prevent epidemics in the first place.

As more countries take ownership of their HIV/AIDS programs, the United States is setting two new bold goals. Over the next 2 years, we'll increase the number of people that our funding reaches—so that nearly 13 million people with HIV/AIDS get lifesaving treatment—and we'll invest \$300 million to help achieve a 40 percent reduction in new HIV infections among young women and girls in the hardest hit areas of sub-Saharan Africa. And I believe we can do that—the first AIDS-free generation.

This next chapter of development must also unleash economic growth, not just for a few at the top, but inclusive, sustainable growth that lifts up the fortunes of the many. We know the ingredients for creating jobs and opportunity; they are not a secret. So let's embrace reforms that attract trade and investment to areas that are in need of investment and in need of trade. Let's trade and build more together, make it easier for developing countries to sell more of their goods around the world. And let's invest in our greatest resource—our people—their education, their

skills. Let's invest in innovative entrepreneurs, the striving young people who embrace new technology and are starting businesses and can ignite new industries that change the world. I have met young people in—on every continent, and they can lead the way if we give them the tools they need.

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3. Ozone Depletion

On April 15, 2015, the United States, Canada, and Mexico submitted an amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer to phase down the production and consumption of hydrofluorocarbons (“HFCs”). See State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/04/240730.htm>. For past proposals by the United States, Canada, and Mexico to phase down HFCs, see *Digest 2014* at 563; *Digest 2013* at 394-96; and *Digest 2012* at 434.

On November 5, 2015, at the 27th Meeting of the Parties to the Montreal Protocol in Dubai, the parties committed to address HFCs under the agreement and work toward an amendment in 2016. See Secretary Kerry's November 5, 2015 press statement, available at <http://www.state.gov/secretary/remarks/2015/11/249230.htm>. Secretary Kerry said:

This is a major accomplishment. The Montreal Protocol is among the most successful multilateral environmental treaties in history. Amending it to include HFCs could set a course for actions that would avoid 0.5C of warming by the end of the century.

The progress in Dubai also indicates that the world is ready for a new chapter in the fight against climate change. In agreeing to address HFCs together, we have laid the groundwork for even greater co-operation toward a successful outcome in Paris—and the entire planet will be better off for it.

4. Protocol on Heavy Metals to the Long-Range Transboundary Air Pollution Convention

In 2012, the United States and other parties to the 1998 Protocol on Heavy Metals to the Convention on Long-Range Transboundary Air Pollution (“LRTAP”) adopted amendments to the Protocol to reduce emissions of lead, cadmium, and mercury. On February 24, 2015, Secretary Kerry submitted acceptance on behalf of the United States of the 2012 Amendments to the Heavy Metals Protocol. The United States' acceptance of the Amendments is subject to the following:

The United States hereby declares, pursuant to Article 15, paragraph 3, of the Protocol as amended, that it does not intend to be bound by the procedures set out in Article 13, paragraph 5ter, as regards the amendment of annexes II, IV, V, and VI.

5. Meeting of the “Triple COP” to the Basel, Rotterdam, and Stockholm Conventions

A combined conference of the parties to the Basel, Rotterdam, and Stockholm Conventions was held in May 2015. It was the twelfth meeting of the Conference of the Parties to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; the seventh meeting of the Conference of the Parties to the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; and the seventh meeting of the Conference of the Parties to the Stockholm Convention on Persistent Organic Pollutants. At the Triple-COP, the parties to the Stockholm Convention—for the first time—held a vote on the adoption of an amendment to the Annex to list a new chemical substance (in this case, PCP), rather than adopting the amendment to list the new substance by consensus. Following the vote, the United States made a brief statement as an observer to the Stockholm Convention, emphasizing the importance of consensus and U.S. concern about the precedent of voting, which does not encourage the kind of collective action and commitment that is necessary for a multilateral environmental agreement to succeed. At the same time, the United States acknowledged Parties’ concerns about the obstructionist tactics by some parties that led to the vote.

B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

1. Arctic Council

a. *Overview*

On November 17, 2015, U.S. Special Representative for the Arctic Robert J. Papp, Jr. testified before the U.S. House of Representatives Committee on Foreign Affairs. Ambassador Papp’s testimony is excerpted below (with footnotes omitted) and available at <http://docs.house.gov/meetings/FA/FA14/20151117/104201/HHRG-114-FA14-Wstate-PappR-20151117.pdf>.

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It is important to note from the outset that the United States and the other Arctic States are pursuing our mutual interests in a safe, stable, and prosperous Arctic region during a difficult time in our relationship with Russia. Russia’s attempted annexation of Crimea, its aggression in Ukraine, and its efforts to intimidate its neighbors are an affront to the rules-based international system and put at risk the peace that we and our allies have worked so hard to achieve in Europe.

The international community's disagreements with Russia caused by Moscow's actions have complicated our efforts in the Arctic. Fortunately, we have worked with Russia on Arctic issues during past political crises and are maintaining activities related to protecting the Arctic environment, ensuring maritime safety, including search and rescue, and law enforcement. We also continue to work with Russia in multilateral fora, including under the auspices of the Arctic Council, and our allies are following similar policies.

We cannot and will not ignore Russian aggression, even as our Arctic cooperation continues. The U.S. is in lockstep with the E.U. and Norway on sanctions that target, among other things, Russian's ability to develop resources in its Arctic waters.

At the same time, we continue to work with Russia and all our Arctic partners on global issues such as those in the Arctic where we share common interests. ...

International Governance

United States engagement with international partners in this region is extremely important, as governance of the Arctic region falls to the United States and the seven other Arctic States: Canada, Iceland, Denmark (through Greenland), Finland, Russia, Norway, and Sweden. International cooperation takes place in multiple fora, such as the Arctic Council, International Maritime Organization, and the new Arctic Coast Guard Forum. Each of these serves a purpose to advance specific priorities and affords the opportunity to engage with appropriate delegations. By and large, our international Arctic engagement takes place through the Arctic Council, the preeminent forum for international diplomacy on Arctic matters.

The Arctic Council

The Arctic Council, a high-level intergovernmental forum of the eight Arctic States and the Arctic indigenous peoples, was created in 1996 to provide a means for promoting international cooperation, coordination and interaction on common Arctic issues. Its founding document focuses the Council's work on environmental protection and sustainable development, but its mandate is not limited to these areas. The one area explicitly excluded from the Council's mandate is "military security"; thus, the Council does not handle military issues or military-to-military cooperation among the Arctic States.

As the challenges and opportunities facing the Arctic have grown in volume and complexity, the Council's workload has increased dramatically in recent years. The Council has six permanent working groups covering a broad range of issues such as human health, climate change impacts, biological diversity, emergency response, and protection of the Arctic marine environment. The Council also periodically mandates task forces and expert groups for limited periods to address specific, cross-cutting issues. Each Arctic State appoints a Senior Arctic Official to run the Council's day-to-day operations. Six Permanent Participant organizations represent the interests of the region's indigenous peoples in the Council. The Council meets at the Ministerial level once every two years at the conclusion of each chairmanship, and most Arctic States send their foreign minister. Each Arctic State assumes the chairmanship of the Council for a two-year period during which the chairing State hosts numerous meetings and other diplomatic events, and assumes all associated costs.

The United States has led or co-led many of the Council's important initiatives including the 2004 Arctic Climate Impact Assessment, the 2008 Arctic Oil and Gas Assessment, and the 2009 Arctic Marine Shipping Assessment. In addition, work under the auspices of the Arctic Council has resulted in two binding agreements among the Arctic States: one on search and rescue cooperation, signed in 2011, and the other on marine oil pollution preparedness and

response, signed in 2013. Over the past 19 years, the Council's cutting-edge work has paved the way for international cooperation to address shared environmental challenges. No other body in the world is doing work of such high caliber on the issues we face in the Arctic, which is why the Council is so important to the United States. Our collaboration with the other seven Arctic States has worked well over the life of the Council, and we could not have done this work without them.

U.S. Chairmanship

The United States assumed Chairmanship of the Arctic Council in April 2015. Our Chairmanship theme, "One Arctic: Shared Opportunities, Challenges, and Responsibilities," echoes the belief that all eight Arctic States must work together to address the challenges of a changing Arctic, to embrace the opportunities it presents and to face the responsibilities we all have as stewards of this great region. In recognition of the urgency of the issues facing the region, we convened the first Senior Arctic Official Executive Meeting under the U.S. Chairmanship in June, the first time such a meeting has been held so soon after an Arctic Council Ministerial meeting. This gathering enabled the Council's working groups, task forces and expert group to expeditiously launch their ambitious work plans for the next two years, tackling themes we have chosen to highlight during the U.S. Chairmanship:

- Arctic Ocean Safety, Security, and Stewardship
- Improving Economic and Living Conditions
- Addressing the Impacts of Climate Change

Climate change impacts in the Arctic have resulted in significant reductions in sea ice, making the Arctic Ocean increasingly accessible. We have also seen an increase in shipping through the Bering Strait, a potential future funnel for trans-Arctic shipping traffic. In addition, the ice-diminished maritime environment is attracting resource exploration in areas previously inaccessible. Advancing safety in the Arctic Ocean requires improved maritime domain awareness, for which navigational services such as weather and sea ice forecasting and nautical charting are critically important.

We are prioritizing emergency response by convening exercises under the auspices of the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic and the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic to examine the coordination of emergency response capabilities of the Arctic States, in conjunction with local communities. We are fostering new partnerships with government institutions, the private sector and indigenous communities for emergency response and environmentally responsible maritime activity in the region. The Arctic Council also continues to develop a network of existing marine protected areas to leverage international best practices for sensible maritime activities that avoid areas of ecological and cultural significance where possible. In addition, a Task Force on Arctic Marine Cooperation is assessing future needs for deepened coordination among the Arctic States in the Arctic Ocean.

The cold temperatures of the Arctic Ocean make it particularly vulnerable to ocean acidification. If current emissions trends continue, scientists predict that, by the end of the century, the Arctic waters will become corrosive to all shell-building organisms, thereby threatening an important component of the marine ecosystem as these organisms are a critical food source. The Arctic Council is working to expand the Arctic reach of the Global Ocean Acidification Observing Network, increase the number of stakeholders trained to conduct ocean

acidification monitoring, and raise public awareness of this threat to the entire Arctic food web and the people whose livelihoods depend on these creatures.

We remain cognizant of how changes in the Arctic have created significant challenges and opportunities for every Arctic nation, especially for our own American citizens in Alaska. The warming climate threatens the traditional ways of life of Arctic residents and risks disrupting ecosystem balance. During the U.S. Chairmanship, we are striving to bring tangible benefits to communities across the Arctic.

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The United States, through many departments and agencies, is using our Arctic Council Chairmanship to enhance climate resilience throughout the region. The Arctic Council is contributing to detailed examinations of Arctic ecosystems, and expanding the Local Environmental Observer Network to encourage citizens to get involved in monitoring their own surroundings. The Arctic Council is also developing a circumpolar plan to prevent, detect, and manage invasive species, as growth in shipping and development activities in the region increases the risk of introduction. There is an immediate opportunity—already largely lost in many other regions of the world—to proactively build resilience to the risks posed by invasive species. The development of an enhanced digital elevation model of the Arctic, will provide better baseline mapping information, both for scientific endeavors and to national security needs as Arctic activities continue to increase. The greater our scientific understanding of current and forthcoming challenges—the better we are able to forecast the impacts of climate change in the region before they hit—the better suited we will be to adapt to new realities.

The Arctic Council is moving to fully implement the Framework for Action on Enhanced Black Carbon and Methane Emissions, which includes the development of national black carbon and methane emission inventories, national reporting on domestic mitigation efforts, and greater international cooperation on reducing these dangerous pollutants. We have also invited Observer States in the Arctic Council to join us in this effort because these pollutants are global in origin. Our cooperation is particularly timely in the run-up to the Conference of the Parties to the United Nations Framework Convention on Climate Change in December, when the United States will join nations around the world to push for joint action on climate change.

GLACIER

The conference on Global Leadership in the Arctic: Cooperation, Innovation, Engagement and Resilience, otherwise known as GLACIER, took place in late August of 2015 in Anchorage, Alaska. Although not a formal component of the Arctic Council, GLACIER served as a centerpiece of the mission of the U.S. Chairmanship to broaden awareness domestically and abroad. GLACIER featured remarks by President Obama and other senior U.S. officials, and panel discussions that brought together influential policy makers, community leaders, and subject matter experts from Alaska, the Arctic region, and around the world. Twenty-one countries participated in GLACIER, including seven foreign ministers, and there were press reports that mentioned GLACIER in at least 25 countries. The White House and the Department of State are now focused on continuing to build on the momentum created by GLACIER, fulfilling the obligations set forth in Presidential commitments, and strengthening the relationship with Alaskans in our American Arctic.

Arctic Fisheries

I am pleased to report that we are making significant progress toward a long-standing U.S. objective of preventing unregulated fishing from starting in the high-seas portion of the central Arctic Ocean. As described below, the United States will convene a new set of international negotiations toward an agreement on this subject before the end of the year.

Although currently there are no commercial fisheries of consequence in the high-seas area of the Arctic Ocean, it is reasonable to expect that, with diminishing sea ice and the possible migration of species, commercial fisheries are possible in the foreseeable future.

Scientific information about the Arctic's marine biodiversity is limited, and even less is understood about the extent to which climate change and increasing industrial and other human activities in the Arctic may threaten marine ecosystems and resources, including fisheries. In light of this, in 2009 the United States took the precautionary step of prohibiting commercial fishing in its own exclusive economic zone (EEZ) north of the Bering Strait until there is a better scientific foundation for a sound fisheries management regime. Other Arctic countries have taken similar steps, most recently Canada.

In our view, this same approach should apply in the high seas area of the central Arctic Ocean, an area beyond the EEZs of the United States, Canada, Norway, Russia and Denmark/Greenland. In that high seas area, with the exception of the small wedge that is within the area covered by the North East Atlantic Fisheries Commission, there is no governance regime in place by any fisheries management organization or arrangement. Thus, we have been working for a number of years with other governments towards an understanding that commercial fishing should occur there only on the basis of adequate scientific information on which to base proper fisheries management and after an international fisheries management regime is in place.

In July 2015, the United States and the other four nations whose EEZs surround this high seas area signed the Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean. In the Declaration, which is [legally] non-binding, the five nations committed [politically] not to authorize their own vessels to engage in fishing in this high-seas area until there is an effective international mechanism in place to manage such fishing in accordance with modern standards. They also committed to establish a joint program of scientific research aimed at improving our understanding of the ecosystems of this area.

The Declaration also acknowledges the interest of other States in this topic and looks forward to working with them in a broader process to develop measures consistent with the Declaration that would include commitments from all interested States.

With that in mind, the United States has invited representatives from the original five States and China, Japan, South Korea, Iceland and the European Union, to a new set of negotiations with the goal of transforming the [legally] non-binding declaration into a [legally] binding agreement. The State of Alaska, the Alaska Native Community, the Alaska-based fishing industry and the environmental community all support this objective. We expect the new set of negotiations to start in Washington, D.C., in early December.

Arctic Ocean—ECS and Maritime Boundaries

Efforts by the United States and other Arctic States to define their continental shelf in the Arctic Ocean are sometimes described as a “race for resources” or “competing territorial claims.” Such hyperbole is inaccurate and unhelpful.

There are two underlying issues here: delineating the continental shelf beyond 200 nautical miles—commonly called the extended continental shelf or ECS; and delimiting the maritime boundaries where ECS may overlap one or more neighboring States. In other words, first, what is the extent, or outer limit, of a country's ECS and, second, how do neighboring countries divide that ECS when it overlaps.

Contrary to many media reports, there is no race for resources or land grab underway in the Arctic. The Arctic coastal States are proceeding in an orderly manner to define their continental shelf limits according to the provisions set out in the Law of the Sea Convention.

Determining the extent of a State's ECS is not simply a matter of measuring a specified distance from its shore. To determine whether a State meets the criteria in the Convention, it must collect data that describe the depth, shape, and geophysical characteristics of the seabed and sub-sea floor. That data is then analyzed in order to determine a set of coordinates of the seaward extent of the ECS.

Each of the five States surrounding the Arctic Ocean—Russia, Canada, Norway, Denmark (via Greenland), and the United States—has an ECS. All five States also have ECS outside of the Arctic Ocean, but the Arctic has received a disproportionate amount of public attention.

The United States, like the other Arctic States, has made significant progress in determining its ECS. All of the necessary data collection to delineate the U.S. ECS in the Arctic Ocean has been completed through tremendous efforts by the U.S. Coast Guard, the National Oceanic and Atmospheric Administration (NOAA), the United States Geological Survey (USGS), and the Department of State. Nine successful cruises were completed in the Arctic Ocean over 12 years, and four of those missions were jointly conducted with Canada.

Last year the Office of Ocean and Polar Affairs at the Department of State established the ECS Project Office at a NOAA facility in Boulder, Colorado. This office is dedicated to completing the data analysis and documentation necessary to establish the limits of the U.S. ECS in the Arctic and for other U.S. ECS areas, such as the Bering Sea, Atlantic Ocean, and the Gulf of Mexico.

While the United States has a significant amount of ECS in the Arctic, as a non-party to the Law of the Sea Convention, the U.S. is at a disadvantage relative to the other Arctic Ocean coastal States. Those States are parties to the Convention, and are well along the path to obtaining legal certainty and international recognition of their Arctic ECS.

Becoming a Party to the Law of the Sea Convention would help the United States maximize international recognition and legal certainty regarding the outer limits of the U.S. continental shelf, including off the coast of Alaska, where our ECS is likely to extend out to more than 600 nautical miles. U.S. accession is a matter of geostrategic importance in the Arctic (where all other Arctic nations, including Russia, are Parties). The Administration remains committed to acceding to the LOS Convention.

Overlapping continental shelves are inevitable in the Arctic Ocean, as elsewhere. Where boundaries have not yet been concluded, we expect that neighboring States will continue to work together on a bilateral basis to reach agreement on what are often complex and time-consuming processes. It is important to keep in mind this is not a question of first-come, first-served.

We have two maritime boundaries in the Arctic, one with Russia and one with Canada. The United States and the Soviet Union signed a maritime boundary agreement in 1990. Although only provisionally in force, Russia has respected this maritime boundary, and has not defined an ECS on the U.S. side of the boundary. The United States is taking the same approach.

Canada and the United States have yet to agree to a maritime boundary that would divide our overlapping ECS. We have made this a key objective for implementation of our National Strategy for the Arctic Region, and this will be an important future effort. Nonetheless, we have managed to work together to collect mutually beneficial data necessary to define our respective ECS areas.

Resource Exploration

Diminishing Arctic Ocean sea ice is unlocking access to significant energy resources and other potentially lucrative natural resources. Estimates of technically recoverable conventional oil and gas resources north of the Arctic Circle include 13 percent of the world's undiscovered oil, 30 percent of the world's undiscovered gas, and 20 percent of the world's natural gas liquids deposits, as well as vast quantities of mineral resources, including rare earth elements, iron ore, and nickel. That said, the Arctic is now and will remain long into the future an extremely challenging environment in which to operate.

The Department of State aims to promote good governance and environmentally responsible development of all energy resources—oil and gas production, as well as clean, renewable energy—with an emphasis on consistency among Arctic States and environmental sustainability. We are committed to implementing international agreements to reduce the risk of marine oil pollution; conducting international joint oil spill response exercises; and increasing global capabilities for preparedness and response to oil pollution incidents in the Arctic. Collaborating closely with domestic agencies, the Department of State aims to work with stakeholders, industry, and the other Arctic States to understand the energy resource base, develop and implement best practices, and share knowledge and experience.

While we acknowledge the importance of fossil fuels to powering Arctic development, affordable renewable energy technologies are also enormously important for the region. Development of renewable energy resources including solar, wind, geothermal, and tidal, has accelerated in recent years. Renewable energy already enjoys a global cost-competitive advantage over diesel fuel. Today, wind and solar technologies have a comparative cost advantage over fossil fuels in the power sector in the mid-West U.S. Midwest and in Europe. As capacity factors for renewable technologies increase, and costs continue to decline for these technologies, more and more regions and energy end-use sectors will transition to higher proportions of renewable energy. There are many dedicated people across the Arctic, including in Alaska, working to make these technologies work effectively for healthier and more sustainable energy generation in the Arctic. We will continue to work with stakeholders to promote a regional focus on addressing barriers to renewable energy development, with the goal of improving the quality of life in Arctic communities and addressing climate impacts.

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b. U.S. Chairmanship

On April 24, 2015, Secretary Kerry delivered remarks as the United States assumed the chairmanship of the Arctic Council for a two-year period at the Arctic Council's Ministerial in Canada. His remarks are excerpted below and available at <http://www.state.gov/secretary/remarks/2015/04/241102.htm>. Secretary Kerry's

remarks to the press following the Arctic Council Ministerial on April 24 are available at <http://www.state.gov/secretary/remarks/2015/04/241106.htm>.

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We're very honored to assume the chairmanship of the Arctic Council today, and in the nearly two decades now since it was first created, I think it's fair to say that the council's created a great shared sense of purpose, but it's also created a sense of trust among all the countries and with the permanent representatives. And I think in doing so, we've laid the groundwork to be able to meet a very tough set of future challenges. With your help, we have developed what we acknowledge is an ambitious agenda, but we believe it's achievable and it's an important demarcation moving forward, if you will, at this particular point in the council's history.

Broadly speaking, the U.S. chairmanship will focus on three interconnected themes. First, addressing the issue of climate, the impacts of climate change. Second, promoting ocean safety, security, and stewardship. And third, improving economic and living conditions for Arctic communities. The theme of our chairmanship is "One Arctic," which is a phrase long used by the Inuit Circumpolar Council, which embodies our belief that the entire world—not only the Arctic, not only the eight here plus, but the entire world shares a responsibility to protect, to respect, to nurture, and to promote the region.

And over the next two years, as we work to further strengthen the Arctic Council as the premier intergovernmental forum for addressing Arctic challenges, we're also going to strive to expand awareness of the links between this region and everywhere else ...

One of the biggest challenges everybody has talked about today is climate change. ...

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We are calling on the council to contribute to detailed examinations of the local ecosystem, so we understand them better. And we propose to expand the local environmental observer group network to encourage citizens to get involved in monitoring their own communities and contributing to our preventative measures and to our knowledge. We also support the creation of an enhanced digital elevation map of the Arctic, which will provide much better information to scientists and other experts in sustainable development and help us make wise development decisions as we go forward.

The greater our understanding of forthcoming challenges, then the better we are able to predict the regional impacts on climate change before they hit, and then the smarter and more collective our response will be able to be. But even as we take necessary steps to prepare for climate change, we also have a shared responsibility to do everything we can to slow its advance, and we cannot afford to take our eye off that ball.

The Arctic Council can do more on climate change, especially when it comes to black carbon emissions. Black carbon is up to 2,000 times more potent than carbon ...

... During our chairmanship, the United States intends to press for the full implementation of the Framework for Action on Enhanced Black Carbon and Methane

Emissions. And that includes the compilation of national black carbon and methane emission inventories, national reporting on domestic mitigation efforts, and greater international cooperation on reducing these dangerous pollutants.

We also call on observer states in the Council to join us in this effort. Because the fact is these pollutants are threats to everybody. And our cooperation is particularly timely in the run-up to COP 21 in December in Paris. And I think all of us are hoping to achieve a broader, more ambitious global agreement on climate action. And doing so really matters deeply for a host of reasons, but it's also an indispensable part of a responsibility that is shared by every member of this council, and that is the stewardship of the Arctic Ocean.

...[M]y fellow ministers know this because many attended or sent people to a conference we did in Washington on the oceans this past year; it'll be followed up by a conference in Chile this year, and then we will pick it up and do it again next year in Washington in order to try to galvanize action about our oceans, which are overfished and over-polluted and certainly over-acidified at this point. But the health of the ocean is critical to all of us.

And one of the things we focused on in Washington is ocean acidification. Carbon dioxide does not just drive climate change. It also gets absorbed by the ocean, although we saw the first regurgitation by the ocean of CO₂ in the Antarctic this past year, so we don't know what the limits of that absorption are, which is another challenge for all of us on Earth. But to the degree that it does get absorbed by the ocean, it winds up threatening marine ecosystems on which we all depend. And the cold temperatures of the Arctic Ocean make it particularly vulnerable to acidification, science tells us. And the science is actually jarring on this. If current trends continue, scientists predict that by the end of the century, the Arctic waters will become corrosive to all shell-building creatures. ...

...So during our chairmanship, we're going to call on every Arctic and observer state to join the Global Ocean Acidification Observer Network to facilitate greater monitoring of Arctic waters. ...

Another effort that's critical to ensuring the stewardship of the Arctic Ocean is continuing the council's work on developing a pan-Arctic network of marine protected areas. ... Creating a network of marine protected areas throughout the region will help us safeguard areas that are particularly significant both culturally and ecologically. And we can also create a regional seas program for the Arctic, something that nations have done in other parts of the world to improve cooperation on marine science and share best practices.

Let me add: The stewardship of the Arctic Ocean is obviously critically important, but so is ensuring the safety and the security. In recent years, the Arctic Council developed two historic agreements to improve the chances that the increase that we are seeing in human traffic can take place safely and securely. Over the next two years, we intend to use those agreements robustly through joint operational exercises, training and information exchange, so that we're better prepared to respond to the incidents at sea.

Ultimately, the people of this region, as we've said again and again, are our top priority. And we want that to be a hallmark of our chairmanship. We fully intend to continue Canada's effort to improve the lives of the Arctic indigenous peoples, and that means focusing on water security and on protecting the freshwater system that the people of the Arctic need and deserve.

...

And along the same lines, improving the lives of the Arctic indigenous peoples also means expanding access to clean, affordable, and renewable energy technologies that will

provide local communities with alternatives to the costly and dirty diesel-based electricity that too many are forced to rely on today.

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So it is essential, especially in the Arctic, to providing affordable, reliable energy that is needed here. We got to find the ways to do it. During our chairmanship, we're going to examine every chance for greater circumpolar collaboration to develop renewable energy and promote energy efficiency in Arctic communities.

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c. *Global Leadership in the Arctic: Cooperation, Innovation, Engagement, and Resilience (GLACIER) Conference*

In late August and early September 2015, the United States hosted in Anchorage, Alaska a meeting of foreign ministers, scientists, policy makers, and civil society called "Global Leadership in the Arctic: Cooperation, Innovation, Engagement, and Resilience," or "GLACIER." The State Department fact sheet on GLACIER, issued on September 1, 2015, summarizes the conference, and is available at <http://www.state.gov/r/pa/prs/ps/2015/09/246511.htm>. Secretary Kerry's remarks at the opening plenary of the conference on August 31, 2015 are available at <http://www.state.gov/secretary/remarks/2015/08/246489.htm>. President Obama addressed the GLACIER conference on August 31, 2015, emphasizing the urgent need to address climate change, and mentioning that, "even if this isn't an official gathering of the Arctic Council, the United States is proud to chair the Arctic Council for the next 2 years." Daily Comp. Pres. Docs. 2015 DCPD No. 00580, pp. 1-6 (Aug. 31, 2015). Foreign ministers at the conference issued a joint statement on climate change and the Arctic, available at <http://www.state.gov/r/pa/prs/ps/2015/08/246487.htm>, which appears below.

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The rapid warming of the Arctic is profoundly affecting communities both in the Arctic region and beyond. As Foreign Ministers and other representatives from the Arctic States—Canada, Denmark, Finland, Iceland, Norway, Sweden, Russia, the United States—attending the GLACIER conference in Anchorage, Alaska on August 31, 2015, and recognizing the leadership role of the Arctic States in providing sustainable development and cooperation in the Arctic, we reaffirm our commitment to take urgent action to slow the pace of warming in the Arctic, focusing on actions that impact the global atmosphere as well as the Arctic itself. The Foreign Ministers and other representatives from France, Germany, Italy, Japan, Republic of Korea,

Netherlands, Poland, Singapore, Spain, United Kingdom, and European Union join us in this commitment.

We take seriously warnings by scientists: temperatures in the Arctic are increasing at more than twice the average global rate. Loss of Arctic snow and ice is accelerating the warming of the planet as a whole by exposing darker surfaces that absorb more sunlight and heat. Sea ice, the Greenland Ice Sheet, and nearly all glaciers in the Arctic have shrunk over the past 100 years; indeed, glaciers that have endured since the last Ice Age are shrinking, in most cases at a very rapid rate. Arctic sea ice decline has been faster during the past ten years than in the previous 20 years, with summer sea ice extent reduced by 40% since 1979. Loss of ice from Arctic glaciers and ice sheets contributes to rising sea levels worldwide, which put coastal communities everywhere at increased risk of coastal erosion and persistent flooding. And emerging science suggests that rapid warming of the Arctic may disrupt weather patterns across the globe.

Moreover, as the Arctic continues to warm, significant feedback loops appear to be coming into play. Warmer, drier weather increases the occurrence, extent, and severity of wildfires that release carbon from vast tracts of burning forests, with about five million acres burned this year in Alaska alone. Warming also promotes thawing of permafrost, which could release substantial stores of greenhouse gas emissions. And the relentless loss of Arctic snow and ice exposes yet more land and water, which in turn absorb yet more heat.

Arctic communities are experiencing first-hand the challenges of dealing with a rapidly changing climate. Thawing permafrost is triggering the collapse of roads, bridges and other infrastructure, and coastal erosion is requiring entire communities to consider relocation. Warming-induced changes can also reduce wildlife and fish populations that support subsistence hunting and fishing. These impacts highlight the need for adaptive management and infrastructure, and illustrate the emerging threat to traditional ways of life.

As change continues at an unprecedented rate in the Arctic—increasing the stresses on communities and ecosystems in already harsh environments—we are committed more than ever to protecting both terrestrial and marine areas in this unique region, and our shared planet, for generations to come.

In particular, we affirm our strong determination to work together and with others to achieve a successful, ambitious outcome at the international climate negotiations in December in Paris this year.

In addition, we acknowledge the importance of the Framework for Action on Black Carbon and Methane, adopted at the Arctic Council Ministerial in April 2015, which provides for enhanced opportunities to act together to reduce emissions of black carbon (soot) that impact the Arctic. Actions to reduce methane—a powerful short-lived greenhouse gas—can slow Arctic warming in the near to medium term. To address the largest industrial source of methane globally, we encourage all oil and gas firms headquartered or operating within our borders to join the Climate and Clean Air Coalition's Oil and Gas Methane Partnership.

We call for additional research to characterize the response of Arctic permafrost and other carbon reservoirs to warming, and resolve to cooperate on wildland fire management, especially in hotspots that have the potential to release particularly large stores of greenhouse gases. We further urge the scientific community, in cooperation with northern communities, to continue to provide the information and tools necessary to assist the Arctic's most vulnerable communities build resilience to climate impacts and to prioritize further research on, and communication of, the links between a changing Arctic and impacts felt across the globe,

including on how such changes may affect mid-latitude weather patterns. We also resolve to work with our Arctic communities to deploy low-carbon solutions that can improve livelihoods, enhance energy security, and promote sustainable economic growth such as renewable energy technologies and energy efficiency measures.

Climate change poses a grave challenge in the Arctic and to the world. But these challenges also present an imperative for cooperation, innovation, and engagement as we work together to safeguard this vital region and to inform the world why the Arctic matters to us all.

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2. Fishing Regulation and Agreements

a. *Arctic Nations Declaration to Prevent Unregulated Fishing*

On July 16, 2015, five Arctic Nations signed a declaration to prevent unregulated fishing in the Central Arctic Ocean. A July 16 State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/07/244969.htm>, and excerpted below, summarizes the content and purpose of the declaration.

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The five states that surround the central Arctic Ocean—Canada, the Kingdom of Denmark in respect of Greenland, the Kingdom of Norway, the Russian Federation, and the United States of America—met in Oslo on July 16 to sign a declaration to prevent unregulated commercial fishing in high seas portion of the central Arctic Ocean.

The declaration acknowledges that commercial fishing in this area of Arctic Ocean—which is larger than Alaska and Texas combined—is unlikely to occur in the near future. Nevertheless, the dramatic reduction of Arctic sea ice and other environmental changes in the Arctic, combined with the limited scientific knowledge about marine resources in this area, necessitate a precautionary approach to prevent unregulated fishing in the area.

To that end, the five countries stated in the declaration that they intend to authorize their vessels to conduct any future commercial fishing in this area only once one or more international mechanisms are in place to manage any such fishing in accordance with recognized international standards. They also intend to establish a joint program of scientific research with the aim of improving understanding of the ecosystems of this area.

The declaration further acknowledges that other states may have interests in preventing unregulated high seas fisheries in this area, and suggests the initiation of a broader process to develop measures consistent with the declaration that would include commitments by all interested states.

The declaration builds on U.S. action in 2009 to prohibit commercial fishing in its Exclusive Economic Zone north of the Bering Strait until better scientific information to support sound fisheries management is available. The United States initiated this five-state process consistent with congressional direction under Public Law 110-243, which calls for the United

States to take steps with other Arctic nations to negotiate an agreement for managing fish stocks in the Arctic Ocean, as well as the Implementation Plan for the 2013 National Strategy for the Arctic Region, which commits the United States to prevent unregulated high seas fisheries in the Arctic.

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Delegations from Canada, China, Denmark, the European Union, Iceland, Japan, the Republic of Korea, Norway, Russia, and the United States met in Washington, D.C. from December 1-3, 2015 to follow up on the signing of the Declaration. The chairman's statement on the meeting is excerpted below and available in full at <http://www.state.gov/e/oes/rls/pr/250352.htm>. Notably, as summarized below, the United States presented a proposal at the meeting for an international agreement regarding commercial fishing in the high seas portion of the central Arctic Ocean.

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The meeting was exploratory in nature. A number of delegations made clear that they did not at present have a mandate to negotiate any particular instrument relating to the topic.

Scientific Matters

The meeting reviewed the outcomes of the 3rd Meeting of Scientific Experts on Fish Stocks in the Central Arctic Ocean held in Seattle, Washington, 14-16 April 2015. Delegations expressed the desire to cooperate in advancing scientific research and monitoring related to this topic and considered various approaches for doing so. The meeting considered the key questions of whether and when there might exist a stock or stocks of fish sufficient to support a sustainable commercial fishery in the high seas area of the central Arctic Ocean and the effects of any such fishery on the ecosystems.

Norway offered to host a follow-up meeting on scientific matters. Delegations reviewed possible Terms of Reference (ToR) for this meeting, with a view to finalizing these ToR in the near future. The meeting also considered several options for organizing future scientific collaboration on this topic.

Policy Matters

The Chairman noted the commitments of all participants to prevent, deter and eliminate illegal, unreported and unregulated fishing as reflected in numerous international instruments.

In light of the outcomes of the 3rd Meeting of Scientific Experts, noted above, the meeting expressed the belief that it is unlikely that there will be a stock or stocks of fish in the high seas area of the central Arctic Ocean sufficient to support a sustainable commercial fishery in that area in the near future. But the meeting also noted that the rapid changes occurring in the Arctic region make such predictions uncertain and therefore recognized the need for a precautionary approach. The meeting also expressed an interest in strengthening international scientific collaboration, given the very limited scientific information that is available today on this topic.

The meeting noted the existence of an applicable international legal framework for fisheries management, as reflected in the 1982 UN Convention on the Law of the Sea, the 1995

UN Fish Stocks Agreement and numerous other international instruments. However, the meeting also noted that, at present, there is no international mechanism to regulate commercial fishing in the high seas area of the central Arctic Ocean, except for the portion of this area that is within the Convention Area of the North-East Atlantic Fisheries Commission.

The meeting recognized the interests of Arctic residents, particularly Arctic indigenous peoples, in this topic and expressed the intention to continue to engage with them.

The meeting considered various approaches to prevent unregulated commercial fishing in the high seas portion of the central Arctic Ocean. Not all of these approaches are mutually exclusive. Indeed, a number of these approaches could be combined in a step-by-step or evolutionary fashion. Suggested approaches include:

- adjusting the Declaration signed by five of the participating States with input from the other participants such that a new, broader non-binding statement could be adopted;
- negotiating a binding international agreement of the kind proposed by the United States, discussed in more detail below; and
- negotiating in the foreseeable future an agreement or agreements to establish one or more additional regional fisheries management organizations or arrangements for the area.

The United States presented a proposal for an international agreement that would, among other things, commit parties to:

- authorize their vessels to conduct commercial fishing in this high seas area only pursuant to one or more regional or subregional fisheries management organizations or arrangements that are or may be established to manage such fishing in accordance with modern international standards;
- establish a joint program of scientific research with the aim of informing future fisheries management decisions and improving understanding of the ecosystems of this area; and
- ensure that any non-commercial fishing in this area follows scientific advice and is well-monitored.

Although the U.S. proposal was not subject to negotiation at this meeting, some delegations provided preliminary reactions to it and suggested ways in which the proposal could be strengthened or clarified. The United States will circulate an updated proposal to all participants in advance of the next meeting on this topic.

The Way Forward

Delegations accepted the offer of Norway to host the follow-up scientific meeting, which is expected to occur in September or October 2016. ...

The United States offered to host a follow-up meeting to continue the policy discussions and will proceed with the planning for that meeting unless another delegation steps forward soon with an offer to host it. The meeting is expected to occur in the spring of 2016. The venue and precise timing of the next meeting will be decided through correspondence.

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b. *Illegal, Unreported, and Unregulated Fishing and Seafood Fraud*

On March 15, 2015, the U.S. Presidential Task Force on Illegal, Unreported, and Unregulated (“IUU”) Fishing and Seafood Fraud released its Action Plan to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud. See State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/03/238890.htm>. The Presidential Task Force is co-chaired by the Department of State and the Department of Commerce. The action plan, available at <http://www.nmfs.noaa.gov/ia/iuu/taskforce.html>, specifies ways the U.S. government will implement the Task Force’s 2014 recommendations, both domestically and internationally. Excerpts follow from the March 15, 2015 State Department media note.

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The plan identifies actions that will strengthen enforcement, create and expand partnerships with state and local governments, industry, and non-governmental organizations, and create a risk-based traceability program to track seafood from harvest to entry into U.S. commerce. The plan also highlights ways in which the United States will work with our foreign partners to strengthen international governance, enhance cooperation, and build capacity to combat IUU fishing and seafood fraud. This includes the Administration’s work to secure historic and enforceable environmental provisions in the Trans-Pacific Partnership, a regional trade agreement that includes countries that together account for approximately one-quarter of global marine catch and global seafood exports.

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“Illegal fishing and seafood fraud affect the American public and people around the world,” said State Department Under Secretary Cathy Novelli. “The plan we are releasing today puts us on course to tackle these complex global challenges, with a new traceability program at its heart. It also gives new urgency to our work towards the strongest possible international tools—including ratification of the Port State Measures Agreement, which will ensure illegal fish cannot reach the global market. We are working closely with our partners in the United States and around the world to bring the full range of resources to the table.”

“The U.S. is a global leader on building sustainable fisheries and the seafood industry is an incredibly important part of our economy,” said Kathryn Sullivan, PhD, NOAA Administrator. “IUU fishing and seafood fraud undermine economic and environmental sustainability of fisheries and fish stocks in the U.S. and around the world. These actions aim to level the playing field for legitimate fishermen, increase consumer confidence in the sustainability of seafood sold in the U.S., and ensure the vitality of marine fish stocks.”

Some key actions include:

International:

- Conclude in 2015 the Trans-Pacific Partnership (TPP) negotiations that include

commitments to combat IUU fishing and first-ever provisions to eliminate harmful fisheries subsidies.

- Work with Congress to enact implementing legislation for the Port State Measures Agreement and receive commitments from at least 14 additional foreign countries to join the Agreement.
- Work with international governments, Regional Fisheries Management Organizations, and others to advance best practices for the monitoring, control, and surveillance of international fisheries; the implementation of port State controls; and compliance monitoring.

Enforcement:

- Implement a strategy to optimize the collection, sharing, and analysis of information and resources to prevent IUU or fraudulently labeled seafood from entering U.S. commerce by September 2015.
- Implement recommended adjustments to U.S. tariff codes to properly identify seafood products in trade by December 2015.
- Prioritize combating seafood fraud and the sale of IUU seafood products for joint federal/state enforcement operations and investigation and prosecution of cases in 2015.

Partnerships:

- Enhance collaboration with interested stakeholders on specific IUU fishing or seafood fraud concerns including through an annual, public, in-person forum of interested stakeholders and the creation of a public web portal to relevant information held by agencies.

Traceability:

- Define the types of information to be collected along the seafood supply chain from harvest or farm to entry into the U.S. market and the ways in which this information will be collected by October 2015.
- With input from our partners through a public engagement process, identify the species to which this system will first apply based on how at risk they are of being the product of IUU fishing or seafood fraud by October 2015.
- Finalize rulemaking to collect additional information on species at risk as a requisite of entry into U.S. commerce by September 2016.
- Determine how information within the traceability system – including species, geographic origin, and means of production – can be shared with consumers.
- By December 2016, the Task Force will identify the next steps in expanding the program to all seafood entering U.S. commerce, taking into careful consideration input from stakeholders, as well as the experience from the first year.

* * * *

c. *IUU Fishing Enforcement Act of 2015*

On October 23, 2015, the U.S. Senate approved the Illegal, Unreported, and Unregulated (“IUU”) Fishing Enforcement Act of 2015. Secretary Kerry issued a press statement on that day, available

at <http://www.state.gov/secretary/remarks/2015/10/248688.htm>, in which he said:

Upon President Obama's expected signing of this legislation, the United States will ratify the Port State Measures Agreement. Global implementation of robust and coordinated port state measures will make it harder and more expensive for criminals to evade the rules by reducing the number of ports worldwide where IUU fishing products can be landed. Billions of dollars are lost each year to IUU fishing, and we must take action now to level the playing field for honest fishermen and women in the United States and around the world.

The passage of this legislation is a critical step forward, but our fight against IUU fishing doesn't stop here. I will continue working with nations around the world and urge them to join the Port State Measures Agreement as well. And, because we know that no single nation can possibly police the entire sea, we'll also begin to implement Sea Scout, an initiative I announced earlier this month at the Our Ocean conference in Chile. Sea Scout is aimed at enhancing global coordination, information sharing, and ultimately enforcement on IUU fishing from pole to pole and across the equator, to help ensure that no patch of it beyond the law. Working together, we can safeguard a healthy ocean—and its bountiful resources—for future generations.

On November 5, 2015, President Obama signed the IUU Fishing Enforcement Act of 2015 into law. See statement by the White House Press Secretary, available at <https://www.whitehouse.gov/the-press-office/2015/11/05/statement-press-secretary-hr-774-illegal-unreported-and-unregulated>. The White House statement includes the following:

The United States will now join a global effort to ratify and implement the Port State Measures Agreement, which will prevent vessels carrying fish caught illegally from entering our ports, keep illegal product out of the market and demonstrate our continued leadership in the global fight against IUU fishing. Twenty-five countries are needed for the treaty to enter into force. * We are more than halfway there and the U.S. will continue to work closely with our partners around the world to finalize this important treaty. These measures will benefit U.S. fishermen, seafood buyers, and consumers by protecting our domestic fishermen from unfair, illegal competition and ensure consumer confidence in the seafood supply. The signing of this bill will also enhance our ability to prevent IUU fish and fish product from entering U.S. commerce by strengthening domestic enforcement authorities. ...

* Editor's note: On February 10, 2016, President Obama signed the instrument of ratification of the Port State Measures Agreement, bringing the United States in line to become the twentieth party to ratify the Agreement.

Title II of the IUU Fishing Enforcement Act (P.L. 114-81) is the “Antigua Convention Implementing Act of 2015.” The “Antigua Convention” is the short name for the Convention for the Strengthening of the Inter-American Tropical Tuna Commission (“IATTC”) Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica, signed at Washington, November 14, 2003. The Antigua Convention was negotiated to strengthen and replace the 1949 Convention establishing the IATTC. It entered into force on August 27, 2010. The objective of the Antigua Convention, as stated in Article II, is to “ensure the long-term conservation and sustainable use of the fish stocks covered by this Convention, in accordance with the relevant rules of international law.” The United States is preparing to deposit its instruments of ratification for the Antigua Convention as well as the Port State Measures Agreement in 2016.

d. *Agreement with Russia on IUU Fishing*

On September 11, 2015, representatives of the governments of the United States and Russia signed an agreement “On Cooperation in Preventing, Deterring, and Eliminating Illegal, Unreported, and Unregulated Fishing.” The agreement was signed in conjunction with the 26th annual meeting of the United States-Russia Intergovernmental Consultative Committee (“ICC”) in Portland, Oregon. See September 11, 2015 State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/09/246833.htm>. The State Department media note states the following about the agreement:

The agreement aims to improve coordination among the multiple government agencies in both countries that need to work together to address IUU fishing. In the United States, the agreement has the strong support of the fishing industry based in the Pacific Northwest/Alaska region, as well as the environmental community. This agreement also supports the recommendations of the Presidential Task Force on Combatting IUU Fishing and Seafood Fraud.

The full text of the agreement and the diplomatic notes effecting entry into force of the agreement are available at <http://www.state.gov/s/l/c8183.htm>.

e. *UN General Assembly*

See Section 3.c., *infra*, for the U.S. statement on the UN General Assembly resolution on fisheries adopted at its 70th session.

3. Marine Pollution

a. *U.S. implementation of MARPOL and SOLAS amendments*

On February 4, 2015, the U.S. Coast Guard published a final rule, updating U.S. regulations to be in alignment with recent amendments to Annex I of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (“MARPOL 73/78”), which were adopted by the International Maritime Organization’s (“IMO’s”) Marine Environment Protection Committee during its 52nd, 54th, 55th, and 59th sessions. 80 Fed. Reg. 5922 (Feb. 4, 2015). In the same final rule, the Coast Guard also provided updates to mariner safety regulations that reflect the International Convention for the Safety of Life at Sea, as amended (“SOLAS 1974”), to which the United States is also a signatory. Excerpts follow from the background section of the Federal Register notice, summarizing the amendments to MARPOL and SOLAS that prompted the revisions.

* * * *

Amendments to MARPOL 73/78 are made through the resolution drafting and adoption process within the Marine Environment Protection Committee (MEPC) of IMO. The United States takes part in revising and updating MARPOL 73/78 by sending delegates to MEPC. These delegates negotiate with delegates of other signatory nations to support the U.S. position regarding pollution from ships.

Since the last revision of Coast Guard regulations implementing Annex I in 2001, (66 FR 55571), there have been numerous amendments to the international standards. This means that the Coast Guard regulations in the CFR and the provisions of Annex I are not currently aligned. The MEPC revised Annex I in the following resolutions:

MEPC.117(52) (October 15, 2004): This resolution revised all of Annex I and adopted new Annex I Regulations 22 and 23. Regulation 22 requires that every tanker of 5,000 deadweight tons or more, constructed on or after January 1, 2007, meet minimum standards of pump-room bottom protection, while Regulation 23 requires that every tanker delivered on or after January 1, 2010, must meet the standard for accidental oil outflow performance. MEPC.117(52) became effective January 1, 2007.

MEPC.141(54) (March 24, 2006): This resolution adopted Annex I Regulation 12A, which contains requirements for the protected location of oil fuel tanks and performance standards for accidental oil fuel outflow for all ships delivered on or after August 1, 2010. This resolution became effective August 1, 2007.

MEPC.154(55) (October 13, 2006): In this resolution, the MEPC adopted the Southern South African Waters as a special area, which prohibits the discharge of bilge water and oil in the defined area. This resolution entered into force on March 4, 2008.

MEPC.186(59) (July 17, 2009): This resolution adopted a new Chapter 8 (consisting of Regulations 40, 41, and 42) to Annex I to prevent pollution during transfer of oil cargo between oil tankers at sea. In addition, it added a requirement for a Ship-to-Ship transfer (STS) operations

plan. This entered into force on January 1, 2011, and applies to STS Operations in which at least one of the involved oil tankers is of 150 gross tons or more.

MEPC.187(59) (July 17, 2009): This resolution amended Annex I Regulations 1, 12, 13, 17, and 38 by altering definitions relating to oil residue, and by adding requirements to Regulation 12 that ships over 400 gross tons contain sludge tanks that meet certain specifications. It also amended International Oil Pollution Prevention Certificate Forms A and B to include a section regarding the means for retention and disposal of oil residues, and added new recordkeeping requirements prescribing entries in the Oil Record Book for bunkering of fuel or bulk lubricating oil or any failure of oil filtering equipment. This resolution entered into force on January 1, 2011.

* * * *

In addition to revisions to MARPOL 73/78, we have not yet integrated some revisions to the SOLAS 1974 agreement into 46 CFR part 197. The Coast Guard represents the United States as a signatory nation of SOLAS 1974, which specifies standards for the safe operation of ships at sea. Under 46 U.S.C. 3306, 46 U.S.C. 3703, and Department of Homeland Security Delegation No. 0170.1, the Coast Guard has authority to prescribe necessary rules and regulations to implement the provisions of SOLAS 1974. These sections include authority over the inspection of vessels and the carriage of liquid bulk dangerous cargoes. The Coast Guard implements SOLAS 1974, in part, through regulations in 46 CFR part 197.

Like MARPOL 73/78, SOLAS 1974 is amended by resolution of an IMO Committee, in this case the Maritime Safety Committee (MSC). In resolution MSC.150(77), the 77th Session of the MSC urged that beginning in June 2003, governments ensure the supply and carriage of Material Safety Data Sheets (MSDS) for Annex I cargoes and marine fuels. The 83rd session of MSC amended SOLAS 1974 by adding Regulation 5-1 to Chapter VI, stating that “Ships carrying Annex I cargoes, as defined in Appendix I to Annex I of [MARPOL 73/78], and marine fuel oils shall be provided with a MSDS prior to the loading of such cargoes based on the recommendations developed by IMO.”

The 86th session of the MSC further amended the SOLAS 1974 into clear and concise language to ensure a common understanding and unambiguous implementation of SOLAS Regulation VI/5-1. SOLAS Regulation VI/5-1 entered into force internationally on July 1, 2009.

* * * *

b. U.S. litigation relating to MARPOL

On March 27, 2015, the United States filed its brief as appellee in a case challenging U.S. actions to enforce MARPOL prohibitions on discharging waste at sea. *Watervale Marine Co., Ltd., et al. v. U.S. Department of Homeland Security et al.*, No. 14-5203 (D.C. Cir.). Owners and operators of oceangoing bulk carriers sued after they were required to file a bond or other surety pursuant to 33 U.S.C. § 1908(e) before the carriers could resume their voyages to allow the United States to pursue criminal proceedings based on suspected environmental crimes conducted on the carriers. The vessels’ operators later pleaded guilty to federal crimes and admitted that their crews had intentionally

bypassed mandatory anti-pollution equipment to discharge oily waste directly into the sea. They challenged the implementation of § 1908, the provision in the Act to Prevent Pollution from Ships (“APPS”) authorizing the requirement of a bond or surety, under the Administrative Procedure Act (“APA”). The following excerpts from the U.S. brief (with footnotes omitted) provide the factual background of the statute in relation to MARPOL and summarize the U.S. arguments in the case. The brief is available at <http://www.state.gov/s/l/c8183.htm>. The Court of Appeals decided the case on December 15, 2015, affirming that the United States had the authority under domestic law to require the bond and associated conditions.

* * * *

A. *Statutory Background: The United States’ Treaty Obligations To Prevent Pollution At Sea And Its Domestic Law Implementing The Treaties*

i. The United States is a party to the International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, as modified by the Protocol of 1978, opened for signature Feb. 17, 1978, 1340 U.N.T.S. 62, 184 (1983) (“MARPOL”), a multilateral international treaty that imposes strict pollution controls upon oceangoing vessels. MARPOL establishes oil pollution standards for shipping worldwide. One hundred and fifty-three countries, representing almost 99% of the world’s shipping tonnage, have signed and ratified the treaty. See Int’l Mar. Org., *Status Of Multilateral Conventions And Instruments In Respect Of Which The International Maritime Organization Or Its Secretary-General Performs Depositary Or Other Functions (as at 12 February 2015)* 102-08.2

In implementing MARPOL, Congress recognized that tanker pollution “of the marine environment ha[d] been a grave concern of the United States for a number of years.” H.R. Rep. No. 96-1224, at 4 (1980). Unlawful “operational discharges” put far more oil into the world’s oceans than do accidental discharges, accounting “for about 85 percent of all the oil entering the oceans from marine transportation operations.” *Id.* Significant provisions of MARPOL address these intentional and damaging discharges. See 1340 U.N.T.S. 62, 197 (1983) (Annex 1); RESOLUTION MEPC.117(52) (adopting Revised Annex 1).

The United States’ domestic implementing legislation for MARPOL is the Act to Prevent Pollution from Ships (“APPS”), 33 U.S.C. § 1901 *et seq.* APPS directs that the Secretary of Homeland Security “shall administer and enforce” MARPOL itself, as well as statutes and regulations designed to preserve the marine environment. 33 U.S.C. § 1903(a). See also 33 C.F.R. subch. O, pt. 151, subpt. A (Coast Guard implementing regulations).

ii. MARPOL limits oil pollution from vessel operational discharges by prohibiting vessels from discharging dirty bilge water directly into the ocean. “‘Bilge water’ is the mixture of oil and water that accumulates in the ‘bilge’—or bottom—of a ship.” *United States v. Pena*, 684 F.3d 1137, 1142 n.2 (11th Cir. 2012). “All of the oil, fuel and other liquids that drip or leak from machinery during the ship’s normal operation, and any seawater that leaks into the ship, ultimately flow downward into the bilge.” *Ibid.* Although the accumulated dirty bilge water must periodically be discharged “so that it does not rise to a level where it endangers the safety of the vessel and its crew,” *ibid.*, releasing bilge water directly into the ocean poses obvious, serious environmental hazards.

MARPOL accordingly requires vessels to clean their bilge water before discharging it into the sea. See MARPOL, Annex 1 (Add.1). MARPOL specifies particular practices for cleaning bilge water; each vessel over 400 tons “shall be fitted with oil filtering equipment” that “will ensure that any oily mixture discharged into the sea after passing through the separator or filtering systems has an oil content not exceeding 15 parts per million.” MARPOL, Annex 1, Reg. 14(1), (6) (Add. 19, 20). See also *id.*, Reg. 15 (Add. 20-22) (regulating discharges); 33 C.F.R. § 155.360 (limiting discharges to an oil content of 15 parts per million).

MARPOL further requires vessels to document their discharges and transfers of bilge water and other oily substances. Each ship must keep an “Oil Record Book” in which it records discharges of bilge water into the sea. See MARPOL, Annex 1, Reg. 17 (Add. 22-23); see also *id.* App. III (Add. 24-29) (required MARPOL form for Oil Record Book). Every entry in the Oil Record Book “shall be signed by the officer or officers in charge of the operations concerned and each completed page shall be signed by the master of ship.” *Id.* at Reg. 17(4) (Add. 23). See also 33 C.F.R. § 151.25 (implementing regulations for maintaining the Oil Record Book).

Complying with MARPOL is a significant expense for the shipping industry, and owners and operators can cut their costs appreciably by bypassing the pollution-control equipment and dumping their oily waste overboard. See generally OECD, *Competitive Advantages Obtained by Some Shipowners as a Result of Non-Observance of Applicable International Rules and Standards* (1996).

iii. The States parties to MARPOL have “undertake[n] to give effect” to the protocol and its Annexes, “in order to prevent the pollution of the marine environment by the discharge of harmful substances or effluents containing such substances in contravention of the Convention.” MARPOL, Art. 1, 1340 U.N.T.S. at 184. Thus, “[a]ny violation of the requirements” of MARPOL “within the jurisdiction of any Party * * * shall be prohibited and sanctions shall be established therefor under the law of that Party.” *Id.* at Art. 4(2), 1340 U.N.T.S. at 186. The penalties imposed by a State party’s domestic law must be “adequate in severity to discourage violations” of MARPOL. *Id.* at Art. 4(4), 1340 U.N.T.S. at 186. The States parties have further bound themselves to enforce MARPOL “using all appropriate and practicable measures of detection and environmental monitoring,” and “adequate procedures for * * * accumulation of evidence.” *Id.* at Art. 6(1), 1340 U.N.T.S. at 187.

Under the United States’ implementing legislation, “[a] person who knowingly violates the MARPOL Protocol,” APPS, or the implementing regulations commits a felony and is subject to potential criminal prosecution. 33 U.S.C. § 1908(a). A ship that contaminates the ocean in violation of MARPOL can be held liable *in rem*. *Id.* § 1908(d). APPS authorizes civil penalties against polluters as well. See *id.* § 1908(b).

iv. Environmental crimes are difficult to detect and prosecute. Because illegal discharges of dirty bilge water often occur in the open ocean, MARPOL and APPS prosecutions often focus upon the vessels’ failure to maintain and present an accurate Oil Record Book in the United States. Although MARPOL requires every vessel’s Oil Record Book to document the movement of all oil and oily waste around the ship, a vessel engaged in illegally discharging pollutants directly into the sea ordinarily does not record those discharges in the Oil Record Book. A vessel arriving in a U.S. port that presents a false Oil Record Book violates MARPOL and the implementing regulations. See MARPOL, Annex 1, Reg.17 (Add. 22-23); 33 C.F.R. § 151.25; see generally *United States v. Ionia Management S.A.*, 555 F.3d 303, 307- 309 (2d Cir. 2009) (per curiam); *United States v. Jho*, 534 F.3d 398, 404 (5th Cir. 2008) (“[T]he ‘gravamen’ of the

[criminal] action was ‘not the pollution itself, or even the Oil Record Book violation occurring at that time, but the misrepresentation in port.’ ”).

Another complication in the prosecution of environmental crimes is the transient nature of vessels’ visits to the United States. Vessels are present in ports of the United States for only the brief periods needed to load and unload their cargo, and they then sail out of the reach of U.S. jurisdiction—taking with them the evidence, potential witnesses, and the defendants themselves. The United States’ jurisdiction to prosecute a foreign-flagged vessel is based upon the physical presence of the vessel in a United States port, and the United States accordingly loses jurisdiction over the vessel when she sails. See generally *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 11 (1887) (“It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes.”).

The APPS addresses this problem by authorizing the Coast Guard to keep a ship in port if MARPOL violations are reasonably likely to have been committed on board:

[I]f reasonable cause exists to believe that [a] ship [subject to MARPOL], its owner, operator, or person in charge may be subject to a fine or civil penalty under this section, the Secretary of the Treasury, upon the request of the Secretary, shall refuse or revoke the clearance required by section 60105 of Title 46.

33 U.S.C. § 1908(e). Under 46 U.S.C. § 60105, a ship must obtain customs clearance from the Secretary of Homeland Security before it can leave a port of the United States. If the ship’s clearance is withheld, the vessel cannot leave port and it remains within the jurisdiction of the United States.

As an alternative to keeping a vessel in port, Section 1908(e) grants the United States discretion to negotiate a surety arrangement that will allow the vessel to resume her voyage under conditions “satisfactory to the Secretary” of Homeland Security. Specifically, the statute provides that a departure “[c]learance may be granted upon the filing of a bond or other surety satisfactory to the Secretary.” 33 U.S.C. § 1908(e). The Coast Guard, exercising authority delegated by the Secretary, see 33 C.F.R. § 151.07 and Add. 31, ordinarily negotiates with the vessel for both a monetary bond, to secure the payment of any penalties ultimately imposed, and for non-monetary conditions, such as agreements to submit to the jurisdiction of the courts of the United States and to ensure that witnesses will be cared for until they are needed to testify. See, e.g., *Angelex Ltd. v. United States*, 723 F.3d 500, 503 (4th Cir. 2013). These conditions serve as an effective substitute for the vessel’s presence and they allow the criminal prosecution to proceed after the ship has left United States waters.

Congress in APPS authorized an after-the-fact remedy for ship owners who believe that a departure clearance was unreasonably withheld. Under 33 U.S.C. § 1904(h), “[a] ship unreasonably detained or delayed by the Secretary acting under the authority of this chapter is entitled to compensation for any loss or damage suffered thereby.” See also *id.* § 1910 (authorizing suits by persons “adversely affected” by certain actions taken under APPS).

* * * *

SUMMARY OF THE ARGUMENT

The Coast Guard's decision to let the *Agios Emilianos* and the *Stellar Wind* resume their voyages while under investigation for environmental crimes, after the vessels had made surety arrangements "satisfactory to the Secretary," 33 U.S.C. § 1908(e), is not subject to judicial review. The district court lacked jurisdiction over this action. Plaintiffs' claims would in any event be unreviewable under the Administrative Procedure Act, as the district court correctly held, because Congress committed decisions about whether vessels can leave port during APPS investigations to agency discretion by law.

1. Neither plaintiffs' claims for injunctive relief nor their claims seeking to have the security agreements vacated are justiciable. Plaintiffs lack standing to seek an injunction against non-monetary departure conditions to be imposed in the future because they have suffered no injury that such an injunction could redress. Plaintiffs' past security agreements cannot support injunctive relief. Nor can plaintiffs credibly assert that they will need to negotiate security agreements again in future; a litigant cannot claim standing based upon a likelihood of violating admittedly valid criminal laws, and plaintiffs' vessels will not be detained under APPS unless they again enter the United States with evidence that crimes were committed aboard.

Plaintiffs' claims that a court should vacate the security agreements they entered into before pleading guilty to APPS violations fail for lack of standing and because they are moot. First, the claims are not redressable. The parties' obligations under the agreements were fully performed once the prosecutions were completed and the criminal penalties paid, so vacatur now could not affect the parties' rights established under the agreements. Any chance that plaintiffs might obtain future relief from an order vacating the injunctions (for example, in a hypothetical future damages action against the United States) is too speculative to make their claims justiciable. And the claims are not saved by the "capable of repetition yet evading review" exception to mootness because plaintiffs cannot allege that their vessels are likely to be detained for APPS violations in ports of the United States in the future.

2. Plaintiffs' claims would in any event be unreviewable under the APA, which excludes from review agency action that is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The district court correctly held that the Coast Guard's decisions about whether to release a vessel detained for APPS violations, and under what conditions, are committed to agency discretion, and thus fall outside the scope of the APA.

Congress committed departure-clearance decisions to the agency's unreviewable discretion when it provided in Section 1908(e) that "[c]learance may be granted upon the filing of a bond or other surety satisfactory to the Secretary." By providing that the surety must be "satisfactory to the Secretary," Congress gave the agency absolute discretion to determine when a security agreement is acceptable. Congress also permitted, but did not require, the release of a vessel after a bond has been filed, and it provided no statutory criteria for deciding when a vessel should be cleared for release. The Fourth Circuit has accordingly held that under Section 1908(e), decisions about departure conditions are committed to agency discretion by law. *Angelex Ltd. v. United States*, 723 F.3d 500 (4th Cir. 2013).

Plaintiffs are mistaken in contending that the phrase "bond or other surety satisfactory to the Secretary" authorizes only financial terms. A security agreement will often have non-monetary conditions, and the non-monetary conditions of departure-clearance agreements are indispensable. Financial terms secure the payment of criminal penalties, but without additional, non-monetary terms (such as the vessel owner's and operator's agreement to submit to the jurisdiction of a United States court), the vessel will sail away with no means for the United

States to obtain a conviction and impose the penalties the agreement supposedly secures. A bond or surety “satisfactory to the Secretary” is therefore one that includes both a financial undertaking to pay criminal penalties and non-monetary conditions that give substance to the purely financial terms.

3. Plaintiffs misinterpret Section 1908(e) when they suggest that Customs, rather than the Coast Guard, exercises discretion under Section 1908(e). The district court correctly held that the Coast Guard determines whether a vessel should be released, and under what conditions, while Customs actually grants the departure clearance. The district court’s view gives meaning to every word of the statute, and it is plaintiffs, rather than the court, who misunderstand the legislative scheme.

Plaintiffs are also mistaken in complaining that the non-monetary conditions in the security agreements are unreasonable and burdensome. The non-monetary terms, without exception, are needed to ensure that the United States will not put its prosecution at risk if the ship is allowed to sail, but will have a fully effective substitute for the vessel’s presence. The terms are also consistent with industry customs that govern the relationships between vessels and their crew.

Plaintiffs’ view that departure conditions should be judicially reviewable under standards found in agency manuals and international law is also misplaced. The district court correctly held that none of the agency materials provides any guidance for whether, or when, a vessel held in port for APPS violations should be cleared to leave the United States. International law supports the view that departure-clearance conditions should be unreviewable. MARPOL is an international treaty and the United States, as a party to it, has a treaty obligation to provide effective enforcement through its domestic legislation. Congress committed to the Coast Guard’s discretion, by law, the statutory discretion to determine departure conditions under APPS. That flexibility ensures that the criminal provisions of APPS will be implemented effectively, and the district court correctly upheld the full range of the Coast Guard’s Section 1908(e) authority.

* * * *

c. *Our Ocean conference commitments*

On October 5, 2015, the State Department issued a fact sheet providing updates on progress made in fulfilling commitments made at the Our Ocean 2014 conference as the Our Ocean 2015 conference opened in Chile. The fact sheet is excerpted below and available at <http://www.state.gov/r/pa/prs/ps/2015/10/247858.htm>

* * * *

Sustainable Fisheries

...Several governments committed to joining the Port State Measures Agreement, which aims to prevent illegally harvested fish from entering the stream of commerce. Three countries have joined since the 2014 conference, and at least 7 more are close to joining, getting us well over half way to the 25 parties needed to bring this groundbreaking treaty into force.

Marine Protected Areas

President Barack Obama announced a commitment to protect some of the most precious U.S. marine seascapes. In September 2014, the United States expanded the Pacific Remote Islands Marine National Monument by almost six times to encompass 1.27 million square kilometers—making it the largest marine reserve in the world that is off limits to any commercial extraction, including commercial fishing.

* * * *

Marine Pollution

The United States announced the Trash Free Waters program to stop refuse and debris from entering the ocean through sustainable product design, increased material recovery, and a new nationwide trash prevention campaign. The program, operated by the Environmental Protection Agency, partnered with regional entities to develop strategies for five major coastal regions and over 10 cities, and it worked with business leaders to alter products, practices, and consumer behaviors to prevent future loadings of trash into the ocean.

* * * *

Ocean Acidification

...The United States announced an investment of more than \$9 million over three years to sustain acidification observing capabilities, and a contribution of \$640,000 to the Ocean Acidification International Coordination Center (OA-ICC) in Monaco. The United States has invested nearly \$6 million in the past two years to monitor ocean acidification and develop new sensor technologies, and has allocated the \$640,000 pledge through the International Atomic Energy Agency's Peaceful Uses Initiative to the OA-ICC.

The United States announced new projects totaling \$1.24 million to meet challenges of ocean acidification and marine pollution in Africa, Asia, Latin America, and the Caribbean. The United States has allocated this pledge to the IAEA through the Peaceful Uses Initiative and projects are getting underway.

The United States announced new funding for a joint initiative with Canada and Mexico to catalogue North American coastal habitats that capture and hold carbon and to evaluate the possible use of carbon credits to protect these habitats. In its first phase, the project has produced detailed maps of these habitats in all three countries, aiding future research and management efforts.

* * * *

Supporting Coastal Communities

The U.S. Agency for International Development announced new coastal programs valued at more than \$170 million. Since the conference, USAID has awarded programs worth more than \$135 million to promote ocean health, food security, nutrition, and human well-being by helping governments and communities improve fisheries management, combat illegal fishing and wildlife trafficking, strengthen MPA management, and conserve critical coastal habitats.

* * * *

Mapping and Understanding the Ocean

The United States announced the activation of two new research vessels, providing a new generation of scientists with cutting-edge technology to explore the ocean. The Office of Naval Research took delivery of the R/V Neil Armstrong in September, and the ship is expected to begin research operations under the Woods Hole Oceanographic Institution next year, while the R/V Sally Ride, to be operated by the Scripps Institution of Oceanography, is expected to enter service in late 2016.

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The State Department issued an additional fact sheet on October 5, 2015 announcing further commitments to concrete actions to protect the ocean and marine resources made by the United States at Our Ocean 2015. The fact sheet is excerpted below and available at <http://www.state.gov/r/pa/prs/ps/2015/10/247897.htm>. Secretary Kerry's remarks at the Our Ocean 2015 conference are available at <http://www.state.gov/secretary/remarks/2015/10/247900.htm> and highlight many of the same commitments described in the fact sheet, which follows.

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The United States is moving to protect waters of historic and national importance by initiating the creation of the **first new National Marine Sanctuaries since 2001**, one in the State of Maryland and the other in the Great Lakes.

Negotiations are underway on a new **sister marine protected area arrangement** between sites in **Cuba** and the **United States** focusing on scientific research, education and outreach, and sound management.

The United States will establish an integrated **seafood traceability program** to track seafood from harvest or production to entry into U.S. commerce, starting with marine species considered to be most at risk of being caught illegally or mislabeled.

The United States will launch **Sea Scout**, a new global initiative to unite governments and other stakeholders worldwide in the fight against illegal, unreported, and unregulated (IUU) fishing by focusing global assets and partnerships on identifying, interdicting, and prosecuting IUU fishing organizations and networks around the world.

The United States has launched the **Oceans and Fisheries Partnership (USAID Oceans)**, a five-year, \$20 million initiative by the U.S. Agency for International Development to promote sustainable marine fisheries and combat illegal, unreported, and unregulated fishing and seafood fraud in the Asia-Pacific region.

The United States has created the **Caribbean Oceans and Assets Sustainability Facility (COAST)** – a new insurance product to reduce the risk that climate change poses to the fishing industry and related food security in the Caribbean region by allowing countries to buy insurance to help protect their fisheries sector from severe weather.

The United States and the UNEP Caribbean Environment Programme are launching a new partnership in the **Wider Caribbean Region** to implement **Trash Free Waters**, a collaborative approach to reduce land-based sources of trash and marine debris.

The United States will commit over \$1.5 million in 2016 to work with partners to **remove marine debris** ... and to ...minimize the amounts and impacts of marine debris.

The United States' second annual **Fishackathon**, held in twelve cities around the world in 2015, resulted in more than 40 apps to help fishers work smarter and more safely in sustainable fishing. The third Fishackathon will be held on Earth Day weekend in 2016.

The United States and China announced a **partnership** between the coastal cities of Xiamen and Weihai in **China** and San Francisco and New York in the **United States** to share best practices related to waste management to **reduce the flow of trash into the ocean**.

The United States and several public and private sector partners established a **Global Development Alliance** to advance economic incentives for conserving biodiversity and sustainably managing local fisheries through managed access.

The United States is supporting the development of **waste-to-energy demonstration projects** in the APEC economies of the **Philippines and Indonesia**, including in the cities of Dagupan, Angeles, and Bandung.

The United States will further develop and make available an application to assist in **detecting ocean-going vessels at night using the Visible Infrared Imaging Radiometer Suite (VIIRS)**, a space-based sensor, in order to target potentially illegal fishing.

The United States is working to create a new and innovative **public-private partnership** involving several foundations that would provide resources to enhance the ability of **African coastal States to monitor and better understand ocean acidification** in the Indian Ocean.

The United States will commission this year the \$582 million **S. Ocean Observatories Initiative**—a system of moorings, gliders, and autonomous underwater vehicles located across the Atlantic and Pacific oceans to collect critical ocean measurements, and make the information freely available online.

The United States will invest over \$21 million in the **Southern Ocean Carbon and Climate Observations and Modeling project (SOCCOM)**, a robotic observing system collecting key data in the Southern Ocean to transform our understanding of its role in climate change.

The United States will allocate another \$370,000 through the International Atomic Energy Agency's Peaceful Uses Initiative to the **Ocean Acidification International Coordination Center (OA-ICC)** located at the Environment Laboratories in Monaco.

Building on and reaffirming previous commitments, the United States committed **not to provide subsidies** to vessels, enterprises, or operators engaged in illegal, unreported and unregulated (IUU) fishing and invited other governments to do the same.

The United States and Chile **deployed two tsunami sensing buoys** in seismically active Chilean waters, helping to improve preparation time for coastal communities, and agreed to work together on joint research, tsunami forecasting, community education, and maintenance of the tsunami sensing network.

The United States will host the next **Our Ocean conference in the United States in 2016**.

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d. UN General Assembly

On December 8, 2015, Mark Simonoff, Minister Counselor for the U.S. Mission to the UN, delivered remarks at the 70th UN General Assembly on General Assembly resolutions on oceans and the law of the sea and on sustainable fisheries. Mr. Simonoff's remarks are excerpted below and available at <http://usun.state.gov/remarks/7025>.

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This debate provides an opportunity for the global community to further commit to the conservation and sustainable use of the ocean and its resources, as reflected in both Sustainable Development Goal 14 of the 2030 Agenda on Sustainable Development, and in the completion of the first-ever World Ocean Assessment, which represents an historic first step towards setting up a regular process to review the environmental, economic, and social aspects of the world's oceans and seas and to ensure science-based decision-making.

As many of you know, Secretary of State John Kerry is a passionate advocate for the ocean. His hosting of the first Our Ocean conference in Washington in 2014 drew global attention to the urgent need to promote the health of the ocean and to address key ocean issues including sustainable fisheries, marine pollution, and ocean acidification. This year, we are extremely grateful for the leadership of President Bachelet and Foreign Minister Munoz of Chile in hosting the second highly successful Our Ocean conference in October, where we saw governments, NGOs, academia, charitable institutions, and industry announce over 80 new initiatives on marine conservation valued at more than \$2.1 billion, as well as new commitments on the protection of more than 1.9 million square kilometers of the ocean. The Our Ocean conferences are proving to be important catalysts for significant international action to protect the ocean and its resources, and we are looking forward to the next conference in the United States in the fall of 2016, and to the 2017 conference to be hosted by the European Union.

Building on the momentum of the Our Ocean conferences, we were pleased to work with our colleagues this year to advance a number of critical issues in the oceans resolution, notably marine debris, especially plastics. Plastic waste pollutes every part of our ocean. It is killing marine life like fish, seabirds, and turtles. It is damaging our coral reefs, degrading the ocean's resilience, and harming human health. The good news is that this is a solvable problem. We have the technology and the resources to improve waste collection, transportation, storage, and treatment to keep plastic and other waste out of the ocean. Over the longer term, we need to encourage innovation in redesigning products and packaging to use less plastic and to reuse plastics rather than discard them. We look forward to fruitful exchanges on marine debris, plastics, and microplastics, in the 2016 Informal Consultative Process on Oceans and Law of the Sea and hope all participants will use that meeting to make real progress on stopping the flow of plastic waste into the ocean.

Similarly, we are pleased that this year's sustainable fisheries resolution has strengthened the call to ensure sustainable fisheries and to articulate the responsibilities of Member States, both individually and collectively. Member States recognized the need for science-based

fisheries management tools and strong compliance measures that underpin international fisheries cooperation, concerted action to ensure the safety of fisheries observers who provide data that is critical to effective fisheries management, and continuing attention to the shared responsibility to protect vulnerable marine ecosystems. 2016 will be an important year for sustainable fisheries issues, with another review of deep-sea fisheries scheduled, as well as plans for a resumption of the Review Conference of Parties to the UN Fish Stocks Agreement.

This year's sustainable fisheries resolution also contains important commitments to combat illegal, unregulated and unreported fishing, including a call for further ratifications to bring into force the global Port State Measures Agreement. We are heartened by the continued progress in this regard, and we are pleased that the United States will very soon become party to this important agreement. We hope that the Agreement will have enough parties to enter into force in 2016.

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4. Sea Turtle Conservation and Shrimp Imports

The Department of State makes annual certifications related to conservation of sea turtles, consistent with § 609 of Public Law 101-162, 16 U.S.C. § 1537, which prohibits imports of shrimp and shrimp products harvested with methods that may adversely affect sea turtles. On April 27, 2015, the Department of State certified that 14 nations have adopted programs to reduce the incidental capture of sea turtles in their shrimp fisheries comparable to the program in effect in the United States. The Department also certified that the fishing environments in 26 other countries and one economy do not pose a threat of the incidental taking of sea turtles protected under Section 609. As excerpted below, the Federal Register notice announcing the State Department's April 27 certifications explains the Department's determinations and the applicable legal framework. 80 Fed. Reg. 30,318 (May 27, 2015).

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On April 27, 2015, the Department certified 14 nations on the basis that their sea turtle protection programs are comparable to that of the United States: Colombia, Costa Rica, Ecuador, El Salvador, Gabon, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Nigeria, Pakistan, Panama, and Suriname. The Department also certified 26 shrimp harvesting nations and one economy as having fishing environments that do not pose a danger to sea turtles. Sixteen nations have shrimping grounds only in cold waters where the risk of taking sea turtles is negligible. They are: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom, and Uruguay. Ten nations and one economy only harvest shrimp using small boats with crews of less than five that use manual rather than mechanical means to retrieve nets, or catch shrimp using other methods that do not threaten sea turtles. Use of such small-scale technology does not adversely affect

sea turtles. The 10 nations and one economy are: The Bahamas, Belize, China, the Dominican Republic, Fiji, Hong Kong, Jamaica, Oman, Peru, Sri Lanka, and Venezuela. The Department of State has communicated the certifications under Section 609 to the Office of Field Operations of U.S. Customs and Border Protection.

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Shrimp harvested with turtle excluder devices (TEDs) in an uncertified nation may, under specific circumstances, be eligible for importation into the United States under the DS-2031 section 7(A)(2) provision for “shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States.” Use of this provision requires that the Department of State determine in advance that the government of the harvesting nation has put in place adequate procedures to monitor the use of TEDS in the specific fishery in question and to ensure the accurate completion of the DS-2031 forms. At this time, the Department has made such a determination only with respect to specific and limited fisheries in Australia and France. Thus, the importation of TED-caught shrimp from any other uncertified nation will not be allowed. For Australia, shrimp harvested in the Exmouth Gulf Prawn Fishery, the Northern Prawn Fishery, the Queensland East Coast Trawl Fishery, and the Torres Strait Prawn Fishery are eligible for entry under this provision. For France, shrimp harvested in the French Guiana domestic trawl fishery are eligible for entry under this provision. An official of the competent domestic fisheries authority for the country where the shrimp were harvested must sign the DS-2031 form accompanying these imports into the United States.

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C. OTHER CONSERVATION ISSUES

1. Joint Statement with Cuba

On November 24, 2015, representatives of the United States and Cuba signed a joint statement on environmental cooperation at the Department of State in Washington, D.C. See State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/11/249982.htm>. As explained in the media note:

The statement is a framework document that will facilitate and guide U.S.-Cuba cooperation—both governmental and non-governmental—on a range of environmental issues including coastal and marine protection, the protection of biodiversity including endangered and threatened species, climate change, disaster risk reduction, and marine pollution.

The United States and Cuba have already begun cooperating on several environmental issues, including by establishing sister marine protected areas and sharing hydrographic information. Cuban Ambassador to the United States José

Ramón Cabañas Rodríguez and Deputy Assistant Secretary of State for Oceans and Fisheries David Balton signed the statement pledging further collaboration.

The full text of the statement can be found at <http://www.state.gov/e/oes/rls/pr/249946.htm>.

2. International Boundary and Water Commission

The International Boundary and Water Commission (“IBWC”) is an international organization created by the Governments of the United States and Mexico that works through separate United States and Mexican sections to apply the boundary and water treaties between the two countries and settle differences that arise in the application of the treaties. On October 5, 2015, the Commissioners of the IBWC signed Minute No. 320, “General Framework for Binational Cooperation on Transboundary Issues in the Tijuana River Basin.” Minute No. 320 establishes a Binational Core Group (“BCG”) to address sediment, trash, water quality, and other transboundary issues relating to the Tijuana River basin. The United States and Mexico reached their agreement on binational cooperation in the form of an agreed Minute of the IBWC pursuant to the U.S.-Mexico Treaty on Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande (“1944 Water Treaty”). Minute 320 is available at http://www.ibwc.gov/Files/Minutes/Minute_320.pdf. The IBWC issued a press release on the establishment of this framework for binational cooperation, which is excerpted below and available at http://ibwc.gov/Files/Press_Release_100515.pdf.

* * * *

The objective of this agreement is to benefit residents of both countries living in the Tijuana River Basin in the area of San Diego, California-Tijuana, Baja California through sustainable management of its transboundary resources. By removing trash and taking actions aimed at eliminating sediment transport into the Tijuana River channel, the goal is to achieve this sustainability.

This agreement will establish a Binational Core Group that will include representatives of the IBWC, federal, state and local authorities; and non-governmental organizations from both countries. This group will recommend cooperative measures to address the issues of concern and define strategies to implement them.

In addition to the priority issues, the Binational Core Group may address other topics of mutual interest that would benefit the basin.

U.S. Commissioner Edward Drusina noted, “The radical reduction of the sediment, trash and contaminants from the Tijuana River Basin will not be solved in a month or a year, but we are committing to implement this Minute to get the job done.”

Mexican Commissioner Roberto F. Salmon commented that this innovative agreement brings together the efforts by authorities and organizations in both countries with the goal of improving conditions in the basin through projects that are jointly identified.

The Commission adopted this agreement, which was prepared in accordance with the provisions of the 1944 Water Treaty, during a ceremony in Tijuana attended by representatives from federal, state and local governments; and non-governmental organizations from both countries. As part of the event, the United States Consul General in Tijuana, William A. Ostick, and the Director General of Special Affairs for Mexico's Ministry of Foreign Relations, Mauricio Ibarra Ponce de Leon, delivered approval letters for the Minute; thus, the Minute entered into force immediately with the approval of both Governments.

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3. Wildlife Trafficking

As discussed in *Digest 2014* at 570-72, the United States released its National Strategy for Combating Wildlife Trafficking in 2014. On February 11, 2015, the federal agencies that co-chair the Presidential Task Force for Combating Wildlife Trafficking (the Departments of State, Justice, and the Interior) released the Implementation Plan for the National Strategy for Combating Wildlife Trafficking. See State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/02/237399.htm>. The Implementation Plan is available at <http://www.state.gov/documents/organization/237592.pdf>. The State Department also issued a fact sheet, available at <http://www.state.gov/documents/organization/237592.pdf>, summarizing steps taken through the Task Force to meet objectives of the National Strategy, including actions related to law enforcement, demand reduction, and international cooperation. Further background on the Implementation Plan, excerpted from the State Department media note, appears below.

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The Implementation Plan builds upon the Strategy, which was issued by President Obama on February 11, 2014, and reaffirms our Nation's commitment to work in partnership with governments, local communities, nongovernmental organizations, and the private sector to stem the illegal trade in wildlife.

Incorporating recommendations from the Secretary of the Interior's Advisory Council on Wildlife Trafficking, this framework will guide and direct new and ongoing efforts of the Task Force in executing the Strategy.

Building upon the Strategy's three objectives—strengthening enforcement, reducing demand for illegally traded wildlife, and expanding international cooperation—the Implementation Plan lays out next steps, identifies lead and participating agencies for each objective, and defines how progress will be measured.

Some of the steps included in the Implementation plan are:

- Continuing efforts to implement and enforce administrative actions to strengthen controls over trade in elephant ivory in the United States;
- Leveraging partnerships to reduce demand both domestically and abroad; and
- Strengthening enforcement capacity, cooperation, and partnerships with counterparts in other countries.

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4. Decision on proposed Keystone XL Pipeline

See Chapter 11 regarding the denial of the application for a Presidential permit under Executive Order 13337 for the proposed Keystone XL Pipeline.

Cross references

U.S. reservation to SPAW Protocol, **Chapter 4.A.2.**

2030 Agenda for Sustainable Development, **Chapter 4.A.3.**

Patookas v. Teck Cominco, **Chapter 4.B.2.**

Center for Biodiversity v. Hagel, **Chapter 5.C.4.**

Human rights and the environment, **Chapter 6.E.**

Putative right to development, **Chapter 6.N.4.**

ILC's work on protection of the environment in relation to armed conflict, **Chapter 7.D.2.**

ILC's work protection of the atmosphere, **Chapter 7.D.4.**

Presidential permits for transboundary infrastructure, **Chapter 11.H.**

Energy cooperation with China, **Chapter 19.B.6.e.**

CHAPTER 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2015, the United States took steps to protect the cultural property of El Salvador and Nicaragua by extending import restrictions on certain archaeological and/or ecclesiastical ethnological material from those countries. These actions were based on determinations by the Department of State's Bureau of Educational and Cultural Affairs that the statutory threshold factors permitting entry into an agreement were met, or that the factors permitting entry into the initial agreement still pertained. 19 U.S.C. §§ 2602 (a)(1) and (e), respectively. In 2015, the United States extended two agreements pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("Convention"), to which the United States became a State Party in 1983, and pursuant to the Convention on Cultural Property Implementation Act, which implements parts of the Convention. See Pub. L. No. 97-446, 96 Stat. 2351, 19 U.S.C. § 2601 *et seq.* If the requirements of 19 U.S.C. § 2602(a)(1) and/or (e) are satisfied, the President has the authority to enter into or extend agreements to apply import restrictions for up to five years on archaeological or ethnological material of a nation which has requested such protections and which has ratified, accepted, or acceded to the Convention.

1. El Salvador

Effective March 8, 2015, the United States and El Salvador amended and extended for five years the Memorandum of Understanding ("MOU") between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological Material from the Prehispanic Cultures of the Republic of El Salvador.

Cooperation to protect the cultural property of El Salvador began in 1987 when the United States imposed emergency import restrictions to curtail the pillage and illicit trafficking of El Salvador's archaeological heritage. The United States and El Salvador entered into their first MOU to protect El Salvador's archaeological heritage in 1995. See *II Cumulative Digest 1991–1999* at 1795-97. The MOU has been amended and extended every five years. The text of the 2015 MOU is available at <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements>. See also the March 10, 2015 Department of State media note, available at <http://www.state.gov/r/pa/prs/ps/2015/03/238734.htm>. U.S. Customs and Border Protection ("CBP") of the Department of Homeland Security and the Department of the Treasury further extended the import restrictions imposed previously with respect to certain archaeological materials from El Salvador. 80 Fed. Reg. 12,080 (Mar. 6, 2015).

2. Nicaragua

Effective October 15, 2015, the Agreement between the Government of the United States of America and the Government of the Republic of Nicaragua Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures of the Republic of Nicaragua was extended for a period of five years. The October 6, 2015 State Department media note announcing the extension is available at <http://www.state.gov/r/pa/prs/ps/2015/10/247957.htm>. The original agreement with Nicaragua was entered into in 2000 and was previously extended in 2005 and 2010. See *Digest 2010* at 565; see also *II Cumulative Digest 1991–1999* at 1800-01 and *Digest 2005* at 775–76. The Federal Register notice of the final rule continuing the import restrictions was published on October 6, 2015. 80 Fed. Reg. 60,292 (Oct. 6, 2015). The text of the agreement is available at <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements>.

B. PROTECTION OF WORLD CULTURAL AND NATURAL HERITAGE

On September 29, 2015, Deputy Secretary of State Antony J. Blinken spoke at the Metropolitan Museum of Art in New York on the endangered patrimony of Iraq and Syria. His remarks are excerpted below and available at <http://www.state.gov/s/d/2015/247646.htm>.

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Carving caverns of inhumanity in its wake, ISIL has murdered, raped, and enslaved its way into Syria and Iraq—towns, villages, cities. They have not only killed, but as you all know, they

sought to erase the identity of those they have killed. To supplant centuries of culture and history with their own ideology of nihilism and terror.

The Assyrian winged bulls in Nineveh. Historic lions in Raqqa. The great city of Palmrya.

Each satellite image of scorched earth, each photo of barren land that shows what we have lost and lost potentially forever gnaws at our hearts.

It was in this region, a cradle of civilization, that our roots first came together—roots that bind us not only to our ancestors but also to each other. Without the enduring reminders of our past, the ground beneath our feet feels a little less certain and the world we will pass onto future generations becomes greatly impoverished.

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These ancient coins, stone, glass, and mosaic fragments travel organized routes through black markets in the Middle East, Europe, and the Persian Gulf. The profits return to line the pockets of these extremists—funding more savagery, more terror, and more devastation.

This afternoon, you'll hear from my colleagues as they offer details on ISIL's ongoing destruction—including some information that has not been made public until today. In the face of this truly unprecedented crisis, it is vital that all of us—governments, international organizations, museums, auction houses, and collectors—take concrete action to both reduce the demand on the world market and cut off the supply.

That's why the United States has developed Red Lists with the International Council of Museums to help law enforcement officials recognize looted objects.

It's why we have stepped up our efforts through the Global Coalition to Counter ISIL to encourage greater action against the illicit trade.

It is why the United States seeks reelection on the UNESCO Executive Board this November, so that we can continue to promote coordination and action at the highest levels.

And that it's why we are working so closely with international law enforcement agencies here in the United States and around the world.

I think many of you know something called the Rewards for Justice program. It encourages people to provide information that prevents terrorist acts or helps put terrorists behind bars. Today, on behalf of Secretary of State Kerry, I am pleased to announce that the Rewards for Justice program will offer—for the first time ever—up to \$5 million for information leading to the significant disruption of the sale and/or of the trade of antiquities by, for, or on behalf of ISIL.

This is one more step in bringing the weight of justice down on those who seek to advance ISIL's destructive agenda—and in opening the eyes of the public to this unprecedented menace.

In this effort, we're grateful for the active involvement of two giants of the art market, Christie's and eBay, which are both represented here today. Their determination to educate their clients and the general public can serve as an example for dealers and collectors around the world.

We also welcome discussions among collectors, museums, auction houses, [and] online marketplaces about collectively pledging to maintain the highest standards in handling

antiquities—especially from regions in crisis like Iraq and Syria. Refusing to deal in conflict antiquities is both a moral imperative and a legal obligation.

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On September 30, 2015, the State Department issued a fact sheet on “Uniting Against Threats to Cultural Heritage in Iraq and Syria,” which is available at <http://www.state.gov/r/pa/prs/ps/2015/09/247616.htm>, and excerpted below.

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The terrorist group known as ISIL, or Daesh, is continuing its campaign of destruction and looting at historic sites in Iraq and Syria. These sites have been preserved for millennia in both Iraq and Syria, whose people are suffering enormous human hardships and losing cultural legacies of universal importance.

ISIL’s damage and looting of historic sites in Syria and Iraq have not only destroyed irreplaceable evidence of ancient life and society but have also helped fund its reign of terror inside those countries. [Documents and items seized during a raid on the compound of ISIL Senior Leader Abu Sayyaf](#) provided further evidence that ISIL – beyond its terrorism, brutality, and destruction – also engages in a wide variety of criminal activity, including systematic looting and profiteering from the [illegal antiquities trafficking](#) under the direction of its senior leadership.

Working together with other nations and private organizations in the preservation of cultural heritage, the United States is committed to disrupting the illegal trafficking of antiquities, and proving that ISIL’s tactics of murder and destruction will not erase Iraq and Syria’s rich history and cultures.

The State Department is the largest contributor to [The American Schools of Oriental Research’s Cultural Heritage Initiative](#) – providing over \$1.5 million since 2014 to document damage, promote global awareness, and plan emergency and post-war responses in Syria and Iraq. This [work is being placed online](#) as part of a global collaboration to halt the trade in conflict-region antiquities.

At a [program](#) yesterday at the Metropolitan Museum in New York, the State Department [announced](#) that its [Rewards for Justice](#) program will reward up to \$5 million dollars for information leading to the significant disruption of the sale and/or trade of antiquities and oil by, for, on behalf of, or to benefit ISIL.

Working in partnership with the International Council of Museums, the State Department has funded the publication of notices to educate customs officials and legitimate art dealers, the [Emergency Red List of Iraqi Cultural Objects at Risk](#) and the [Emergency Red List of Syrian Cultural Objects at Risk](#).

The United States joins with the international community to urge all parties in Iraq and Syria and the international community to respect and protect archaeological, historic, religious,

and cultural sites, including museums and archives, and reaffirm that all those who destroy important cultural property must be held accountable.

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On December 16, 2015, the State Department issued a media note announcing a partnership with the International Council of Museums to fight illicit traffic of Libyan cultural objects. The media note, excerpted below, is available at <http://www.state.gov/r/pa/prs/ps/2015/12/250691.htm>.

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The U.S. Department of State and the International Council of Museums (ICOM) have launched the [Emergency Red List of Libyan Cultural Objects at Risk](#). The Emergency Red List alerts law enforcement and the collecting community to the types of Libyan cultural objects that are vulnerable to being looted and trafficked. It serves as an important tool in the fight against trafficking by transnational crime organizations and Foreign Terrorist Organizations, such as ISIL.

The United States joins with the international community to urge all parties in Libya and worldwide to respect and protect archaeological, historic, religious, and cultural sites, including museums and archives, and reaffirm that all those who damage or destroy important cultural property must be held accountable. For the past ten years, the State Department has been engaged with private sector partners in several projects to protect and preserve the archaeological heritage of Libya.

The illicit traffic in cultural goods is not a new practice; however, conflicts in the Middle East and Northern Africa have increased its severity. Significant damage and destruction has been done to cultural heritage sites, particularly by ISIL, feeding the networks through which stolen and looted objects travel. In order to fight illicit traffic, we must constantly adapt to emergency situations and new practices, such as internet sales.

The State Department's support of the Red List reflects the United States' commitment to cultural preservation and respect for world heritage. In addition to the Libya Red List, the State Department has supported the publication of lists for [Syria](#), [Iraq](#), Afghanistan, Egypt, Cambodia, China, Central America and Mexico, Haiti, Colombia, and Peru, with more on the way.

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C. EDUCATIONAL EXCHANGE

On February 2, 2015, the United States and Andorra signed an MOU on the Fulbright Exchange Program. The MOU is available at <http://www.state.gov/s/l/c8183.htm>. On February 11, 2015, the United States and Portugal signed an agreement continuing the Commission for Educational Exchange between the United States and Portugal. The

U.S.-Portugal agreement is also available at <http://www.state.gov/s/l/c8183.htm>. On February 19, 2015, the United States and Estonia signed an MOU on the Fulbright Program, which is also available at <http://www.state.gov/s/l/c8183.htm>. For background on the Fulbright Program, see *II Cumulative Digest 1991-1999* at 1807-08.

On June 15, 2015, the Ministry of Foreign Affairs of the Republic of Cyprus confirmed by letter to the Chair of the Fulbright Commission that the 1962 Agreement between for financing and conducting educational exchanges between the United States and Cyprus had been terminated and the Commission for Educational Exchange had been dissolved. The 1962 Agreement was terminated by exchange of diplomatic notes. The June 15, 2015 letter is available at <http://www.state.gov/s/l/c8183.htm>.

D. EXCHANGE VISITOR PROGRAM

As discussed in *Digest 2014* at 576-79, a United States district court granted the U.S. Department of State's motion to dismiss claims brought by ASSE International, a program sponsor in the Department's J-1 Exchange Visitor Program ("EVP"), relating to sanctions imposed by the Department for ASSE's violations of EVP regulations. ASSE appealed the district court's ruling. The U.S. Court of Appeals for the Ninth Circuit reversed the district court's finding that sanctions actions against EVP sponsors are judicially unreviewable and its holding that ASSE was provided adequate process. *ASSE Int'l Inc. v. Kerry*, 803 F.3d 1059 (9th Cir. 2015). Though the Court of Appeals agreed with the Department that due process does not mandate trial-type proceedings in the imposition of sanctions for violations of EVP regulations, it held that the Department did not provide adequate procedural protections to ASSE in this case. The Court of Appeals reasoned that the issues in this case had only a "weak connection to foreign policy." The Court of Appeals remanded to the district court for further proceedings to determine whether ASSE has a property interest at issue, and, if so, whether the due process violation suffered was harmless error. The Department has filed a motion in the district court seeking remand to the Department for further proceedings within the agency consistent with the Ninth Circuit's opinion.

Cross References

ICC prosecution regarding cultural sites in Mali, **Chapter 3.C.1.c.**
Syria, **Chapter 17.B.2.**

CHAPTER 15

Private International Law

A. COMMERCIAL LAW/UNCITRAL

1. General

On October 19, 2015, Mark Simonoff, Minister Counselor for the U.S. Mission to the UN, addressed the UN General Assembly's Sixth (Legal) Committee during its debate on the report of the UN Commission on International Trade Law ("UNCITRAL") on the work of its 48th session. Mr. Simonoff's statement, excerpted below, is available at <http://usun.state.gov/remarks/6908>.

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The United States welcomes the Report of the 48th 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.

UNCITRAL has had another successful year, particularly in terms of efforts to promote greater awareness of UNCITRAL instruments. In the context of Asia-Pacific Economic Cooperation initiatives aimed at improving the business environment in the Asia-Pacific region, UNCITRAL member states and the Secretariat have increased their efforts to bring attention to the benefits of using UNCITRAL instruments as a means of encouraging economic growth. We believe these efforts are extremely valuable and can serve as a model for other regions as well.

The newest UNCITRAL treaty, the Convention on Transparency in Treaty-Based Investor-State Arbitration, opened for signature in March. The United States was pleased to be among the eight countries to sign the Convention at the ceremony in Mauritius, and eight more countries have signed in recent months. We continue to believe that the Convention will be a

convenient tool for applying transparency measures—such as open hearings, publication of key arbitration documents, and participation by third parties—to arbitrations occurring under thousands of existing investment treaties. We encourage all states to consider becoming parties to the Convention.

In terms of ongoing and future work, UNCITRAL has decided to commence work on the enforcement of mediated settlement agreements. We believe that this project could be a very valuable tool for promoting the use of mediation to settle cross-border commercial disputes, and we hope that the instrument being developed can help encourage the growth of mediation in the same way that the New York Convention promoted the use of arbitration.

We are pleased that several of UNCITRAL's long-term projects are nearing completion. We look forward to the completion, in this upcoming year, of the work on online dispute resolution. This project should result in a non-binding, descriptive document reflecting elements of an online dispute resolution process.

We also are looking forward to the completion of the Model Law on Secured Transactions next year.

Similarly, on electronic commerce issues, UNCITRAL is preparing to finish an instrument that will facilitate the use of electronic transferable records, and is beginning to explore issues related to identity management and cloud computing.

On other topics, UNCITRAL is continuing its efforts to develop legal instruments that will help states encourage the growth of micro, small, and medium enterprises, starting with the issue of simplified incorporation. Finally, UNCITRAL is also continuing its work on enterprise group insolvency issues and a model law on the recognition and enforcement of insolvency-related judgments.

The United States believes that all of these projects have the potential to result in instruments that significantly assist with the development of international commercial law. However, for these efforts to have their greatest effect, UNCITRAL needs broad participation in all of its working groups, so that the resulting instruments will meet the needs of countries from all regions and legal cultures. We encourage states to participate in as many of the working group sessions as possible, and we look forward to continued collaboration on all of these projects.

* * * *

2. Transparency in Treaty-based Investor-State Arbitration

As mentioned in Mr. Simonoff's statement, above, the UNCITRAL Convention on Transparency in Treaty-Based Investor-State Arbitration opened for signature in March 2015. Sixteen states had signed as of the end of 2015, with Mauritius being the only to accede as of the end of 2015. See UNCITRAL webpage on the status of the Convention, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

3. Hague Apostille Convention

In May 2015, the State Department notified the Netherlands Ministry of Foreign Affairs, as depositary for the Convention Abolishing the Requirement of Legalization for Foreign Public Documents (“Hague Apostille Convention”), done at The Hague October 5, 1961, that it was withdrawing its 1995 objection to Liberia’s accession to the Hague Apostille Convention. The State Department revisited its original assessment of Liberia’s ability to accept U.S. public documents that have been authenticated in the United States under the procedures of the Convention, based on 19 years of Liberia operating pursuant to the Convention and developing a comprehensive system of competent authorities. Withdrawal of the objection allows the Convention to enter into force between the United States and Liberia. In a note dated June 9, 2015, and available at <http://www.state.gov/s/l/c8183.htm>, the Netherlands Ministry of Foreign Affairs confirmed that the Convention entered into force between the United States and Liberia on May 20, 2015.

B. FAMILY LAW

1. Hague Convention on Intercountry Adoption

The fourth meeting of the Special Commission to review the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption met in The Hague from June 8 to 12, 2015. The conclusions and recommendations of the fourth meeting are available at https://assets.hcch.net/upload/wop/adop2015concl_en.pdf.

In preparation for the meeting, the United States submitted its response to a questionnaire on the practical operation of the Convention, both as a State of origin for adopted children and as a receiving State. The U.S. response is available at https://assets.hcch.net/upload/wop/adop2015q2_us.pdf.

2. Hague Convention on the Civil Aspects of International Child Abduction

Lopez Sanchez Case

As discussed in *Digest 2014* at 593-95, the Court of Appeals for the Fifth Circuit in *Angelica Lopez Sanchez v. R.G.L. et al.*, 761 F.3d 495 (5th Cir. 2014), held that the district court should consider the grant of asylum to the children when ruling on a petition for their return brought pursuant to the Hague Convention and its implementing legislation. The district court issued its final judgment on May 27, 2015, denying as moot the petition to return the children; denying as futile the request to amend the complaint; and granting the motion to dismiss the case. *Lopez Sanchez v. Lopez Sanchez*, No. SA-12-CA-568-XR (W.D. Tex, 2015).

3. Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

In 2014 Congress passed implementing legislation for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. The federal legislation requires all U.S. states to enact the 2008 amendments to their Uniform Interstate Family Support Act (“UIFSA”) as a condition of continuing to receive federal funds for state child support programs. The 2008 amendments modified UIFSA’s international provisions to comport with the obligations of the United States under this Hague Convention. By the end of 2015, most states had enacted the 2008 UIFSA amendments.

C. INTERNATIONAL CIVIL LITIGATION

1. Arbitration

a. *COMMISA v. PEP*

On February 6, 2015, the United States submitted a letter brief as *amicus curiae* in a case in the U.S. Court of Appeals for the Second Circuit. *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (“COMMISA”) v. Pemex-Exploración y Producción (“PEP”)*, No. 13-4022 (2d. Cir.). COMMISA, a Mexican subsidiary of a U.S. corporation, sued in U.S. district court to enforce an arbitral award against PEP, a subsidiary of the state-owned oil company of Mexico. The district court confirmed and increased the amount of the award, despite the fact that a Mexican court had nullified the award. Excerpts follow (with footnotes omitted) from the sections of the brief discussing the district court’s errors in declining to recognize the nullification of the award and in increasing the amount of the award. Sections of the U.S. brief discussing jurisdiction and venue under the FSIA are excerpted in Chapter 10. The letter brief is available in its entirety at <http://www.state.gov/s/l/c8183.htm>.

* * * *

III. The District Court Misapplied This Court’s Jurisprudence In Declining To Recognize the Mexican Court’s Nullification Judgment

The district court recognized and enforced the Mexican arbitral award, notwithstanding that the award has been nullified by a Mexican court. Consistent with the United States’ position in pending NAFTA proceedings arising out of the underlying dispute between COMMISA and PEP, the United States does not take a position as to whether the district court properly could

conclude on remand that the Mexican nullification decision “violated basic notions of justice.” SPA 39. However, the United States addresses several aspects of the district court’s reasoning that, in the government’s view, diverged from the legal standards that apply to the consideration of a foreign judgment nullifying an arbitral award.

This Court has described the contrasting “regimes for the review of arbitral awards” in “the state in which, or under the law of which, the award was made” and the state “where recognition and enforcement are sought.” *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997). The first state, *i.e.*, the “rendering state” or primary jurisdiction, may “set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.” *Id.* at 22–23. The second state, *i.e.*, the enforcement state or secondary jurisdiction, “may refuse to enforce the award only on the grounds explicitly set forth in Article V,” *id.* at 23, including that the award “has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.” Panama Convention, art. 5(1)(e); *see also* New York Convention, art. V(1)(e). The New York and Panama Conventions do not, however, compel a court to deny recognition and enforcement under Article 5, instead using the permissive term “may.” This latitude is consistent with “the strong public policy in favor of international arbitration” recognized by both the New York Convention and U.S. law. *Telenor Mobile Commc’ns AS v. Storm LLC*, 584 F.3d 396, 405 (2d Cir. 2009); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (recognizing “the emphatic federal policy in favor of arbitral dispute resolution . . . that applies . . . with special force in the field of international commerce”).

When a U.S. court is asked to enforce a nullified arbitral award, the court must consider whether to recognize the foreign judgment that has nullified the arbitral award. The appropriate standard for this inquiry is set out in the draft Restatement (Third) of International Commercial Arbitration: “if a Convention award has been set aside by a competent authority, a court of the United States may confirm, recognize, or enforce the award if the judgment setting it aside is not entitled to recognition under the principles governing the recognition of judgments in the court where such relief is sought, or in other extraordinary circumstances.” Restatement (Third) of International Commercial Arbitration § 4-16(b) (Tentative Draft No. 2, Apr. 16, 2012).

Linking the issue of whether to enforce a nullified arbitral award to the question of whether to recognize the foreign judgment that nullifies that award is consistent with the New York and Panama Conventions, and gives courts the benefit of guidance from well-developed precedents on the recognition of judgments. “American courts will normally accord considerable deference to foreign adjudications as a matter of comity.” *Diorinou v. Mezitis*, 237 F.3d 133, 142 (2d Cir. 2001). Such deference is also consistent with Article 5(1)(e), which, by declining to prescribe standards for nullification in the primary jurisdiction, leaves that issue to the jurisdiction’s domestic law. *See* Restatement (Third) of International Commercial Arbitration § 4-16 cmt. a (Tentative Draft No. 2, Apr. 16, 2012) (“The scope and proper exercise of set-aside authority are determined by the arbitration law of the country in which or under the law of which the award was made.”). Because courts in the primary jurisdiction apply their domestic law regarding nullification, a refusal to recognize a nullification decision could be perceived as showing a measure of disrespect for that jurisdiction’s laws and judicial system. *Cf. Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895).

This standard is also consistent with the prior precedents of this and other Circuits, which have framed the issue of whether to enforce a nullified arbitral award in terms of whether to recognize the relevant nullification judgment. This Court considered whether to enforce a nullified arbitral award in *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 196–97 (2d Cir. 1999). There, the parties’ contracts provided for arbitration under Nigerian law. *Id.* at 195. Baker Marine obtained two arbitral awards in its favor, but a Nigerian court set aside the awards. *Id.* at 195–96. When Baker Marine nevertheless sought to confirm the arbitral awards in New York, the district court declined to do so, and this Court affirmed. *Id.* at 196–97. The Court held that Baker Marine had “shown no adequate reason for refusing to recognize the judgments of the Nigerian court.” *Id.* at 197. The Court further observed that “[r]ecognition of the Nigerian judgment” did not “conflict with United States public policy.” *Id.* at 197 n.3.

The D.C. Circuit took a similar approach in *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007), in which TermoRio and Electrificadora del Atlantico, a state-owned public utility, agreed to submit any contractual dispute to arbitration in Colombia. *Id.* at 930–31. A Colombian arbitration panel issued an award in favor of TermoRio, but a Colombian court invalidated the award on the ground that the arbitration clause in the parties’ agreement violated Colombian law. *Id.* The D.C. Circuit affirmed the district court’s refusal to enforce the invalidated arbitral award, reasoning that there was “nothing in the record here indicating that the proceedings before the [Colombian court] were tainted or that the judgment of that court is other than authentic.” *Id.* at 935. The court reasoned that United States courts should not go behind a foreign court’s nullification decision absent “extraordinary circumstances.” *Id.* at 938. Although the D.C. Circuit acknowledged that Article V(1)(e) of the New York Convention permits enforcement where the foreign nullification judgment violates United States “public policy,” it cautioned that courts “must be very careful in weighing notions of ‘public policy’ in determining whether to credit” a nullification decision. *Id.* As the D.C. Circuit explained, a judgment is “unenforceable as against public policy [only] to the extent that it is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.” *Id.* (quoting *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986)).

As set forth above, the Government does not take a position on whether the district court could have demonstrated reasons for refusing to recognize the Mexican court’s decision, either on public policy grounds or in light of other extraordinary circumstances. However, the district court did not articulate an adequate basis for doing so. While the district court purported to apply the test set forth in *Baker Marine* and *TermoRio*, its analysis was consistent with neither these decisions nor § 4-16 of the draft Restatement (Third). The standard for finding that a foreign judgment is “unenforceable as against public policy” is “high, and infrequently met.” *Ackermann*, 788 F.2d at 841. The district court concluded that the Mexican court’s decision violated basic notions of justice, and thus was unenforceable as against public policy, because it purportedly applied Mexican law retroactively, favored a state enterprise over a private party, and left COMMISA without a remedy in Mexican court. SPA 62–68. As set forth below, these conclusions, at least as articulated by the district court, are not persuasive.

First, the proceedings in the district court focused on whether the Mexican court’s decision was correct, not whether it “tend[ed] clearly” to undermine the public interest. Although the district court claimed that it neither decided nor reviewed Mexican law, its reasoning was based on interpretations of both Mexican law and the Mexican court’s decision. Before rendering its decision, the district court heard three days of expert testimony on Mexican law—and

specifically “the nature of the remedy of administrative rescission and its possible interplay with arbitration.” SPA 54–55. These proceedings culminated in findings by the district court that “there was no [Mexican] statute, case law, or any other source of authority that put COMMISA on notice that it had to pursue its claims in court”; that Mexican law did not previously preclude arbitration of decisions to administratively rescind a contract; and that the Mexican court did not apply that amendment only as a “guiding principle,” despite its explicit statement to the contrary. SPA 64–68. In making such findings, the district court effectively acted as a Mexican appellate court. Such an extensive inquiry into the soundness of a foreign court’s legal reasoning, particularly when that inquiry involves consideration of issues of foreign law that were already considered by the foreign court, is inconsistent with principles of comity and is not an appropriate method of evaluating whether the foreign court’s decision “tends clearly” to undermine public confidence in the administration of the law. *Ackermann*, 788 F.2d at 841.

Similarly, in holding that the Mexican nullification judgment violated public policy, the district court stated that the Mexican court had acted “to favor a state enterprise over a private party.” SPA 65. The district court did not, however, adequately justify this conclusion or demonstrate that it warrants enforcement of the arbitral award in this case. The district court deemed it “a basic principle of justice” that when a state waives its sovereign immunity and contracts with a private party, “a court hearing a dispute regarding that contract should treat the private party and the sovereign as equals.” SPA 65 (citing, *e.g.*, *Winstar*, 518 U.S. at 895). The cases cited by the district court, however, merely discussed principles of U.S. law applicable to U.S. government contracts; they did not purport to articulate overriding principles of fairness that must apply in this setting. While the district court pointed to the Mexican court’s invocation of legal principles intended to safeguard public resources, SPA 65, it is not exceptional that a legal system affords protections to sovereigns and their property that it does not extend to private parties. To the extent the district court believed that the Mexican court manipulated the law out of bias in favor of the Mexican government, any such determination would have to be based on “solid proofs (rather than mere speculation) [that] raise substantial and justifiable doubts about the integrity or independence of the rendering court with respect to the judgment in question.” *See* Restatement (Third) of International Commercial Arbitration § 4-16, Reporters’ note d (Tentative Draft No. 2, Apr. 16, 2012). It is inappropriate to presume that a country’s courts will improperly favor its executive branch in litigation involving a government party. We note in this regard that the United States is frequently designated as a seat of arbitration, including in cases involving U.S. government entities. It would be wholly unwarranted for a foreign court to refuse to recognize a U.S. judgment nullifying an award against the U.S. government based on speculation that the U.S. court was motivated by favoritism.

Furthermore, although the district court also placed substantial reliance on its view that COMMISA might lack further recourse, it did not explain why the absence of a remedy in 2011 violated U.S. public policy, or examine whether a judicial remedy in Mexico might have been available at an earlier time. Thus, the district court did not consider whether COMMISA, after failing to prevail in the *amparo* proceeding, could have brought a timely action in Mexican court at that time, SPA 42–43, 45–46, and whether COMMISA, by instead proceeding with arbitration, assumed the risk of a future judicial determination that its dispute was not arbitrable. Many judicial systems, including the United States’, presume that courts will decide “disputes about ‘arbitrability.’” *BG Grp. v. Republic of Argentina*, 134 S. Ct. 1198, 1206–07 (2014) (collecting cases); *see also* 9 U.S.C. § 10(a)(4) (permitting courts to vacate an arbitral award where “the

arbitrators exceeded their powers”); Panama Convention, art. 5(1)(a). Where such disputes reach courts only after an arbitration has occurred, relevant statutes of limitation may have expired. The district court did not adequately explain why such an expiration, which could also occur in U.S. courts, could by itself render a nullification judgment contrary to public policy.

Because the district court misapplied the law governing the recognition of foreign judgments, the United States recommends that the Court vacate the district court’s decision and remand in order to permit the district court to apply the standards outlined above.

IV. The District Court Erred in Augmenting the Final Arbitral Award

Finally, in the view of the United States, the district court erred in augmenting the arbitral award by approximately \$106 million so as not to “undermine the award.” SPA 83.

As this Court has recognized, “[a]ctions to confirm arbitration awards . . . are straightforward proceedings,” *Ottley v. Schwartzberg*, 819 F.2d 373, 377 (2d Cir. 1987), in which “the judgment to be enforced encompasses the terms of the confirmed arbitration awards and may not enlarge upon those terms,” *Zeiler*, 500 F.3d at 170. “It is . . . well-settled that the New York Convention does not permit a court in a Contracting State to correct, interpret, or supplement a foreign or nondomestic award.” GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3714 (2d ed. 2014). Thus, when a U.S. court is asked to enforce an international arbitral award, it lacks authority to modify that award. *See Gulf Petro Trading Co. Inc. v. Nigerian Nat’l Petroleum Corp.*, 512 F.3d 742, 747 (5th Cir. 2008); *see also Wartsila Finland OY v. Duke Capital LLC*, 518 F.3d 287, 292 (5th Cir. 2008) (“A district court should enforce an arbitration award as written—to do anything more or less would usurp the tribunal’s power.”).

Here, the district court acknowledged that it was “not confirming the [arbitral tribunal’s] preliminary award,” SPA 81, which was the only award specifically to address COMMISA’s performance bonds, A 143; SPA 81 (noting that “there is nothing in the [final] award itself” that referred to the performance bonds). Nonetheless, the district court appeared to conclude that, because PEP collected on the bonds after the Mexican court had nullified the final arbitral award, its decision not to recognize the Mexican court’s judgment also invalidated that collection. SPA 83. Assuming without deciding that the district court could have enforced injunctive relief in the final award, the final award here contained no such relief, and the district court’s approach thus did not enforce the award “as written.” *Wartsila*, 518 F.3d at 292. Instead, the district court modified the award to compensate for subsequent events that it regarded as inconsistent with the arbitral panel’s intent. Under these circumstances, the district court exceeded its authority by “enlarg[ing]” upon the terms of the final award. *Zeiler*, 500 F.3d at 170.

* * * *

b. Salini v. Morocco

The United States filed a Statement of Interest on August 15, 2015 in U.S. District Court for the District of Columbia in *Salini Construttori v. Kingdom of Morocco*, No. 14-2036. The case arose when Salini, an Italian company, initiated court proceedings to obtain recognition of an arbitral award it won based on a contract with the Kingdom of Morocco. After making several attempts to serve the Kingdom of Morocco, Salini

moved for a default judgment and the court invited the United States to file a statement of interest. Excerpts follow (with most footnotes omitted) from the U.S. statement, which is also available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The Foreign Sovereign Immunity Act sets forth the only ways in which a foreign sovereign may be served. *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 688 (1989); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994); *Bleier v. Bundesrepublik Deutschland*, 2011 WL 4626164 (N.D. Ill. Sep. 30, 2011); *Davoyan v. Republic of Turkey*, 2011 WL 1789983 (C.D. Cal. May 5, 2011). Because Salini’s first attempt to serve Morocco was not pursuant to the FSIA, but pursuant to Rule 4(f)(2)(C)(ii), service was not effective. See Docket Nos. 7-8; cf. *Transaero*, 30 F.3d at 153 (attempts to serve Ambassador, Consul General, First Minister, and Air Force insufficient). Accordingly, in our view, a default judgment should not have been entered.

The FSIA requirements must be “adhered to rigorously.” *Transaero*, 30 F.3d at 154. In pertinent part, 28 U.S.C. § 1608(a) provides for service:

- 1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
- 2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
- 3) if service cannot be made under paragraphs (1) or (2), 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, or
- 4) if service cannot be made within 30 days under paragraph (3), 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.

There is no “special arrangement” between the United States and Morocco. Accordingly, as the options are hierarchical, Salini attempted service under the applicable international service convention, namely the Hague Convention.

I. A Sovereign May Be Served Pursuant To Article 5 Of The Hague Convention, But Morocco’s Invocation Of Article 13 Renders Service Ineffective

The United States entered into the Hague Convention in 1969; Morocco acceded to the convention in 2011. The convention requires each member state to designate a Central Authority,

which endeavors to effectuate service in a manner consistent with its internal law. Article 5; *see also Richardson v. Att’y Gen. of BVI*, 2013 WL 44947 *10-12 (D. V.I. Aug. 20, 2013) (service through Central Authority required; service upon Ministry clerk insufficient); *Davoyan*, 2011 WL 1789983 *2; *Doe I v. State of Israel*, 400 F.Supp. 2d 86, 102 (D.D.C. 2005). Service by way of the Central Authority is the principal method of service under the convention. *Brockmeyer v. May*, 383 F.3d 798, 802 (9th Cir. 2004); *Compass Bank v. Katz*, 287 F.R.D. 392, 396 (S.D. Tx. 2012); *Julien v. Williams*, 2010 WL 5174545 (M.D. Fl. Dec. 15, 2010). Significantly, transmitting a service request to the Central Authority is not, itself, service; rather, the Central Authority then effectuates service and is obligated to provide a “Certificate” confirming process has been affected. Article 6; *see, e.g., Paracelsus Healthcare Corp. v. Philips Medical Systems*, 384 F.3d 492, 494-95 n.2 (8th Cir. 2004); *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1077 (9th Cir. 1999); *Day v. Corn*, 789 F.Supp.2d 136, 146 (D.D.C. 2011). Whether, and when, a default judgment may be entered is addressed by Articles 15 and 16 of the convention. When a Central Authority refuses to execute a service request, the convention requires it to “promptly inform the applicant and state the reasons for the refusal.” Article 13. A member state may refuse to comply with a service request that otherwise conforms with convention requirements only if compliance with the service would infringe that state’s sovereignty or security. Article 13; *see In re South African Apartheid Litigation*, 643 F. Supp.2d 423, 432 (S.D.N.Y. 2009). An Article 13 refusal “is not a declaration that the lawsuit itself violates its sovereignty or security.” *Jian Zhang v. Baidu.com Inc. et al.*, 293 F.R.D. 508, 513 (S.D.N.Y. 2013).

Salini’s attempt to serve Morocco, through its Central Authority, in accordance with Article 5 of the convention, is consistent with section 1608(a)(2) of the FSIA, service through an applicable international convention on service of judicial documents. *See also* Rule 4(j)(1). Morocco, however, rejected service under Article 13 of the convention, as contrary to its “sovereignty or security.” Docket No. 20 (May 22, 2015 letter from the Kingdom of Morocco to district court). Whether execution of a service request so infringes upon a member state’s sovereignty or security is a matter for the requested state, here Morocco. Accordingly, the draft Practical Handbook on the Operation of the Hague Service Convention (Handbook) cautions that the “requesting state (here the United States) should avoid reviewing a decision by the authorities of the requested State to refuse compliance.” *See* Exhibit A (Para. 223). Consistent with that caution, district courts have held, and Salini does not contest, that courts are without jurisdiction to revisit a member state’s invocation of Article 13. *See Jian Zhang v. Baidu.com Inc. et al*, 932 F.Supp. 2d 561 (S.D.N.Y. 2013); *Davoyan*, 2011 WL 1789983; *cf. Gurung v. Malhotra*, 279 F.R.D. 215, 218- 19 (S.D.N.Y. 2011) (holding refusal to serve not proper under Article 13 where Central Authority’s rejection cited not India’s sovereignty or security, but diplomatic immunity). Given the potential negative impact upon foreign relations of a United States court rejecting the sovereignty and security concerns of a foreign sovereign, or vice versa, a foreign court’s reweighing our sovereignty and security concerns, this Court should follow *Baidu* and *Davoyan*.

II. Salini’s Attempts To Serve The Moroccan Ministry Of Equipment And Transport Were Not In Accordance With The Hague Convention

To the extent Salini contends its attempts to serve Morocco through postal channels were made “in accordance with an applicable international convention on service of judicial documents,” the United States disagrees. First, as noted above, Salini’s attempts to serve

Morocco through postal channels were not made pursuant to the convention, but pursuant to FRCP 4(f)(2)(C)(ii). *See* Docket Nos. 7-8, 17-18.

Second, in our view, a sovereign cannot be properly served through postal channels, except as detailed in section 1608(a)(3) of the FSIA. Salini's reliance upon Article 10 of the convention is misplaced. In acceding to the Hague Convention, Morocco, like the United States, made no Article 10 reservation. Therefore, service through postal channels is permissible where it is in accordance with otherwise applicable law.¹⁴ Accordingly, private litigants in Morocco may be served through "postal channels." Service upon a sovereign, however, is generally a matter of customary international law. At the time the Hague Convention was ratified, absolute sovereign immunity was commonly recognized, and service through diplomatic channels was the norm. *See* H.R. Rep. 94-1487, 1976 U.S.C.C.A.N. 6004, 6624 (FSIA legislative history recognizing "[s]ervice through diplomatic channels is widely used in international practice, and the "accepted and indeed preferred" manner of service upon a sovereign). In 2009, the Permanent Bureau sought comments regarding service upon sovereigns "using the *main* channel" of communication. Emphasis added. Some member states reported service under Article 5, 9 and most reported using/recognizing service by diplomatic channels. *See, generally*, <http://www.hcch.net/upload/wop/2008pd14e.pdf> and http://www.hcch.net/index_en.php?act=publications.details&pid=5470&dtid=33. Most recently, the Handbook identifies the following methods of service upon a sovereign: Article 5, the Central Authority, or Article 9(2), which addresses service through diplomatic channels under certain circumstances. Exhibit A (Para. 23-24). No suggestion is made in the Handbook that a foreign state may be served through such informal means as mail.

The United States, for example, accepts service through Article 5 of the Hague Convention or through diplomatic channels. But, because no provision of United States law permits service in a foreign proceeding through postal channels, *compare* Rule 4(i), an attempt to serve the United States through postal channels pursuant to Article 10 of the Hague Convention is ineffective. Therefore, Salini's assertion that Morocco can be served through postal channels, because it lodged no Article 10(a) reservation against service through postal channels upon private litigants in Morocco, is not consistent with the Hague Convention and United States practice. *Doe I*, 400 F.Supp.2d at 102 (no jurisdiction over Israel where not served by way of Central Authority); *but see Great Amer. Boat Co., Inc. v. Alsthom Atlantic, Inc.*, 1987 WL 4766 (E.D. La. 1987)(permitting service by mail under 28 U.S.C. § 1608(b)(2)). In any event, neither of Salini's attempts to serve Morocco were made pursuant to the convention, and thus neither attempt at service is effective.

III. It Is Unclear Whether Morocco Has Been Served Under Section 1608(a)(3) Of The FSIA, Where Evidence Of Signed Receipt Is Pending

¹⁴ The Hague Convention recognizes "the freedom" to serve by other means, including through postal channels. Article 10(a). Some courts have therefore concluded that Article 10(a) neither authorizes nor forbids service by process by mail. *Julien*, 2010 WL 5174545 at 2; *Doe I*, 400 F.Supp. 2d at 103. That is, "Article 10(a) does not create an affirmative right . . . , it simply does not prohibit," service by postal channels. *Doe I*, 400 F.Supp. 2d at 103. "A court must look to the internal law of the receiving nation, under which the type of service contemplated by Article 10(a) – if any – must be permitted." *Doe I*, 400 F.Supp. 2d at 103; *cf. Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 f. Supp.2d 1273 (S.D. Fl. 1999) ("As long as the nation concerned has not, in its ratification or in any other part of its law, imposed any limits on particular methods . . . other methods . . . may be resorted to).

Most recently, Salini has sought to serve Morocco through the third subsection of the FSIA, by a transmission from the Clerk of the Court to the head of the Ministry of Foreign Affairs. Docket No. 34. Although Salini has proffered proof of service by Federal Express, the document proffered does not, to date, reflect the signed receipt as provided by section 1608(a)(3) of the FSIA. *See* Docket No. 38. Accordingly, the strict requirements of section 1608(a)(3) have, to date, not been met. *See Transaero*, 30 F.3d at 154. In our view, however, this does not warrant dismissal.

Morocco contends these proceedings must be dismissed because Salini cannot proceed under section 1608(a)(3) of the FSIA given Morocco's invocation of Article 13. Morocco Br. at 9. Morocco points to Article 14, which provides for member states to resolve "[d]ifficulties which may arise in connection with the transmission of judicial documents for service" through diplomatic channels." The Handbook advises that Article 14 "does not prevent the application of the Convention by a State from being reviewed internally by way of appeal or judicial review." Exhibit A (Para. 104). Here, it is uncontested that Morocco's invocation of Article 13 prevents service by way of the convention. Morocco Br. at 9. As established above, this Court lacks jurisdiction to revisit Morocco's invocation, and the United States has not questioned that invocation. Accordingly, in our view, Article 14 is not implicated. The FSIA, however, expressly provides that where "service cannot be made" by special arrangement or under the convention, a plaintiff can proceed to section (a)(3), as Salini has done.

We know of no precedent for Morocco's position. The plaintiffs in *Doe I* could not proceed to serve under section 1608(a)(3) of the FSIA because they had failed to attempt to serve Israel through its Central Authority. 400 F.Supp.2d at 102. The Court in *Davoyan* noted the plaintiff had made no effort to proceed under section 1608(a)(3) of the FSIA following the invocation of Article 13, not that Article 14 prohibited the plaintiff from proceeding to the next permissible method of service under the FSIA. 2011 WL 1789983 at *2. And, in *Bleier*, the Court dismissed the complaint because the plaintiffs failed to "proceed[] to the third method of service," but rather elected to serve Germany and its Ministry of Finance by emailing their counsel. 2011 WL 4626164 *6. Unlike in those cases, Salini has attempted to serve Morocco in accordance with section 1608(a)(3) of the FSIA by requesting the Court transmit the documents to the Ministry of Foreign Affairs. If service cannot be accomplished consistent with section 1608(a)(3) of the FSIA, the FSIA authorizes service through diplomatic channels. 28 U.S.C. § 1608(a)(4). Accordingly, in our view, dismissal at this juncture is unwarranted.

* * * *

2. Using discovery obtained in the United States in foreign courts

On April 22, 2015, the United States filed an *amicus* brief in response to an invitation from the U.S. Court of Appeals for the Federal Circuit on the question of whether 28 U.S.C. § 1782 provides the exclusive means for securing documents from another party for use in a foreign proceeding. *In re POSCO*, No. 15-112 (Fed. Cir.). Section 1782 is used by the U.S. Department of Justice, Office of International Judicial Assistance ("OIJA"), to respond to requests for international judicial assistance by presenting letters rogatory or letters of request to U.S. district courts on behalf of foreign tribunals.

The case relates to ongoing litigation between two multinational steel companies, POSCO and Nippon, being conducted both in the United States and in the courts of Japan and the Republic of Korea (Korea). Nippon obtained a modification of the protective order in the U.S. district court case to allow use of documents that it obtained from POSCO in the U.S. proceedings in litigation in Japan and Korea. POSCO then petitioned the Court of Appeals for the Federal Circuit for a writ of mandamus, maintaining that the district court applied the wrong legal standard when amending the protective order. POSCO relied on *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) in asserting that Section 1782 must be used as a guide in determining whether to allow cross-use of discovery.

The U.S. *amicus* brief, addressing the applicability of 28 U.S.C. § 1782, per the court's request, is excerpted below (with footnotes omitted) and available at <http://www.state.gov/s/l/c8183.htm>. The Federal Circuit issued an order on July 22, 2015, granting POSCO's petition and directing the district court to reconsider its modification of the protective order, using Section 1782 to guide its reasoning, while agreeing with the U.S. brief that Section 1782 is not exclusive.

* * * *

Section 1782 is not the “exclusive” means for “securing documents from another party for use in a foreign proceeding” in the circumstances of this case.

In domestic litigation, discovery is governed by the Rules. *Cf. Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (S.D.N.Y. 2002) (“The liberal principles of Rule 26 of the Federal Rules of Civil Procedure are clearly applicable even in cases where the documents at issue were created in foreign countries.”). Under the Rules, a party normally may use evidence it has obtained in discovery as it sees fit. ...

As an exception to that basic principle, the court may, for good cause, issue a protective order. Fed. R. Civ. P. 26(c). Whether to grant a protective order is within the trial court's discretion. *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1130-31 (9th Cir. 2003); *Dove v. Atlantic Capitol Corp.*, 963 F.2d 15, 19 (2d Cir. 1992) (“The grant and nature of protection is singularly within the discretion of the district court”); *AT&T Co. v. Grady*, 594 F.2d 594, 597 (7th Cir. 1978); *Jepson*, 30 F.2d at 858. Likewise, whether to amend a protective order is within the discretion of the trial court. *Public Citizen*, 858 F.2d at 790; *AT&T Co.*, 594 F.2d at 597.

Because nothing in the Rules prohibits a party not subject to a protective order from using material obtained in discovery in separate litigation, whether foreign or domestic, it follows that a protective order, where appropriate, may permit cross-use, *i.e.*, use in foreign litigation of evidence obtained in domestic litigation. Indeed, the courts regularly permit use of discovered materials in collateral litigation, as cross-use is in the interest of judicial economy. ...

POSCO contends that, where disclosed evidence might be used in a foreign proceeding, section 1782, and not the Rules, must control. But, for the Rules to be inapplicable, there must be a “plain statement” in section 1782 pre-empting application of the Rules. *See Société Nationale*

Industrielle Aérospatiale and Société De Construction D'avions De Tourisme v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 539 (1987); see also *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). There is no such plain statement in section 1782. To the contrary, section 1782 explicitly refers to the Rules, providing that requested evidence be taken in accordance with the Rules. 28 U.S.C. § 1782(a).

Moreover, section 1782 is designed to address situations where there is no domestic litigation pending, such that a district court might otherwise lack the statutory authority to order the witness to produce the requested materials. Compare 28 U.S.C. § 1781(b)(2) (addressing obtaining evidence for use in domestic litigation); S. Rep. No. 88-1580, 1964 U.S.C.C.A.N. 3782 (distinguishing international judicial assistance provisions from provisions for obtaining evidence for use in domestic litigation); cf. *United States v. Reagan*, 453 F.2d 165, 172 (6th Cir. 1971); *In re Application of the Pacific Railway Commission*, 32 F. 241, 256-57 (1887) (discussing court's power to provide international judicial assistance while analyzing authority to act where there is a case or controversy). Section 1782 enables a district court to order a witness to produce documents "for use in a proceeding in a foreign or international tribunal." In contrast, a court considering whether to issue or modify a protective order is not ordering the production of material for use in a foreign proceeding but defining, where good cause is presented, what the recipient may do with the materials produced in a domestic proceeding. Fed. R. Civ. P. 26(c)(1); see *Kolon*, 479 F. App'x at 485 ("modified protective order does not compel Kolon to do anything; it merely allows Dupont to disclose documents it already possesses").

In short, section 1782 does not address the district court's authority to issue orders in domestic cases that have the effect of permitting (or prohibiting) materials obtained in discovery to be used in foreign proceedings. POSCO's primary argument, that federal courts are courts of limited jurisdiction, is thus inapposite, as the district court possesses jurisdiction over the litigants here and the authority to supervise discovery, which authority includes the power to issue and to modify the protective order, as appropriate. Fed. R. Civ. P. 26(c)(1).

This Court has already held: "Case law interpreting the requirements of section 1782 is not relevant to a determination whether a protective order may be modified to permit the release of deposition testimony, already discovered, to another court." *In re Jenoptik AG*, 109 F.3d 721 (Fed. Cir. 1997). In *Jenoptik*, the party seeking a writ of mandamus, like POSCO, challenged a modification to a protective order that would permit use of deposition testimony in German proceedings. *Id.* at 721-22. Although the petitioner did not argue that section 1782 is the exclusive manner to obtain materials for use in a foreign proceeding, it argued by analogy that the district court should have considered the "discoverability" of the deposition transcripts in the German proceedings, a factor relevant under section 1782. *Id.* at 723. Noting the petitioner did not argue that, but for the protective order, the transcripts could not be presented to another court, this Court reasoned the confidentiality of the transcripts was the relevant inquiry. *Id.* The Court accordingly considered whether the trial court abused its discretion in modifying the protective order without regard to section 1782. *Id.* at 724.

Nothing in *Intel* requires a different analysis here. The Supreme Court in *Intel* considered the circumstances in which a district court may assist in obtaining evidence "for use in a foreign or international tribunal;" it did not consider what a litigant in a domestic case may do with evidence obtained in discovery. 542 U.S. at 247. Analyzing the plain language of the statute, the Supreme Court held that section 1782 authorizes, but does not require, the district court to aid a foreign tribunal or interested party. 542 U.S. at 255. It concluded the term "interested party" was

not limited to litigants in the foreign proceeding and the proceedings at issue were before a foreign tribunal. *Id.* at 256. The Supreme Court rejected the notion that only evidence “discoverable” in the foreign jurisdiction could be obtained under section 1782. *Id.* at 260-61. The Court also rejected the notion that an applicant must show the requested evidence is discoverable in analogous domestic litigation. *Id.* at 263. The Supreme Court explained that “[s]ection 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here.” *Id.* at 263.

Since *Intel*, the district courts have consistently held that section 1782 does not control the disclosure or use of evidence in domestic litigation. *See, e.g., Invista North America S.A.R.L. v. M&G USA Corp.*, 2013 WL 1867345 (D. Del. Mar. 28, 2013); *Oracle Corp. v. SAP AG*, 2010 WL 545842 (N.D. Cal. Feb. 12, 2010); *Infineo Tech. AG v. Green Power Tech. Ltd.*, 247 F.R.D. 1, 4 (D.D.C. 2005). This is because the issues addressed in *Intel* are distinct. As established above, section 1782 addresses a district court’s authority to order a witness, over which the court might not otherwise possess jurisdiction, to produce evidence for use in a foreign proceeding. Here, in contrast, the district court possessed jurisdiction over the party litigants, and the question before the court was whether it was appropriate to limit the litigants’ use of evidence relevant to the domestic litigation.

* * * *

Section 1782 does not provide the “exclusive” means for “securing documents from another party for use in a foreign proceeding” when such documents have been obtained in the course of discovery in a domestic proceeding and their use is unrestricted. Section 1782(a) addresses when “judicial assistance” may be provided by a United States District Court to a foreign court or interested person, but there are several other ways that evidence in the United States may be obtained for use in foreign proceedings.

First, as discussed above, evidence produced in discovery in a domestic proceeding may be used for any purpose, including litigation in a foreign court, absent a protective order restricting use. *See, e.g., Invista*, 2013 WL 1867345; *Oracle Corp.*, 2010 WL 545842; *Infineo*, 247 F.R.D. 1, 4.

Second, anyone within the United States may voluntarily give testimony or produce a document for use in a foreign proceeding without any involvement from the United States Government or any United States Court. 28 U.S.C. § 1782(b). Significantly, the legislative history of section 1782 confirms this provision merely “reaffirm[ed] the pre-existing freedom of persons within the United States to voluntarily give testimony or . . . produce tangible evidence in connection with foreign or international proceedings This explicit reaffirmation is considered desirable to stress in the relations with foreign countries the large degree of freedom existing in this area in the United States.” S. Rep. No. 88-1580; 1964 U.S.C.C.A.N. at 3790. It follows that Congress did not consider section 1782 to be the only way to obtain evidence for use in foreign litigation.

Third, judicial assistance may be requested pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention) or other bilateral agreement. Korea is a member of the Hague Evidence Convention; Japan is not. A

Convention request comes to the OIJA, as the United States Central Authority. *See* Article 1 of the Hague Evidence Convention. The OIJA, working with the Office of the United States Attorney where the evidence is located, seeks to obtain the requested evidence. If the evidence is provided voluntarily, section 1782 is not implicated. If the evidence is not provided voluntarily, the United States applies to the district court for an order pursuant to section 1782 compelling the production of evidence. *See* Article 10 of the Hague Evidence Convention (requiring members to “apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings”). Once the evidence is obtained, the OIJA transmits it to the foreign tribunal.

Fourth, requests for judicial assistance from non-Convention countries like Japan are received by the OIJA through diplomatic channels. *See* 28 U.S.C. § 1781. The OIJA processes the letters rogatory in the same manner as Hague Evidence Convention Requests. Accordingly, section 1782 is not invoked if a witness provides the requested evidence voluntarily. And, section 1781(b)(1) clarifies that foreign courts may directly transmit such letters of requests to United States courts, as occurred before the statute’s enactment. Congress explained that section 1781(b) “explicitly leaves unaffected the freedom directly to transmit letters rogatory and requests to tribunals, officers, or agencies.” S. Rep. No. 88- 1580, 1964 U.S.C.C.A.N. at 3788. Congress’s clarification again signals that it did not consider section 1782 to be the only manner in which judicial assistance could be obtained.

Fifth, separate statutes authorize the provision of assistance in, for example, consumer protection and securities proceedings. The Federal Trade Commission (FTC), in accordance with 15 U.S.C. § 46, is authorized to provide assistance to foreign law enforcement agencies. This authority includes the ability of the FTC, with concurrence from the Department of State, to negotiate international agreements “for the purpose of obtaining such assistance, materials, or information.” 15 U.S.C. § 46(j)(4). Similarly, the Securities and Exchange Commission possesses statutory authority, separate from section 1782, to assist its foreign counterparts, including the authority to compel the production of testimony or documents. *See* 15 U.S.C. § 78u.

Finally, a foreign tribunal or “interested person” may invoke section 1782 to seek direct assistance from a United States District Court, without the participation of the OIJA or the Department of State. 28 U.S.C. § 1782(a). In that circumstance, the district court appoints a “commissioner” authorized to compel production of the requested evidence for use in a civil or criminal foreign proceeding. *Id.*; *see, e.g., In re Letter Rogatory from the Justice Court, District of Montreal, Canada*, 523 F.2d 562, 564 (6th Cir. 1975).

Construing section 1782 as the “exclusive” manner in which evidence in the United States may be secured for use in a foreign proceeding would thus conflict with section 1781, 15 U.S.C. §§ 46(j)(1) and 78u, and 18 U.S.C. § 3512. Holding that section 1782 is the “exclusive” manner of obtaining evidence is also contrary to the legislative intent, which was to “liberalize” the procedures for assisting foreign tribunals and litigants in hopes of comity and reciprocity. S. Rep. No. 88- 1580, 1964 U.S.C.C.A.N. at 3788; *see Via Vadis Controlling GMBH v. Skype, Inc.*, 2013 WL 646236 (D. Del. 2013). In enacting section 1782, Congress meant to take “a major step in bringing the United States to the forefront of nations adjusting their procedures . . . [to] provid[e] equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.” S. Rep. No. 88-1580; 1964 U.S.C.C.A.N. at 3783.

Interpreting section 1782 as exclusive also could hamper international judicial cooperation, cooperation from which United States litigants greatly benefit. Pursuant to Article 2 of the Hague Evidence Convention, the United States designated the OIJA as the United States Central Authority, and agreed that the OIJA will receive Requests to obtain evidence or perform certain judicial acts from other State Parties and transmit those Requests to authorities competent to execute such Requests. Most other State Parties consider use of the Convention mandatory. *See* Hague Prel. Doc. No. 10, Dec. 2008. Many State Parties to the Hague Evidence Convention will thus seek judicial assistance via the Convention and not section 1782. Consequently, an interpretation that section 1782 provides the exclusive means to obtain evidence in the United States for use in proceedings in Member States could limit the ability of the United States to implement the Hague Evidence Convention for voluntarily-provided evidence in response to judicial requests. *Cf.* Article 27 (recognizing the internal law of Contracting States may provide for “less restrictive conditions” for taking evidence).

* * * *

3. International Comity: *Gucci v. Wixing Li*

As discussed in *Digest 2014* at 611-18, the U.S. Court of Appeals for the Second Circuit remanded a case to the district court for consideration of whether exercising jurisdiction to enforce subpoenas issued to the Bank of China (“BOC”) relating to sales of counterfeit luxury goods is consistent with principles of comity. The district court issued its decision on remand on September 29, 2015. *Gucci et al. v Wixing Li et al.*, No. 10 Civ. 4974 (S.D.N.Y.). In *Gucci*, the district court found that compelling BOC to comply with the subpoenas was consistent with principles of comity. The *Gucci* court’s decision to compel the subpoenas has been appealed. Excerpts follow from the *Gucci* court’s comity analysis.

* * * *

The Court’s initial comity analysis considered seven factors. Five of those factors came from [§ 442\(1\)\(c\)](#): (i) “the importance to the investigation or litigation of the documents or other information requested;” (ii) “the degree of specificity of the request;” (iii) “whether the information originated in the United States;” (iv) “the availability of alternative means of securing the information;” and (v) “the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.” Two additional factors that the Court considered included “the hardship of compliance on the party or witness from whom discovery is sought” and “the good faith of the party resisting discovery.” (August 23 Order at 6 (quoting *Minpeco S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y.1987)).) After carefully considering the various factors and interests, the Court concluded that a balancing of the factors “strongly weighs in favor” of granting Gucci’s motion

to compel. The Court noted that this result was particularly necessary in light of (1) “[BOC’s] failure to demonstrate an actual likelihood that compliance with the Subpoena would result in criminal or civil liability in China,” (2) “[BOC’s] failure to put forward credible, non-speculative evidence that requests made through the Hague Convention represent a viable alternative method of obtaining discovery,” (3) “the clear and obvious harm caused by counterfeiters to mark holders such as [Gucci],” and (4) “the fact that such counterfeiters have deliberately utilized institutions such as [BOC] to thwart Congress and the reach of the Lanham Act.” (August 23 Order at 13.)

The Second Circuit directed the Court to “consider the question of comity again in light of the newly available December 4, 2013 Judgment of the Second Intermediate People’s Court of Beijing Municipality, and any subsequent judgments it finds relevant.” (Doc. No. 127 at 44.) After the Second Intermediate People’s Court of Beijing Municipality issued the December 4, 2013 Civil Judgment (Doc. No. 142, Declaration of Yuqing Zhang, dated Jan. 22, 2015 (“Zhang Decl.”), Ex. 10 (“Beijing Intermediate Court Judgment”)), BOC appealed the Beijing Intermediate Court Judgment to the Higher People’s Court of Beijing Municipality. On June 20, 2014, the Higher People’s Court issued a Civil Judgment, upholding the Beijing Intermediate Court Judgment. (Zhang Decl., Ex. 11 (“Beijing High Court Judgment”).) Accordingly, the Court will consider how both the Beijing Intermediate Court Judgment and Beijing High Court Judgment (the “Beijing judgments”) affect the [§ 442](#) comity analysis.

The controversy underlying the Beijing judgments is a private civil suit between BOC and some of the Defendants in this action. Specifically, the plaintiffs in that action—who are Defendants here—alleged that BOC unlawfully froze their bank accounts as a result of the litigation before this Court, and argued that the terms and conditions of their account opening documents did not permit BOC to suspend their banking services. (Beijing Intermediate Court Judgment at 2–3.) Consequently, the account holders sought an order directing BOC to lift the account freezes and to pay all litigation costs associated with the case. (*Id.* at 2.)

The Beijing Intermediate Court held that BOC “failed to produce evidence to prove that [the plaintiffs] actually made any operation with malicious intent, or defamed or damaged the reputation of the bank, or maliciously attacked the electronic banking system of the bank,” which the Beijing Intermediate Court found was the necessary prerequisite for BOC to freeze the plaintiffs’ bank accounts. (*Id.* at 6–7.) The Beijing Intermediate Court further noted that the action before this Court “is still on-going and pending,” “no judgment has taken effect in China,” and BOC “failed to produce evidence sufficient to prove that it has justifiable reason ... to cease to provide services” to the account holders. (*Id.* at 7.) The Beijing Intermediate Court therefore concluded that BOC had no contractual or legal basis for suspending the plaintiffs’ accounts and ordered BOC to resume providing banking services to the account holders. (*Id.*)

On appeal, the Beijing High Court noted that under Chinese commercial banking law, “the lawful business operation of a commercial bank [should be] free from interference of any entity or individual,” “a commercial bank shall protect the lawful interest of depositors from being damaged by any entity or individual,” and “personal savings deposit business with commercial banks shall be based on the principles of voluntary deposit, free withdraw[all], deposit bearing interest, and the confidentiality for the depositor.” (Beijing High Court Judgment at 8.) After *de novo* review of the Beijing Intermediate Court Judgment (Doc. 137, Declaration of Donald Clarke, dated Dec. 1, 2014 (“Clarke Decl.”) ¶ 13), the Beijing High Court held that BOC “failed to produce evidence to prove that [the account holders] violated any contractually agreed

terms, [that BOC] unilaterally terminated services for their bank accounts, [and] thus there is no contractual or legal basis for BOC to unilaterally stop financial service and suspend usage of the accounts.” (*Id.*) The Beijing High Court Judgment directed BOC to pay 140 renminbi in court fees (approximately \$22.00 at current exchange rates) and upheld the Beijing Intermediate Court’s injunction. (*Id.*)

As an initial matter, it is important to note that the Beijing judgments impact only a few of the seven factors the Court considered. Nothing in the Beijing judgments changes the Court’s conclusion that: (i) “the documents requested in the Subpoena[s] are important to the instant litigation,” (ii) “the Subpoena[s] [are] sufficiently specific,” and (iv) “Hague Convention requests in circumstances similar to those presented here are not a viable alternative method of securing the information [Gucci] seek[s].” (August 23 Order at 6–10.) The only factors that the Beijing judgments could affect are (v) “the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located,” and “the hardship of compliance on the party or witness from whom discovery is sought.” The Court will consider each in turn.

With respect to the balancing of national interests, the Court noted that while China has bank secrecy laws that prevent disclosure of an individual’s account information without consent, such protection can be waived by several different public bodies. (August 23 Order at 10 (discussing declaration of BOC’s Chinese bank law expert).) Accordingly, the Court concluded that “China’s bank secrecy laws merely confer an individual privilege on customers rather than reflect a national policy entitled to substantial deference.” (*Id.* at 11.) Weighing against China’s interests, the Court concluded that the United States “has a powerful interest in enforcing the acts of Congress, especially those, such as the Lanham Act, that are designed to protect intellectual property rights and prevent consumer confusion.” (*Id.*) Overall, the Court determined that this factor “clearly weighs in favor of” Gucci. (*Id.*)

The Beijing judgments, if anything, shift the balance of national interests more firmly toward the United States because they acknowledge that BOC had broad contractual rights over its customers’ account information, such as the power to suspend or terminate service in certain circumstances. (Clarke Decl. ¶¶ 16–18.) That BOC did not sufficiently prove the existence of those circumstances does not change the fact that the Beijing judgments recognized BOC as lawfully having that authority. The Beijing judgments do not provide any support for BOC’s assertion that China’s bank secrecy laws are rigidly enforced or a matter of strong state policy that trump the United States’ interest in enforcing the Lanham Act. Accordingly, the Court concludes that this factor “clearly weighs in favor of” Gucci.

As for the hardship of compliance, the Court initially found that this factor weighed in favor of Gucci because it concluded that BOC’s representations that it would face significant criminal and civil liability from complying with the 2010 Subpoena were unduly speculative. Specifically, the Court determined that the Chinese cases that purportedly demonstrated that Chinese courts take customer bank account secrecy seriously did not in fact support BOC’s assertion that compliance with the 2010 Subpoena would subject BOC or its employees to heavy fines or incarceration. (August 23 Order at 11–12.) In fact, the Court concluded that BOC could point to no case where a Chinese bank was subjected to liability for disclosing the type of bank account information sought by Gucci. (*Id.* at 12.) In light of the speculative nature of BOC’s

professed hardship, the Court determined that the factor supported granting the motion to compel.

Once again, the Beijing judgments only provide further support for Gucci's case. The controversy underlying the Beijing judgments was a simple, private contract case. The Beijing Intermediate Court and Beijing High Court merely concluded that BOC had not sufficiently proven grounds upon which it could lawfully freeze the plaintiffs' bank accounts. Nothing in the Beijing judgments suggests that China has an ironclad requirement of bank secrecy or that disclosure of the information requested by the 2010 and 2011 Subpoenas would expose BOC and its employees to serious criminal or civil liability in China. Even BOC's own Chinese bank law expert does not opine that the Beijing judgments demonstrate that China has a strong national policy against disclosure of bank client information (*see* Zhang Decl. ¶¶ 30–35), whereas Gucci's Chinese bank law expert expressly states that the Beijing judgments do not change his opinion that “there is no strong state policy affording a high degree of protection to clients of Chinese banks” and that “BOC and its officers are unlikely to be prosecuted for complying with the Court's orders in this case” (Clarke 2014 Decl. ¶¶ 14–15). Put simply, the Beijing judgments, which resulted in BOC paying the equivalent of \$22.00 in court fees, do nothing to change the Court's prior conclusion that BOC's contention that compliance with the 2010 and 2011 Subpoenas would subject it to serious criminal and civil liability is unduly speculative.

Because the Court previously found that a balancing of the [§ 442](#) factors “strongly weighs in favor of” granting Gucci's motion to compel, and the Beijing judgments actually strengthen that determination, the Court reaffirms its comity analysis and concludes that ordering BOC to comply with the 2010 and 2011 Subpoenas is consistent with § 442 of the Restatement (Third) of Foreign Relations Law.

* * * *

Cross References

Hague Abduction Convention, **Chapter 2.B.2.**

Extraterritoriality, **Chapter 5.A.1. and 5.B.2.**

Child abduction added to UN report on children in armed conflict, **Chapter 6.C.2.a.**

COMMISA v. PEP, **Chapter 10.A.1.**

Commercial activity exception under FSIA, **Chapter 10.A.2.**

Service of process, **Chapter 10.A.3.**

CHAPTER 16

Sanctions, Export Controls, and Certain Other Restrictions

This chapter discusses selected developments during 2015 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. Detailed information on the Commerce Department's activities relating to export controls is provided in the U.S. Department of Commerce, Bureau of Industry and Security's Annual Report to the Congress for Fiscal Year 2015, available at <http://www.bis.doc.gov/index.php/about-bis/newsroom/publications>. Details on the State Department's defense trade control programs are available at <http://www.pmdt.c.state.gov>.

A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS

1. Iran

a. *The Joint Comprehensive Plan of Action ("JCPOA")*

As discussed in more detail in Chapter 19, the P5+1 and Iran concluded the Joint Comprehensive Plan of Action ("JCPOA") to curtail Iran's nuclear program on July 14, 2015. On April 2, 2015, the P5+1 and Iran reached the parameters for the JCPOA, which set forth the outlines of Iran's nuclear-related commitments and the U.S. and EU sanctions relief commitments. Before the JCPOA was reached, the U.S. Department of State continued to extend sanctions relief under relevant statutes in order to implement the U.S. sanctions relief commitments under the Joint Plan of Action of 2013 ("JPOA"), which had also been extended. As the April 16, 2015 Federal Register notice setting

forth the renewal of sanctions relief under the National Defense Authorization Act of 2012 (NDAA) explains, “The JPOA was renewed ... on July 19, 2014, and again on November 24, 2014, extending the temporary sanction relief provided under the JPOA ..., in order to continue negotiations aimed at achieving a long-term comprehensive solution to ensure that Iran's nuclear program will be exclusively peaceful.” 80 Fed. Reg. 20,552 (Apr. 16, 2015); see *Digest 2013* at 466-71 for background on the JPOA.

Under the JCPOA, the U.S. committed to relieve sanctions on activities by non-U.S. persons with various sectors of Iran’s economy, including the energy, financial and banking, and shipping sectors, trade with Iran in precious metals and certain industrial metals, and exports to Iran’s automotive sector. In addition, the United States committed to license the export to Iran of aircraft and spare parts, the import of foodstuffs and carpets from Iran, and the activities of foreign subsidiaries of U.S. corporations involving Iran. President Obama issued a memorandum on October 18, 2015 (“Adoption Day” under the JCPOA), instructing federal agencies to prepare for implementation of the JCPOA. 80 Fed. Reg. 66,783 (Oct. 30, 2015). The presidential memo includes the following:

I hereby direct you to take all necessary steps to give effect to the U.S. commitments with respect to sanctions described in section 17 of Annex V of the JCPOA, including preparation for the termination of Executive Orders as specified in section 17.4 and the licensing of activities as set forth in section 17.5, to take effect upon confirmation by the Secretary of State that Iran has implemented the nuclear-related measures specified in sections 15.1–15.11 of Annex V of the JCPOA, as verified by the IAEA.

See also President Obama’s statement on Adoption Day. Daily Comp. Pres. Docs. 2015 DCPD Doc. No. 00734, p. 1 (Oct. 18, 2015).

In order to implement the U.S. commitments under the JCPOA under statutory sanctions related to Iran, on October 18, 2015, the Secretary of State issued contingent waivers and findings under relevant authorities that would take effect once Iran completed certain nuclear commitments (referred to as “Implementation Day” under the JCPOA). The waivers and findings were issued under the Iran Freedom and Counter-Proliferation Act of 2012, the Iran Threat Reduction and Syria Human Rights Act of 2012, the National Defense Authorization Act for Fiscal Year 2012, and the Iran Sanctions Act of 1996. 80 Fed. Reg. 67,470 (Nov. 3, 2015).

b. *Implementation of UN Security Council resolutions*

For discussion of past UN Security Council resolutions relating to Iran’s nuclear activities, see *Digest 2010* at 632-45, *Digest 2008* at 969–75, *Digest 2007* at 1031–36, and *Digest 2006* at 1280–84. In Resolution 1929 (2010), the Council established, for an initial period of one year, a Panel of Experts to assist the Committee in carrying out its mandate. The

Panel's mandate has been renewed yearly, most recently in Resolution 2224 (2015) on June 9, 2015.

On July 20, 2015, the UN Security Council unanimously adopted Resolution 2231, endorsing the Joint Comprehensive Plan of Action ("JCPOA"). U.N. Doc. S/RES/2231 (2015). Resolution 2231 provides that the provisions of prior UN Security Council Resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1929 (2010), and 2224 (2015) shall be terminated upon receipt by the Security Council of the report from the IAEA verifying that Iran has taken the actions specified in paragraphs 15.1-15.11 of Annex V of the JCPOA. Upon receipt of that report, Resolution 2231 also requires all States to comply with paragraphs 1, 2, 4, and 5 and the provisions of subparagraphs (a)-(f) of paragraph 6 of Annex B for the duration specified in each paragraph or subparagraph, and calls upon States to comply with paragraphs 3 and 7 of Annex B. Resolution 2231 also includes a procedure providing, under certain conditions, for the application of the provisions of resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), and 1929 (2010) in the same manner as they applied before the adoption of resolution 2231. For further discussion of Resolution 2231, see Chapter 19.

c. U.S. sanctions and other controls

Some sanctions programs relating to Iran are unaffected by the JCPOA. 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) Iran Sanctions Act, as amended

As discussed in *Digest 2012* at 509-11, Congress amended the Iran Sanctions Act ("ISA") in 2012 with passage of the Iran Threat Reduction Act and Syria Human Rights Act of 2012 ("TRA") (Pub. L. 112-158).

Effective February 25, 2015, the Secretary of State terminated sanctions imposed under ISA on Republican Unitary Enterprise Production Association Belarusneft based on a determination that it was no longer engaging in sanctionable activity described in section 5(a) of ISA, as amended, and reliable assurances that it would not knowingly engage in such activities in the future. 80 Fed. Reg. 12,544 (Mar. 9, 2015). Effective November 2, 2015, the Secretary terminated ISA sanctions on Dettin S.p.A. based on the same determinations: that it was no longer engaging in sanctionable activity and had provided assurances that it would not in the future. 80 Fed. Reg. 73,866 (Nov. 25, 2015).

(2) *Iran Freedom and Counter-Proliferation Act*

See *Digest 2013* at 480-82 for background on the Iran Freedom and Counter-Proliferation Act of 2012 (“IFCA”), part of the National Defense Authorization Act for Fiscal Year 2013 (signed January 2, 2013). In addition to renewals of waivers under IFCA to implement U.S. sanctions relief under the JPOA, in 2015, the Department of State renewed waivers issued in 2014 to allow for a discrete range of transactions related to the provision of satellite connectivity services to the Islamic Republic of Iran Broadcasting (“IRIB”). 80 Fed. Reg. 22,762 (Apr. 23, 2015). See *Digest 2014* at 633-34. The Secretary issued waivers based on Iran’s commitment to ensure that harmful satellite interference does not emanate from its territory, and verification by the U.S. government that harmful satellite interference is not currently emanating from the territory of Iran. IFCA required the designation of the IRIB for the imposition of sanctions.

(3) *Section 1245 of the 2012 National Defense Authorization Act*

Section 1245(d) of the NDAA requires the U.S. Government to report to Congress on the availability of petroleum and petroleum products in countries other than Iran and determine whether price and supply permit purchasers of petroleum and petroleum products from Iran to “reduce significantly in volume their purchases from Iran.” If there is an affirmative determination in this regard, the statute requires the imposition of sanctions on foreign financial institutions that conduct or facilitate significant financial transactions with the Central Bank of Iran or other designated Iranian banks. Sanctions do not apply to countries that have made significant reductions in purchases of Iranian oil. See *Digest 2012* at 506-7. Effective January 20, 2014, President Obama delegated to the Secretary of State, in consultation with the Secretary of the Treasury, the authority conferred upon the President by section 1245(d)(5) of the NDAA. 79 Fed. Reg. 6453 (Feb. 4, 2014).

On February 19, 2015, the Secretary determined that Belgium, the Czech Republic, France, Germany, Greece, Italy, the Netherlands, Poland, Spain, Sri Lanka, and the United Kingdom, each once again qualified for the 180-day exception outlined in section 1245(d)(4)(D). 80 Fed. Reg. 10,563 (Feb. 26, 2015). Those countries again qualified for the exception on August 14, 2015. 80 Fed. Reg. 52,534 (Aug. 31, 2015). On May 20, 2015 the Secretary determined that Malaysia and Singapore qualified for the 180-day exception. 80 Fed. Reg. 33,006 (Jun. 10, 2015). Malaysia and Singapore again received the exception based on a determination on November 10, 2015. 80 Fed. Reg. 74,832 (Nov. 30, 2015).

In Presidential Determination No. 2015-06 of May 19, 2015, the President determined that the availability of petroleum and petroleum products was sufficient to permit purchasers to reduce their purchases from Iran. 80 Fed. Reg. 32,851 (June 9, 2015). The President made the determination again on November 18, 2015 in Presidential Determination No. 2016-03, noting, however, that:

...in the Joint Plan of Action, the interim arrangement to address concerns with Iran's nuclear program reached between the P5+1, European Union and Iran in November 2013, the United States committed to allow oil purchases from Iran to continue at the levels that prevailed at that time. Accordingly, my Administration is not seeking further reductions of Iranian oil purchases.

Daily Comp. Pres. Docs. 2015 DCPD No. 00822 (Nov. 18, 2015).

(4) *Modification of sanctions*

As discussed in *Digest 2013* at 483, OFAC issued a General License authorizing the exportation to Iran of certain services, software, and hardware incident to personal communications. As discussed in *Digest 2014* at 635, OFAC updated this license by issuing General License D-1, permitting the exportation and re-exportation of certain goods and services incident to personal communications. The State Department released a fact sheet on July 13, 2015, available at <http://www.state.gov/e/eb/rls/fs/2015/244863.htm>, identifying the authorization for Iran along with other regulatory authorizations that facilitate personal communications for the people of Cuba, and Sudan, as reflecting the "U.S. commitment to the principle of freedom of expression, as well as to ensuring that our sanctions do not unnecessarily or disproportionately impact ordinary people."

2. Syria

On March 31, 2015, OFAC blocked the property and interests in property of Batoul RIDA, an individual, pursuant to E.O. 13582, "Blocking Property of the Government of Syria and Prohibiting Certain Transactions with Respect to Syria." 80 Fed. Reg. 20,078 (Apr. 14, 2015). Also on March 31, 2015, OFAC published the revised information about Adib MAYALEH, an individual whose property and interests in property are blocked pursuant to E.O. 13573, "Blocking Property of Senior Officials of The Government of Syria." *Id.* On July 21, 2015, OFAC designated three individuals pursuant to E.O. 13582. 80 Fed. Reg. 46,648 (Aug. 5, 2015). The three individuals—Mustafa BADR AL DIN, Ibrahim AQIL, and Fu'ad SHUKR—are all Lebanese and affiliated with Hizballah. On August 3, 2015, OFAC designated four individuals (Mustafa AYDIN, Serkan DUZGOREN, Erkan DUZGOREN, Ufuk KENAR) and seven entities (Aqua Shipping Ltd., Blue Energy Trade Ltd., Ebla Trade Services, S.A.L./Off-Shore, Green Shipping Ltd., Melenyum Energy S.A., the Eagles L.L.C., Morgan Additives Manufacturing Co.) pursuant to E.O. 13582. 80 Fed. Reg. 47,989 (Aug. 10, 2015). Also on August 3, 2015, OFAC identified six additional persons 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: the General Directorate of Syrian Ports, Lattakia Port General Company, Syrian

Chamber of Shipping, Syrian General Authority for Maritime Transport, Syrian Shipping Agencies Company, Tartous Port General Company. *Id.* On November 25, 2015, OFAC blocked the property and interests in property of 4 individuals and 6 entities pursuant to E.O. 13582: Kirsan Nikolayevich ILYUMZHINOV, Mudalal HURI, Nicos NICOLAOU, George HASWANI, Ezegoo Investments Ltd., Hudsotrade Limited, Kremson Commercial Inc., Primax Business Consultants Limited, Russian Financial Alliance Bank, and Hesco Engineering & Construction Co. 80 Fed. Reg. 75,167 (Dec. 1, 2015).

3. Cuba

a. *Amendments to the Cuban Assets Control Regulations*

On January 16, 2015, OFAC amended the Cuban Assets Control Regulations (“CACR”) to implement the change in policy toward Cuba announced by President Obama in December 2014. See *Digest 2014* at 336; see also January 15, 2015 Treasury Department fact sheet, available at <https://www.treasury.gov/press-center/press-releases/Pages/jl9740.aspx>. As described in the Federal Register notice of OFAC’s final rule, 80 Fed. Reg. 2291 (Jan. 16, 2015):

The amendments facilitate travel to Cuba for authorized purposes, facilitate the provision by travel agents and airlines of authorized travel services and the forwarding by certain entities of authorized remittances, raise the limit on certain categories of remittances to Cuba, allow U.S. financial institutions to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions, authorize certain transactions with Cuban nationals located outside of Cuba, and allow a number of other activities related to, among other areas, telecommunications, financial services, trade, and shipping. These amendments also implement certain technical and conforming changes.

The CACR were amended again in September to further facilitate travel to Cuba, expand telecommunications and Internet-based services, authorize U.S. entities to establish a presence in Cuba, allow U.S. persons to have bank accounts in Cuba, allow additional financial transactions, authorize provision of U.S. goods and services to Cuban nationals outside of Cuba, and allow other activities such as legal services, sending of gifts to the United States, and educational activities. 80 Fed. Reg. 56,915 (Sep. 21, 2015); see also September 18, 2015 Treasury Department press release and fact sheet, available at <https://www.treasury.gov/press-center/press-releases/Pages/jl0169.aspx>.

Effective March 24, 2015, OFAC delisted and unblocked six individuals, 28 entities, and 11 vessels whose property and interests in property had been blocked pursuant to the Cuban Assets Control Regulations. 80 Fed. Reg. 17,153 (Mar. 31, 2015). Effective June 4, 2015, OFAC delisted and unblocked five individuals, 53 entities, and one vessel whose property and interests in property had been blocked pursuant to the

Cuban Assets Control Regulations. 80 Fed. Reg. 33,025 (Jun. 10, 2015). Effective August 27, 2015, OFAC delisted and unblocked 21 individuals, 36 entities, and three vessels designated pursuant to the Cuban Assets Control Regulations. 80 Fed. Reg. 53,227 (Sep. 2, 2015). On November 19, 2015, OFAC delisted and unblocked 19 more individuals. 80 Fed. Reg. 74,216 (Nov. 27, 2015).

b. *Rescission of designation as state sponsor of terrorism (“SST”)*

As discussed in Chapter 9, the United States and Cuba resumed diplomatic relations on July 20, 2015. As part of the process leading up to the restoration of diplomatic relations, the U.S. government reviewed Cuba’s designation as a state sponsor of terrorism (“SST”).

On April 14, 2015, President Obama submitted to Congress the statutorily required report indicating the Administration’s intent to rescind Cuba’s SST designation, including the requisite certifications. Daily Comp. Pres. Docs. 2015 DCPD No. 00271 (Apr. 14, 2015). The President certified, pursuant to section 6(j)(4)(B) of the Export Administration Act of 1979, Public Law 96–72, as amended (50 U.S.C. App. 2405(j)), and as continued in effect by Executive Order 13222 of August 17, 2001, that:

- (i) the Government of Cuba has not provided any support for international terrorism during the preceding 6-month period; and
- (ii) the Government of Cuba has provided assurances that it will not support acts of international terrorism in the future.

This certification also satisfied the provisions of section 620A(c)(2) of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (22 U.S.C. 2371(c)), and section 40(f)(1)(B) of the Arms Export Control Act, Public Law 90-629, as amended (22 U.S.C. 2780(f)).

The White House press secretary issued a statement on the proposed rescission of Cuba’s SST designation on April 14, 2015. The White House statement is available at <https://www.whitehouse.gov/the-press-office/2015/04/14/statement-press-secretary-proposed-rescission-cuba-s-designation-state-s>. On April 14, 2015, senior Obama administration officials provided a background briefing on the process and requirements for rescinding Cuba’s SST designation and the outcome of the review of the designation. The briefing is available at <http://www.state.gov/r/pa/prs/ps/2015/04/240697.htm> and excerpted below.

* * * *

...[A]fter a careful review of Cuba's record, which was informed by the intelligence community as well as ... assurances provided by the Cuban Government, the Secretary of State concluded that Cuba met the conditions for rescinding its designation as a state sponsor of terrorism and forwarded that recommendation ... to the President last week and recommended he submit to Congress the statutorily required report and certification. Today, this afternoon, the President submitted to Congress that required report and certification indicating the Administration's intent to rescind Cuba's designation as a state sponsor of terrorism.

To recap and to provide a little context, a country remains a state sponsor of terrorism until its designation is rescinded in accordance with criteria that are established by statute. In Cuba's case, ... those criteria require the President to submit a report to Congress at least at a minimum of 45 days before the proposed rescission would take effect, justifying it and certifying, number one, that the Government of Cuba has not provided any support for international terrorism during the preceding six-month period and, number two, that the Government of Cuba has provided assurances that it will not support acts of international terrorism in the future.

As President Obama noted recently in a separate media interview and in comments subsequently to that, we're going to continue to have differences with Cuba, including some profound differences on issues that are important in terms of values of U.S. support for democracy and human rights. However, those differences are not necessarily going to be a factor in whether or not Cuba is a designee as a state sponsor of terrorism. Whether they engage in repressive or authoritarian activities in their own country, whether they have relationships with countries that are adversaries of the United States are not necessarily a factor in making this determination. This determination was based on the facts and the statutory criteria.

* * * *

...[T]here are three laws actually that we have to look at with respect to acts of international terrorism and the designation process. ...

... But notwithstanding the removal of Cuba from those [SST] regulations, most transactions involving Cuba or Cuban nationals, including transactions with the Government of Cuba, will continue to be prohibited by OFAC regulations under the Cuban asset control regulations.

...The statutes that we're talking about provide that no rescission can be made if within 45 days after the receipt of the report from the President the Congress enacts a joint resolution on the issue prohibiting the rescission. The President, of course, can veto any such joint resolution and Congress then, of course, can further act to override the veto. ...

...We continue to have the conversations on diplomatic relations. And as the President said, there are a number of issues we're still working out, and we expect those to continue to be resolved and to move ahead. We don't have a fixed date or a time for a next conversation or a response ... on those issues. But we hope that will be very soon.

...The two issues—state sponsor of terrorism designation removal and the OFAC financial sanctions—are two separate issues. But OFAC has taken steps to ease the situation and facilitate banking and banking for the Cuban Interests Section here in the United States.

... unlike with certain kinds of sanctions, for example with respect to foreign terrorist organization designations, we are required by law to periodically, at a certain time interval, review that designation and ensure that the individual or entity still meets the criteria.

That is not the case with respect to the designation of a state sponsor of terrorism. That said, we're completely cognizant of the fact that the circumstances change over time, and we do undertake reviews from time to time as we are called upon to do it or as we feel there is a rationale for so doing.

In this instance, it's not required that the President initiate that review—there may be other reasons or other specified instances or circumstances that call on us to do it—but in this instance we were specifically asked by the President to undertake it in light of, again, the evolving situation with Cuba. And that's why we undertook the process now.

...the four main categories of sanctions that result from the designation under the state sponsor of terrorism authorities include restrictions on U.S. foreign assistance, a ban on defense exports and sales, certain controls over the exports of dual-use items, and miscellaneous financial and other restrictions. So those are the kinds of things that are governed by this one designation.

... But just to confirm, economic sanctions under Cuba's—OFAC's Cuban Assets Control Regulations will remain in effect and most transactions with Cuba and with Cuban nationals and the Government of Cuba will remain prohibited absent authorization from Treasury.

* * * *

On April 14, 2015, Secretary Kerry publicly announced the State Department's recommendation to rescind Cuba's SST designation. See the State Department press statement available at <http://www.state.gov/secretary/remarks/2015/04/240687.htm>. The press statement summarizes the grounds for the recommendation of rescission.

As announced in a May 29, 2015 State Department press statement, the rescission of Cuba's SST designation became effective on May 29. The rescission of the 1982 designation was done in accordance with section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), as continued in effect by Executive Order 13222 of August 17, 2001; section 620A(c) 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)). 80 Fed. Reg. 31,945 (June 4, 2015). The press statement is available at <http://www.state.gov/r/pa/prs/ps/2015/05/242986.htm> and excerpted below.

* * * *

...On April 8, 2015, the Secretary of State completed that review and recommended to the President that Cuba no longer be designated as a State Sponsor of Terrorism.

Accordingly, on April 14, the President submitted to Congress the statutorily required report indicating the Administration's intent to rescind Cuba's State Sponsor of Terrorism designation...

The rescission of Cuba's designation as a State Sponsor of Terrorism reflects our assessment that Cuba meets the statutory criteria for rescission. While the United States has significant concerns and disagreements with a wide range of Cuba's policies and actions, these fall outside the criteria relevant to the rescission of a State Sponsor of Terrorism designation.

* * * *

Effective June 15, 2015, in response to the rescission of Cuba's SST designation, OFAC amended the Terrorism List Governments Sanctions Regulations to replace the list of countries designated as supporting international terrorism and made a conforming amendment to the Cuban Assets Control Regulations. 80 Fed. Reg. 34,053 (June 15, 2015). Effective July 22, 2015, the Department of Commerce Bureau of Industry and Security ("BIS") amended the Export Administration Regulations ("EAR") to implement the rescission of Cuba's SST designation. 80 Fed. Reg. 43,314 (July 22, 2015).

4. Sudan

On February 12, 2015, Ambassador Power delivered the U.S. explanation of vote on the Security Council's renewal of the mandate of the Sudan sanctions panel of experts. Ambassador Power's statement is excerpted below and available at <http://usun.state.gov/remarks/6368>.

* * * *

In November, this Council was confronted with reports of an alleged mass rape in Thabit—a town in North Darfur, Sudan. The UN peacekeeping mission in Darfur attempted to investigate, but was systematically denied meaningful access. The one time the peacekeepers were permitted to reach Thabit, Sudanese military and intelligence officials refused to let them interview alleged rape victims in private, and in some cases recorded the interviews. To this day, the Government of Sudan has shamefully denied the UN the ability to properly investigate this incident, despite this Council's mandate for UNAMID to do precisely that.

* * * *

Nearly ten years after the Security Council first adopted Resolution 1591 with the aim of protecting civilians in Darfur and stopping the violence there, the horror of Thabit is just one attack, in one place, out of too many to count.

In 2014 alone, more than 450,000 additional people were displaced in Darfur—the highest number of new IDPs in any year since 2004—adding to the approximately two million people already displaced. In the first six weeks of this year, humanitarian organizations estimate an additional 36,000 people have been driven from their homes in North Darfur State.

* * * *

Today we renewed the mandate of an important UN panel that monitors the sanctions imposed by this Council—sanctions the government of Sudan continues to flout. The government and armed groups it supports routinely violate the arms embargo—a fact that they openly acknowledge. They continue to launch deliberate attacks on civilians, as well as on UNAMID peacekeepers; between December 2013 to April 2014 alone, 3,324 villages were destroyed in Darfur, according to the Panel of Experts. And the Sudanese government continues to allow individuals subject to sanctions to travel and access their finances.

Today we renewed a sanctions monitoring panel that has provided thorough, independent monitoring of the Government of Sudan and other armed groups in Darfur, with a resolution that is more forward-leaning than its predecessors.

But even as we take this important step, we are reminded that the sanctions regime is impotent when the Sudanese government systematically violates it, and the Council cannot agree to impose sanctions on those responsible for the violence and the abuses.

Nonetheless, today's resolution matters. It speaks to our deep concern with these ongoing violations, it presses the Government of Sudan to take the long-overdue steps necessary to protect the people of Darfur and stop the violence. For the first time, it condemns the violence perpetrated by the government-backed Rapid Support Forces, the heirs to the Janjaweed. And, for the first time, it urges the Sudanese government to account for the situation of civilian populations, who are suffering from devastating waves of attacks in North Darfur, like the reported mass rapes at Thabit.

Yet encouraging as it is to see some very modest improvements to today's renewals resolution, the most important measure of our efforts will be our ability to alleviate the immeasurable suffering of the people of Darfur. And on that front, this Council—and the international community—has failed. Our complacency is deadly for the people of Darfur. So perhaps today, with a slightly more robust sanctions resolution, we can reignite this Council's engagement on this continuing crisis.

People's lives depend on it, and so too does the credibility of this Council—because our ability to promote international peace and security depends on our ability to keep our word, and implement the measures that we impose. And we need to do it because for every Thabit we know about, there are so many more villages that have been the victims of unspeakable atrocities over the past decade in Darfur. They demand we find a way to stop this, and we must.

* * * *

5. Nonproliferation

a. *Democratic People's Republic of Korea*

(1) *UN sanctions*

In Resolution 2207 (2015), the Security Council renewed the mandate of the panel of experts created by Resolution 1874 (2009). U.N. Doc. S/RES/2207.

(2) *U.S. sanctions*

(a) *E.O. 13687*

On January 2, 2015, President Obama issued Executive Order 13687, "Imposing Additional Sanctions With Respect To North Korea." 80 Fed. Reg. 817 (Jan. 6, 2015). The order is based on the President's finding that:

the provocative, destabilizing, and repressive actions and policies of the Government of North Korea, including its destructive, coercive cyber-related actions during November and December 2014, actions in violation of UNSCRs 1718, 1874, 2087, and 2094, and commission of serious human rights abuses, constitute a continuing threat to the national security, foreign policy, and economy of the United States...

The new executive order expands on sanctions previously authorized by E.O. 13466 of 2008, E.O. 13551 of 2010, and E.O. 13570 of 2011. Specifically section 1 of E.O. 13687 authorizes sanctions on "any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

- (i) to be an agency, instrumentality, or controlled entity of the Government of North Korea or the Workers' Party of Korea;
- (ii) to be an official of the Government of North Korea;
- (iii) to be an official of the Workers' Party of Korea;
- (iv) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the Government of North Korea or any person whose property and interests in property are blocked pursuant to this order; or
- (v) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, the Government of North Korea or any person whose property and interests in property are blocked pursuant to this order."

On March 16, 2015, the Department of the Treasury published the names of 10 individuals and three entities whose property and interests in property were blocked pursuant to E.O. 13687. 80 Fed. Reg. 13,667 (Mar. 16, 2015).

On July 23, 2015, OFAC designated one individual (Leonard Lai) and one entity (Senat Shipping Limited) pursuant to E.O. 13551. 80 Fed. Reg. 48,137 (Aug. 11, 2015).

On November 13, 2015, OFAC designated four individuals and one entity pursuant to E.O. 13687: Sok Chol KIM, Kwang Hyok KIM, Chong Chol RI, Su Man HWANG, and EKO DEVELOPMENT AND INVESTMENT COMPANY. 80 Fed. Reg. 72,147 (Nov. 18, 2015).

(b) *E.O. 12938, E.O. 13382, and Missile Proliferation Sanctions*

Effective September 24, 2015, the U.S. Government imposed sanctions on two North Korean entities that were determined to have engaged in proliferation activities pursuant to Executive Order 12938 of November 14, 1994, as amended by Executive Order 13094 of July 28, 1998 and Executive Order 13382 of June 28, 2005. 80 Fed. Reg. 57,650 (Sep. 24, 2015). The two entities are Hesong Trading Corporation and Korea Mining and Development Corporation (“KOMID”). The sanctions include a procurement ban; an assistance ban; an import ban; and a two-year suspension on licenses for exports, transfers, and imports of defense articles and services pursuant to the International Traffic in Arms Regulations and the Arms Export Control Act.

Effective September 24, 2015, the same two entities, Hesong Trading and KOMID, were also subject to the imposition of measures pursuant to missile proliferation sanctions authorities in the Arms Export Control Act, as amended, and the Export Administration Act of 1979, as amended (as carried out under Executive Order 13222 of August 17, 2001). 80 Fed. Reg. 57,649 (Sep. 24, 2015). The missile sanctions imposed for a period of two years include: the denial of licenses for the transfer of U.S. Munitions List and Export Administration Act controlled items; the denial of U.S. Government contracts; and a prohibition on imports into the United States of their products. In addition, these same sanctions extend for two years to all activities of the North Korean government relating to the development or production of missile equipment or technology and all activities of the North Korean government affecting the development or production of electronics, space systems or equipment, and military aircraft. *Id.*

On December 8, 2015, the State Department announced the designation of North Korea’s Strategic Force pursuant to E.O. 13382. The December 8 media note concerning the designation is available at <http://www.state.gov/r/pa/prs/ps/2015/12/250478.htm>. As explained in the media note,

The Strategic Force conducted multiple ballistic missile launches during 2014. Specifically, it conducted the launches of two short-range Scud-class ballistic missiles, test-fired two medium-range No Dong-class ballistic missiles, and conducted the launch of a short-range ballistic missile. All missiles had a range of 500km or greater. The launches of these missiles materially contributed to North Korea’s ballistic missile program.

The media note also announced concurrent designations by the Department of the Treasury pursuant to E.O. 13382 and E.O. 13551 (“Blocking Property of Certain Persons With Respect to North Korea”).

b. *Iran, North Korea, and Syria Nonproliferation Act*

The Department of State imposed sanctions pursuant to the Iran, North Korea, and Syria Nonproliferation Act on multiple foreign persons based on a determination on August 28, 2015 that those persons had engaged in transfers or acquisitions to or from Iran, North Korea, or Syria of goods, services, or technology controlled under multilateral control lists (Missile Technology Control Regime, Australia Group, Chemical Weapons Convention, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to the development of weapons of mass destruction (WMD) or cruise or ballistic missile systems. 80 Fed. Reg. 53,222 (Sep. 2, 2015) and 80 Fed. Reg. 65,844 (Oct. 27, 2015) (correcting the effective date of the sanctions). Those sanctioned include individuals and entities in China, Iran, North Korea, Russia, Sudan, Syria, and the UAE. *Id.*

On November 19, 2015, the Department decided to modify the sanctions imposed on one of the entities listed in the September 2, 2015 notice in the Federal Register: Rosoboronexport (“ROE”). 80 Fed. Reg. 73,865 (Nov. 25, 2016). The modification allows that sanctions will not apply to “subcontracts at any tier with ROE and any successor, sub-unit, or subsidiary thereof made on behalf of the United States Government for goods, technology, and services 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.” *Id.*

c. *Executive Order 13382*

See section 5.a.(2)(b), *supra*, for sanctions imposed on two North Korean entities pursuant to E.O. 13382.

On March 31, 2015, OFAC, in consultation with the Departments of State, Justice, and other relevant agencies, designated three entities whose property and interests in property are blocked pursuant to Executive Order 13382, “Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters”: DENISE COMPANY, SHADI FOR CARS TRADING, and SIGMA TECH COMPANY. 80 Fed. Reg. 20,078 (Apr. 14, 2015).

d. *Chemical and biological weapons sanctions*

On February 18, 2015, the State Department made a determination pursuant to Section 81(e) of the Arms Export Control Act and Section 11C(e) of the Export Administration Act of 1979, as amended, to waive nonproliferation sanctions imposed on two Chinese entities. 80 Fed. Reg. 9846 (Feb. 24, 2015). The two entities, Nanjing Chemical Industries Group (“NCI”) and Jiangsu Yongli Chemical Engineering and Technology Import/Export Company, were originally sanctioned in 1997.

6. Terrorism

a. *UN and other coordinated multilateral action*

On February 12, 2015, Ambassador Power delivered the U.S. explanation of vote at a Security Council session on threats to international peace and security caused by terrorist acts. Her remarks, lauding Resolution 2199 on countering ISIL, al-Nusra, and other groups associated with al-Qaeda, are excerpted below and available at <http://usun.state.gov/remarks/6369>.

* * * *

Today the Security Council adopted a robust Chapter VII resolution to counter the threat posed by the Islamic State in Iraq and the Levant, the al-Nusra Front, and other individuals and entities associated with al-Qaeda. The unanimous vote in favor of Resolution 2199 shows our joint commitment to confronting violent extremist groups that threaten our collective security and the human rights the United Nations was created to defend.

The United States strongly supports today's resolution, which is part of a comprehensive strategy to degrade and ultimately destroy ISIL. The strategy also includes coordinated efforts by many nations to conduct robust military operations to degrade ISIL's military capabilities; to enact tougher laws and foster better cooperation to stop the flow of foreign terrorist fighters who fill ISIL's ranks; and to counter the violent ideologies that attract people to ISIL and help fuel the group's attacks.

In recent weeks and months, we have seen what this strategy can yield. Together with partners, we are degrading ISIL's leadership capabilities; knocking out oil fields, refineries, and other associated infrastructure that ISIL controls; and supporting troops on the ground as they fight to recapture territory from the group, as was achieved in Kobani.

As a result of these and other efforts, ISIL is having a harder time generating new funds needed to carry out its operations. Today's resolution aims to make that effort even more challenging, by using sanctions and other punitive tools to target three ISIL income streams.

First, the resolution provides states with clear, practical instruction for how to cut off ISIL's illicit oil smuggling. UN sanctions already require states to stop this trade. But this resolution also presses states to step up their efforts to prevent and disrupt the movement of vehicles going to and from ISIL and al-Nusra Front-controlled areas, to stop the flow of assets traded by the groups—whether oil, precious metals and minerals, or refining equipment.

Second, by imposing a new ban on the trade in smuggled Syrian antiquities, this resolution both cuts off a source of ISIL revenue and helps protect an irreplaceable cultural heritage, of the region and of the world. To help stop this trade, the United States has sponsored the publication of so-called "Emergency Red Lists" of Syrian and Iraqi antiquities at risk, which can help international law enforcement catch antiquities trafficked out of these countries.

Third, the resolution reinforces the existing prohibition in UN sanctions on all payments and donations to ISIL, al-Nusra Front, and other al-Qaeda affiliates—including ransoms—which

perpetuate a cycle of horrific brutality, giving these groups resources to carry out more murderous acts and incentivizing them to take more people captive.

* * * *

The United States joined Italy and Saudi Arabia in 2015 to form a coalition to combat ISIL's financial networks, the Counter-ISIL Finance Group ("CIFG"). The Group held its inaugural meeting in Rome, Italy from March 19 to 20, 2015. See March 20, 2015 State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/03/239592.htm>. Excerpts follow from the March 20, 2015 media note on the establishment of CIFG.

* * * *

Representatives from 26 countries and several multilateral organizations met to agree on an Action Plan to further their understanding of ISIL's financial and economic activities, share relevant information, and develop and coordinate efforts to combat ISIL's financial activities.

The CIFG was established as part of the Counter-ISIL Coalition effort to enhance coordination among international partners on key lines of effort to defeat ISIL. The CIFG will meet regularly to consult on efforts to counter ISIL's financial activities and economic sustainment. The next meeting of the CIFG is scheduled to take place in Saudi Arabia in early May 2015.

The CIFG Action Plan notes the unique terrorist financing challenges posed by ISIL, and identifies and establishes key steps that Coalition members, and potentially the entire international community, should undertake to disrupt ISIL's sources of revenue, movement and use of funds, and its overall economic sustainment. The key objectives of the CIFG will be to (1) prevent ISIL's use of the international financial system, including unregulated money remitters; (2) counter ISIL's extortion and exploitation of economic assets and resources—such as cash, oil, agricultural goods, cultural property, and other economic commodities—that transit, enter, or are derived from areas in which ISIL operates; (3) deny ISIL funding from abroad, including from external donors, foreign terrorist fighters, and kidnapping for ransom; and (4) prevent ISIL from providing financial or material support to foreign affiliates in an effort to expand its global ambitions. In addition, the CIFG will promote the implementation of United Nations Security Council Resolutions specifically targeted at ISIL and other al-Qaida associated groups in Iraq and Syria.

The CIFG will work to accomplish these goals through enhanced information collection and sharing, developing new countermeasures, providing technical assistance, coordinating sanctions efforts, strengthening internal anti-money laundering/counter-terrorist financing measures, and private sector outreach, among other steps.

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U.S. Treasury Secretary Jacob Lew chaired a special meeting of the UN Security Council on December 17, 2015 on countering the financing of terrorism. The meeting was the first ever where finance ministers represented the UN Security Council member states. As explained in the December 17, 2015 fact sheet on the meeting, available at <http://usun.state.gov/remarks/7058>, the UN Secretary-General and the President of the Financial Action Task Force (“FATF”), the international standard-setting body on countering terrorist financing, also spoke at the meeting. The meeting concluded with the adoption of Resolution 2253 (2015) on countering ISIL, Al-Qaida, and associated individuals, groups, undertakings, and entities. Excerpts follow from the U.S. fact sheet.

* * * *

Isolating ISIL from the international financial system is an integral part of the Administration's strategy to degrade and ultimately destroy ISIL. Successfully countering terrorist financing requires a global response. The goal of this meeting was to bolster international efforts to further disrupt ISIL's sources of revenue and isolate ISIL from the international financial system.

At this meeting, Security Council finance ministers unanimously adopted a Security Council resolution that improves the international community's ability to disrupt ISIL financing and to counter the financing of terrorism more broadly.

Key Topics Covered During the Meeting

Strengthening Global Efforts to Disrupt Financing of ISIL and other Terrorist Groups

Security Council finance ministers today focused on urgent steps needed to deny ISIL access to funds and other forms of support, limit what ISIL can do with its revenue, and impose sanctions on ISIL's supporters and financial facilitators to isolate them from the international financial system. Ministers focused on efforts to ensure the international community is implementing global standards on countering the financing of terrorism. They emphasized the importance of sharing information on ISIL financing and committed to making the international financial system a hostile environment for ISIL.

The discussion built on work started over a year ago when the Global Coalition to Counter ISIL established the Counter ISIL Finance Group, chaired by the United States, Italy, and Saudi Arabia. The [Counter ISIL Finance Group](#), which is made up of more than 30 members worldwide, is focused on enhancing the exchange of information on ISIL's financial activities, targeting ISIL's oil revenues, combatting the financing of ISIL's affiliates, and addressing its sales of antiquities, among other topics.

Ministers also focused on means to more effectively disrupt terrorist financing more broadly, beyond ISIL. The international community already has an array of authorities and standards in place to combat terrorist financing, including UN and other multilateral legal and regulatory frameworks, such as the FATF's international standards. However, it is important that countries now *implement* these measures more rigorously.

Background on the Resolution Adopted at this High-Level Event

Sharpening UN Tools to Counter Terrorist Finance

The principal UN tool to counter ISIL and Al-Qaida-related financing is the Security Council's 1267/1989 Al Qaida sanctions regime. For over fifteen years, the UN has had in place robust sanctions—including an asset freeze, travel ban and ban on transferring arms—against Al-

Qaida and associated groups and individuals. These are binding measures taken under Chapter VII of the United Nations Charter, and UN Member States are required to enforce them without delay.

During this meeting, Security Council members, represented by their finance ministers unanimously adopted a resolution to review the UN sanctions on Al-Qaida and adapt these measures to the evolving terrorist threat. The Security Council has adopted a new 1267 resolution every 18 months to focus these sanctions on the latest trends in terrorist finance. This resolution will incorporate the substantial knowledge the international community has gained since the Security Council last reviewed these sanctions in June 2014, in particular to address ISIL's finances and the new ways in which terrorists and terrorist organizations acquire funding and support.

The key provisions of this new resolution include:

- Recognizing the increasing prominence of ISIL as a global threat by renaming the current 1267/1989 Al-Qaida Sanctions Regime and List to the 1267/1989 *ISIL (Da'esh) and Al Qaida Sanctions Regime and List*.
- Establishing "association with ISIL" as a new stand-alone criterion for imposing new sanctions designations (the previous criterion was "association with Al-Qaida").
- Calling upon countries to criminalize financial transactions related to terrorism, including all transactions with individual terrorists and terrorist groups, not just those transactions tied to terrorist acts, in order to better disrupt the activities of foreign terrorist fighters.
- Providing guidance on stopping ISIL's oil smuggling, extortion and taxation, robbery, kidnapping for ransom, foreign donations, trade in antiquities, and human trafficking.
- Calling on countries to improve communication and information sharing on terrorist financing among their government agencies.
- Encouraging countries to enhance engagement with the private sector to better identify terrorist financing activity, particularly by encouraging governments to develop stronger relationships with financial institutions.
- Underscoring the need for countries to better implement the international standards and guidelines developed by FATF to counter terrorist financing.
- Requesting regular UN reporting on ISIL's efforts to radicalize and recruit members, including foreign terrorist fighters, its sources of finance, including through illicit trade in oil, antiquities, and other natural resources, and its planning and facilitation of attacks.
- Adding two new experts to the UN's Al-Qaida Sanctions Monitoring Team to focus on ISIL (the Monitoring Team is composed of eight specialists who monitor implementation of the UN sanctions).
- Requesting countries to provide a report to the UN on their progress in implementing the measures in this resolution.

* * * *

Secretary Lew's remarks at the special Security Council meeting on December 17, 2015 are excerpted below and available at <http://usun.state.gov/remarks/7059>.

* * * *

... We come together at a consequential time, and in a historic setting: never before have finance ministers convened for an official Security Council meeting. This unprecedented session underscores the importance of combating the financing of terrorism, the international community's dedication to destroying ISIL, and the critical role of finance ministries and the broader international financial community in this fight.

* * * *

After the September 11th attacks, the United States and our international partners vowed to counter terrorism with every tool at our disposal. Early on, we recognized the need to target the financial resources of terror networks, depriving them of the funds they need to recruit, train, travel, equip, attack, and murder.

Since that time, we have greatly strengthened the transparency and resilience of the international financial system and developed tools to track and disrupt terror funding streams. The impact is real. Regulators and financial institutions alike are far more sophisticated and attuned to the threat of terror financing, and have made it harder for terror groups, like Al-Qaida and Hizballah, to place and move funds. Our financial system is more transparent, resilient, and stronger as a result. We have uncovered and cut off channel after channel of support to Al-Qaida, leaving its branches hungry for funding, and less capable of plotting and carrying out attacks. We've also improved our ability to deploy these tools in effective and sophisticated ways against other illicit finance threats, most notably in our successful, multilateral effort to bring Iran to the negotiating table over its nuclear program.

But we have also seen the terror threat evolve in dangerous ways. Different tactics, like lone wolf attacks or shootings, are examples we have seen on American soil. And new groups have emerged, with innovative messaging, recruiting, military, and financing strategies. ISIL is the most dangerous manifestation of this new threat. Since it emerged, ISIL has terrorized the people of Iraq and Syria with its attacks in Paris and elsewhere, killed and wounded people from many nations and religions. Our governments, in coordination with the UN and other multilateral organizations, have been countering ISIL for some time, but we all know there is more we need to do together to degrade and destroy this brutal force of terror.

Since 2014, the United States has been working to destroy ISIL by, as President Obama made clear again last week, "drawing upon every aspect of American power." A critical part of the U.S. whole-of-government strategy is the use of counterterror financing tools and authorities to stop ISIL's operations by isolating it financially and economically.

As many of you know, ISIL is a challenging financial target. Unlike other terror groups, ISIL derives a relatively small share of its funding from donors abroad. Instead, ISIL generates wealth from economic activity and resources within territory under its control. And ISIL's financing has evolved from seizing territory and looting bank vaults to leveraging more renewable revenue streams: so far, ISIL has reaped an estimated \$500 million dollars from black market oil and millions more from people it brutalizes and extorts.

At the same time, ISIL has financial vulnerabilities. And the U.S. approach has evolved as well to attack these vulnerabilities; ISIL's newer financing methods are now targets. Because of its need to control territory, ISIL requires large and renewable streams of income to pay fighters, procure weapons, and provide basic services for local populations. And in order to

sustain its oil infrastructure and its military efforts, ISIL needs access to the international financial system. Those dependencies present opportunities for attack.

To cut off ISIL resources and funding streams, most importantly revenue from its oil sales, the United States military has been working with coalition partners to attack ISIL's entire oil supply chain: its oil fields, refineries, and its tanker trucks. Over the past month, nearly 400 of ISIL's oil tanker trucks have been destroyed. While these attacks are having a real and growing impact, the United States and the international community must also work with countries bordering Iraq and Syria to enhance border security to help stop illicit cross-border flows.

To sever ISIL from the international financial system, the United States is working with its partners to actively target ISIL's key financial facilitators, sanctioning more than 30 of its senior leaders and financiers; U.S. officials have worked with the Government of Iraq to deny ISIL access to the Iraqi financial system; and, in collaboration with law enforcement and foreign partners, U.S. officials have worked with financial institutions as they refine their ability to detect activity associated with ISIL supporters.

While we are making progress to financially isolate ISIL, if we are to succeed we must all intensify our efforts, on our own and together at an international level.

Today, we adopted a new UN Security Council resolution that builds on previous measures and strengthens our existing tools. It expands the focus of UN Security Council resolution 1267 Al-Qaida sanctions to specifically emphasize ISIL in the designation criteria, making ISIL-association grounds for targeted sanctions. It calls on Member States to ensure they have the legal tools to criminalize the financing of individual terrorists and terrorist organizations for any purpose—recruiting, training, travel, and other activities—even in the absence of a link to a specific terrorist act. It calls upon Member States to increase engagement with the private sector to prevent terrorist use of the financial system. And it encourages governments to better share information, internally and between nations, to avoid missing critical information about terrorist activities.

This resolution is a critical step, but the real test will be determined by the actions we each take after adoption. We need meaningful implementation, coordination, and enforcement from each country represented here, and many others. As we have all learned—with our work to counter Al-Qaida, ISIL, and other groups to date—the successful use of these counterterror financing tools requires robust domestic implementation, deep collaboration with private partners, and intense multilateral coordination and information-sharing. The importance of this coordination was exemplified this year when we at Treasury worked with our French and European counterparts in real time to provide over 1,300 leads immediately following the horrific Paris attacks in January and November. This type of coordination is ongoing and essential, and we must combine it with a relentless desire to adapt and change our tools as these groups adapt to us. The nations of the world standing together, acting together represents a more powerful force than our individual actions alone.

We must also work through other multilateral organizations. Last week, FATF held a meeting on investigating and prosecuting terrorist financiers and implementing targeted financial sanctions. And the Counter-ISIL Finance Group, which the United States leads along with Italy and Saudi Arabia, is focused on, among other things, expanding information-sharing and combatting the financing of ISIL affiliates.

Even as we continue this important work, we must also remain steadfast in our commitment to both protect the stability of the international financial system and expand financial inclusion so the benefits of global growth are broadly shared. These two objectives—

protecting the financial system from illicit activity while increasing access to financial services—are complementary, not conflicting, as we know that financial exclusion undermines the integrity of the entire financial sector and inclusion creates stakeholders around the world committed to positive change.

In conclusion, our joint work on counterterror financing over the past 14 years has taught us we can meet the long-term, evolving terror challenge, but we must keep adapting and we must stay focused to do so. This enhanced sanctions regime, and robust implementation of it and other counterterror financing measures, will help us meet the terror threat, whether from ISIL; or others, like Al-Qaida, Al-Shabab, Boko Haram, Hizballah, and Nusrah; or new individuals and groups.

* * * *

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 working for or on behalf of, providing support to, or having other links to, 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.

b. U.S. targeted financial sanctions

(1) Department of State

In 2015, the Department of State announced the Secretary of State’s designation of numerous entities and individuals (including their known aliases) pursuant to E.O. 13224.

In a Federal Register notice dated January 21, 2015, the State Department announced the January 8 designation pursuant to E.O. 13224 of ‘Abdallah al-Ashqar 80 Fed. Reg. 3004 (Jan. 21, 2015). A January 14, 2015 Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/01/235955.htm>, provides further information about the designation:

‘Abdallah al-Ashqar is a Palestinian national reported to be a leader of the Mujahidin Shura Council in the Environs of Jerusalem (MSC), a designated Foreign Terrorist Organization (FTO) and Specially Designated Global Terrorist entity under E.O. 13224, and serves on their military committee. Al-Ashqar also

serves as a foreign relations official for the group. In addition to his leadership activity, al-Ashqar has sought missiles and other materials with which to attack Israel.

An umbrella group composed of several terrorist sub-groups based in Gaza, MSC has claimed responsibility for numerous attacks on Israel since the group's founding in 2012. For example, in August 2013, MSC claimed responsibility for a rocket attack targeting the southern Israeli city of Eilat. Previous attacks have also included improvised explosive devices, claiming civilian lives.

The Department designated Denis Cuspert on January 9, 2015. 80 Fed. Reg. 4619 (Jan. 28, 2015). In a February 9, 2015 media note, available at <http://www.state.gov/r/pa/prs/ps/2015/02/237324.htm>, the Department provides background on Cuspert:

Cuspert is also listed by the United Nations 1267/1989 al-Qa'ida Sanctions Committee. ...

Denis Cuspert is a foreign terrorist fighter and operative for ISIL, a designated foreign terrorist organization. Cuspert joined ISIL in 2012 and has appeared in numerous videos on its behalf, the most recent dating from early November, in which he appears holding a severed head he claims belongs to a man executed for opposing ISIL. Born in Berlin, the 39-year-old Cuspert spent time in jail for various offenses. Now calling himself Abu Talha al-Almani, Cuspert has pledged an oath of loyalty to ISIL leader Abu Bakr al-Baghdadi and appears to serve as an ISIL recruiter with special emphasis on recruiting German speakers to ISIL. Cuspert is emblematic of the type of foreign recruit ISIL seeks for its ranks—individuals who have engaged in criminal activity in their home countries who then travel to Iraq and Syria to commit far worse crimes against the people of those countries. Foreign terrorist fighters are reported to have played significant roles in some of ISIL's most egregious crimes, including the massacres of the Sh'aitat tribe in Syria and the Abu Nimr tribe in Iraq, as well as the almost daily public executions in Raqqa. Cuspert has been a willing pitchman for ISIL atrocities. Cuspert is also wanted by the German government on suspicion of involvement in terrorist activities in his home country.

Also on January 9, 2015, the Department designated Maulana Fazlullah. 80 Fed. Reg. 2771 (Jan. 20, 2015). A January 13, 2015 Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/01/235901.htm>, provides the following information about Fazlullah:

Maulana Fazlullah was elected commander of Tehrik-e Taliban Pakistan (TTP) in November 2013, following the death of former TTP leader Hakimullah Mehsud. The Department of State designated TTP as a Foreign Terrorist Organization and

a Specially Designated Global Terrorist on September 1, 2010. TTP was also listed at the United Nations 1267/1989 Al-Qaida Sanctions Committee on July 29, 2011.

Under the leadership of Fazlullah, TTP claimed responsibility for the December 16, 2014 attack on a school in Peshawar, Pakistan that resulted in the deaths of at least 148 individuals, mostly students. Prior to becoming the leader of TTP, Fazlullah claimed he was behind the killing of Pakistani Army Major General Sanaullah Niazi in September 2013, as well as ordering the shooting of schoolgirl and activist Malala Yousafzai in 2012. Fazlullah was responsible for the beheading of 17 Pakistani soldiers after an attack in June 2012 and also ordered the targeted killings of elders who led peace committees against the Taliban.

The Secretary's March 18 designation of Aliaskhab Kebekov was published in the Federal Register on March 27, 2015. 80 Fed. Reg. 16,492 (Mar. 27, 2015). A March 25, 2015 State Department media note on the designation, available at <http://www.state.gov/r/pa/prs/ps/2015/03/239759.htm>, includes the following on Kebekov:

Kebekov is also listed by the United Nations 1267/1989 al-Qa'ida Sanctions Committee. ...

Aliaskhab Kebekov is the current leader of the Caucasus Emirate, a Specially Designated Global Terrorist entity operating primarily in the Russian North Caucasus. He became head of the group following the death of its former leader, Doku Umarov. In the summer of 2014, Kebekov issued a video statement proclaiming the Caucasus Emirate's "structural subordination" to al-Qa'ida and noted his group's readiness to execute orders and instructions from al-Qa'ida's leaders. In late December 2014, Kebekov praised the killing of 14 Chechen law enforcement officers by militants who claimed allegiance to him and the Caucasus Emirate. In 2013, Caucasus regional police sources reported that Kebekov ordered the killing of Sheikh Said-Afandi Chirkeykiy, a prominent moderate religious leader in the Republic of Dagestan, also in the North Caucasus region of Russia, who was ideologically opposed to the Caucasus Emirate.

The Federal Register notice of the March 30, 2015 designation of Ali Ouni Harzi was published on April 16, 2015. 80 Fed. Reg. 20,552 (Apr. 16, 2015). The State Department issued a media note on April 14, 2015, available at <http://www.state.gov/r/pa/prs/ps/2015/04/240667.htm>, announcing the designation of Ali Ouni Harzi pursuant to E.O. 13224. Ali Ouni Harzi was also added to the UN 1267/1989 al-Qaida Sanctions List. The media note provides the following background on Ali Ouni Harzi:

Syrian-based Tunisian national Ali Ouni Harzi joined Ansar al-Sharia in Tunisia

(AAS-T) in 2011 and was a high-profile member known for recruiting volunteers, facilitating the travel of AAS-T fighters to Syria, and for smuggling weapons and explosives into Tunisia. AAS-T was designated as a Foreign Terrorist Organization (FTO), and a Specially Designated Global Terrorist entity under E.O. 13224, by the U.S. Department of State on January 13, 2014, and was added to the UN 1267/1989 al-Qaida Sanctions List on September 23, 2014.

The State Department designated Ahmed Diriye and Mahad Karate pursuant to E.O. 13224 on April 10, 2015. 80 Fed. Reg. 22,605 (Apr. 22, 2015). An April 21, 2015 State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/04/240932.htm>, provides background information on Ahmed Diriye and Mahad Karate:

Ahmed Diriye became the leader of al-Shabaab following the death of the group's former leader, Ahmed Abdi Godane, in September 2014. Prior to replacing Godane, Diriye served in several positions within al-Shabaab, including as Godane's assistant, the deputy governor of Lower Juba region in 2008, and al-Shabaab's governor of Bay and Bakool regions in 2009. By 2013, he was a senior adviser to Godane, and served in al-Shabaab's "Interior Department," where he oversaw the group's domestic activity. He shares Godane's vision for al-Shabaab's terrorist attacks in Somalia as an element of al-Qa'ida's greater global aspirations.

Mahad Karate, also known as Abdirahim Mohamed Warsame, played a key role in the Amniyat, the wing of al-Shabaab responsible for the recent attack on Garissa University College in Kenya that resulted in nearly 150 deaths. The Amniyat is al-Shabaab's intelligence wing, which plays a key role in the execution of suicide attacks and assassinations in Somalia, Kenya, and other countries in the region, and provides logistics and support for al-Shabaab's terrorist activities.

The April 20, 2015 designations of Nikolaos Maziotis and Christodoulos Xiros pursuant to E.O. 13224 were published in the Federal Register on April 28, 2015. 80 Fed. Reg. 23,635 & 23,636 (Apr. 28, 2015) and announced in an April 21, 2015 Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/04/240928.htm>. The media note explains:

Christodoulos Xiros was one of the chief assassins of 17 November, until his arrest in 2002. In January 2014, Xiros was serving multiple life terms at the Korydallos Prison near Athens, Greece, when he disappeared while on furlough from the prison, after being granted temporary leave to visit his family in northern Greece. 17 November was active beginning in the 1970s through the early 2000s, claiming attacks against Greek politicians and businessmen, as well as Western interests. After his escape, he publicized a manifesto focusing on his discontent with the Greek government. Xiros was re-arrested by Greek police in

January 2015 while planning to carry out armed assaults in Greece, possibly with the intent to free other prisoners. At the time of his arrest, Xiros was likely coordinating with members of Conspiracy of Fire Nuclei, a group designated by the State Department under E.O. 13224 in 2011.

Nikolaos Maziotis is the leader of the Greek terrorist organization, Revolutionary Struggle. He was arrested with six other alleged members of Revolutionary Struggle in 2010, but went missing in the middle of his trial. In April 2014, under the leadership of Maziotis, Revolutionary Struggle claimed responsibility for a bomb blast in central Athens outside the branch offices of the Greek central bank. On July 16, 2014, Maziotis was re-arrested by Greek police after a shootout in Athens' central tourist district, which left four people wounded. Revolutionary Struggle was designated a foreign terrorist organization by the U.S. Department of State on May 18, 2009 and is most well-known for a rocket-propelled grenade attack on the U.S. Embassy in Athens in 2007.

In a Federal Register notice dated May 1, 2015, the Department announced the April 22, 2015 designation of Hussein Atris under E.O. 13224. 80 Fed. Reg. 25,000 (May 1, 2015). Meliad Farah and Hassan el-Hajj Hassan were designated at the same time. 80 Fed. Reg. 25,001 (May 1, 2015). The designations of Meliad Farah, Hassan el-Hajj Hassan, and Hussein Atris are further explained in an April 28, 2015 Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/04/241205.htm>:

On July 18, 2012, a bombing at the airport in Burgas, Bulgaria killed six people, including five Israeli tourists and a Bulgarian citizen. In July 2013, Meliad Farah and Hassan el-Hajj Hassan were publicly identified as key suspects in the bombing, which has been attributed to Hizballah, a designated Foreign Terrorist Organization (FTO). Both are believed to be located in Lebanon.

Hussein Atris is a member of Hizballah's overseas terrorism unit. In 2012, Atris was arrested in Thailand in connection with a terror warning about a possible attack in Bangkok. Atris was found to be hiding nearly three tons of ammonium nitrate, a component in the manufacture of explosives. In 2013, a Thai court sentenced Atris to two years and eight months in prison for illegally possessing the materials. He was released in September 2014, and traveled to Sweden and later Lebanon, where he is believed to be located currently.

The State Department designated Abdul Aziz Haqqani pursuant to E.O. 13224 on June 1, 2015. 80 Fed. Reg. 51,860 (Aug. 26, 2015).

The State Department designated Sajid Mohammad Badat pursuant to E.O. 13224 on August 3, 2015. 80 Fed. Reg. 51,861 (Aug. 26, 2015). On August 4, 2015, the Department designated Abu 'Ubaydah Yusuf al 'Anabi. 80 Fed. Reg. 54,650 (Sep. 10, 2015).

On August 19, 2015, the Department designated Muhammed Deif. 80 Fed. Reg. 54,366 (Sep. 9, 2015). Yahya Ibrahim Hassan Sinwar and Rawhi Mushtaha were

designated on August 27, 2015. 80 Fed. Reg. 54,366, 54,367 (Sep. 9, 2015). The Department provided further information about Yahya Sinwar, Rawhi Mushtaha, and Muhammed Deif in a September 8, 2015 media note available at <http://www.state.gov/r/pa/prs/ps/2015/09/246687.htm>:

Yahya Sinwar is a Hamas operative known for his role in founding the forerunner of the Izzedine al-Qassam Brigades, the military wing of Hamas, a designated Foreign Terrorist Organization (FTO) and SDGT. He was arrested by Israel in 1988 for his terrorist activity. Sinwar was later released from prison in 2011 as part of a prisoner swap for kidnapped Israeli soldier Gilad Shalit. Sinwar was serving four life sentences for the abduction and murder of two Israeli soldiers in the late 1980s. He is considered to be one of the most senior and prominent prisoners to be exchanged, and has called on militants to capture more Israeli soldiers.

Rawhi Mushtaha is a Hamas operative known for his role in founding the forerunner of the Izzedine al-Qassam Brigades. He was arrested by Israel in 1988 for his terrorist activity, but was released from prison in 2011 as part of a prisoner swap for kidnapped Israeli soldier Gilad Shalit. Mushtaha was serving four life sentences for murder and acts of terrorism. In 2015, Mushtaha also publicly called on Hamas's al-Qassam Brigades to kidnap more Israeli citizens in order to strike more prisoner exchange deals to free Hamas members.

Muhammed Deif is the top commander of the Izzedine al-Qassam Brigades. He is known for deploying suicide bombers and directing the kidnapping of Israeli soldiers. During the 2014 conflict between Israel and Hamas, Deif was the mastermind of Hamas's offensive strategy.

The Department designated Samir Kuntar on August 31, 2015. 80 Fed. Reg. 54,366 (Sep. 9, 2015). In a September 8, 2015 media note, available at <http://www.state.gov/r/pa/prs/ps/2015/09/246687.htm>, the Department provided information regarding the designation of Samir Kuntar:

In April 1979, Samir Kuntar participated in the attempted kidnapping of an Israeli family in Nahariya, Israel that resulted in the deaths of five Israelis, including two young children. Kuntar was convicted in an Israeli court for the murders. Kuntar was later released from prison in 2008 as part of a prisoner exchange.

On his return to Lebanon, Kuntar was welcomed by Hizballah, a U.S. Department of State-designated Foreign Terrorist Organization, and he has since emerged as one of the group's most visible and popular spokesmen. Since Kuntar's return, he has also played an operational role, with the assistance of Iran and Syria, in building up Hizballah's terrorist infrastructure in the Golan Heights.

On September 7, 2015, the Department designated Peter Cherif. 80 Fed. Reg. 54,366 (Sep. 9, 2015). Emilie Konig was also designated on September 7, 2015. 80 Fed.

Reg. 58,805 (Sep. 30, 2015). Both were identified in a September 29, 2015 media note explaining multiple designations of foreign terrorist fighters (“FTFs”), which is available at <http://www.state.gov/r/pa/prs/ps/2015/09/247433.htm>. Descriptions of Konig and Cherif follow:

French citizen **Emilie Konig** traveled to Syria in 2012 to join and fight for ISIL. While in Syria, Konig directed individuals in France to attack French government institutions. In a video posted on May 31, 2013, Konig was shown training with weapons in Syria.

French citizen **Peter Cherif** is a foreign fighter and member of al-Qa’ida in the Arabian Peninsula (AQAP). In 2004, he was captured while fighting for al-Qa’ida in Iraq (AQI) near Fallujah. He was convicted in Baghdad in July 2006 for illegally crossing the border, and sentenced to 15 years in prison. He escaped in March 2007 after an insurgent attack and prison break, and traveled to Syria. He was later arrested in Syria, extradited, and served 18 months in jail in France. He was released pending trial and fled the country to Yemen. Cherif was sentenced to five years in prison, in absentia, for being a member of a terrorist organization.

In a September 9, 2015 media note, the Department announced the designation pursuant to E.O. 13224 of Algerian citizen Abu Ubaydah Yusuf al-Anabi. The media note, available at <http://www.state.gov/r/pa/prs/ps/2015/09/246716.htm>, identifies Abu Ubaydah Yusuf al-Anabi as a member of al-Qa’ida in the Islamic Maghreb (“AQIM”) who “is the leader of AQIM’s Council of Notables and serves as AQIM’s Media Chief. In an April 25, 2013 video, al-Anabi called for armed conflict by violent extremists against French interests throughout the world, presumably in response to France’s Mali intervention.”

Gulmurod Khalimov was designated pursuant to E.O. 13224 on September 16, 2015. 80 Fed. Reg. 58,806 (Sep. 30, 2015). The Department designated Sally-Anne Frances Jones, Maxime Hauchard, and Boubaker Ben Habib Ben Ali Hakim on September 21, 2015. 80 Fed. Reg. 58,803, 58,805 (Sep. 30, 2015). The entities, Mujahidin Indonesia Timur (“MIT”) and Jaysh Rijal al-Tariq al-Naqshabandi (Army of the Men of the Naqshabandi Order) were also designated on September 21, 2015. 80 Fed. Reg. 58,806 & 58,803 (Sep. 30, 2015). The Department designated Rustam Aselderov on September 22, 2015. 80 Fed. Reg. 59,221 (Oct. 1, 2015). ISIL-Caucasus Province was also designated on September 22, 2015. 80 Fed. Reg. 59,222 (Oct. 1, 2015). Jund al-Khilafah in Algeria was designated on September 24, 2015. 80 Fed. Reg. 59,221 (Oct. 1, 2015). On September 24, 2015, the State Department designated Tarkhan Ismailovich Gaziyeu, Shamil Izmaylov, and Nasser Muthana. 80 Fed. Reg. 59,220 & 59,221 (Oct. 1, 2015). On September 28, 2015, the State Department designated ISIL Khorasan. 80 Fed. Reg. 60,431 (Oct. 6, 2015). These individuals and entities were identified in a September 29, 2015 media note explaining multiple designations of foreign terrorist fighters (“FTFs”), which is excerpted below and available

at <http://www.state.gov/r/pa/prs/ps/2015/09/247433.htm>.

* * * *

The Department of State's designations today, and those carried out by the Treasury Department, highlight the scope of the foreign terrorist fighter challenge facing the international community. At the same time, these U.S. sanctions also underscore our resolve to counter the threat posed to international peace and stability by foreign terrorist fighters. The Counter-ISIL Coalition has taken a number of steps to address the flow of Foreign Terrorist Fighters, but it is clear that more work remains to be done.

Credible reports published recently on the topic of foreign terrorist fighters in Syria and Iraq have provided first-hand accounts of the barbaric injustices and nihilistic violence perpetrated by ISIL—the result of which has been defections from ISIL. The United States will continue to work closely with its partners and multilateral bodies to apply sanctions against ISIL's tyranny of violence and oppression.

The Islamic State of Iraq and the Levant – Caucasus Province (ISIL-CP) became ISIL's newest regional group on June 23, 2015 when the spokesman for ISIL leader Abu Bakr al-Baghdadi released an audio recording accepting the sworn allegiance of the fighters of four Caucasus regions—Dagestan, Chechnya, Ingushetia, and Kabardino-Balkaria. The statement also appointed Rustam Aselderov as the emir of the new ISIL-CP. On September 2, 2015, ISIL-CP claimed responsibility for an attack on a Russian military base in Magaramkent, southern Dagestan, which resulted in the deaths and injuries of a number of Russian citizens.

Islamic State of Iraq and the Levant Khorasan's (ISIL-K) formation was announced in an online video on January 10, 2015. The group is led by former Tehrik-e Taliban (TTP) commander Hafiz Saeed Khan, and consists of former Pakistani and Afghan Taliban faction commanders who swore an oath of allegiance to Abu Bakr al-Baghdadi. On January 26, 2015, ISIL spokesman Abu Muhammad al-Adnani announced ISIL's expansion into Khorasan by reporting that Baghdadi had accepted Khan's pledge and appointed him as Governor of Khorasan.

Rustam Aselderov is a former commander of the North Caucasus extremist group Caucasus Emirate, a designated SDGT, and the current leader of ISIL-CP. Aselderov defected from Caucasus Emirate, and swore allegiance to Abu Bakr al-Baghdadi in early December 2014. A spokesman for al-Baghdadi accepted this pledge of allegiance and appointed Aselderov as the "emir" of ISIL-CP, which conducted its first attack in September 2015, which resulted in the deaths of Russian citizens.

ISIL member and foreign fighter **Boubaker Hakim** appeared in an ISIL video where he claimed responsibility for the assassinations of two Tunisian political leaders in 2013. Previously, Hakim was reported to have ties with U.S. designated FTO Ansar al-Sharia Tunisia (AAS-T) and to have worked with related associates to target Western diplomats in North Africa.

Maxime Hauchard is a French national who traveled to Syria to join ISIL in August 2013. Hauchard was identified among the ISIL fighters who appeared in the November 2014 execution video which depicted the beheadings of several Syrian soldiers and showed the severed head of an American hostage.

Tarkhan Ismailovich Gazyev is a North Caucasian foreign terrorist fighter who has

been involved in the Chechen insurgency since 2003. In 2007, he became the Caucasus Emirate Commander of the Southwestern Front of the Province of Chechnya, and carried out numerous attacks in this role. Gaziyevev later split from the group in 2010 and then entered Syria through Turkey, where he now leads an ISIL-linked group known as Tarkhan Jamaat.

Shamil Izmaylov is a well-known Russian foreign terrorist fighter currently in Syria. Before arriving in Syria in 2012, Izmaylov trained in—and later set up his own—training center in Egypt. In mid-2013, Izmaylov established his own Russian-speaking ISIL faction in Raqqa. In addition to participating in combat in Syria, Izmaylov has also been associated with Caucasus Emirate.

Nasser Muthana traveled to Syria from his home in Cardiff, UK in November 2013, to fight for ISIL. In June 2014, Muthana was featured in an ISIL video where he admits to having participated in battles in Syria.

British citizen **Sally Jones** traveled from the UK to Syria in 2013 to join ISIL and fight alongside her husband, deceased ISIL hacker Junaid Hussain. Jones and Hussain targeted American military personnel through publication of a “hit list” online to encourage lone offender attacks. Jones has used social media to recruit women to join ISIL. In August 2015, Jones encouraged individuals aspiring to conduct attacks in Britain by offering guidance on how to construct homemade bombs.

Jund al-Khilafah in Algeria (JAK-A) emerged on September 13, 2014, when senior al-Qaida in the Islamic Maghreb (AQIM) military commanders broke away from the group and announced its allegiance to ISIL. JAK-A is best known for its abduction and subsequent beheading of French national Herve Gourdel in September 2014.

Mujahidin Indonesian Timur (MIT) is an ISIL-linked terrorist group operating in Indonesia. MIT members have ties to other U.S. Department of State designated FTOs, including Jemmah Anshorut Tauhid (JAT) and Jemaah Islamiya (JI). In July 2014, MIT’s leader, Abu Warda Santoso, pledged allegiance to ISIL. MIT has become increasingly bold in its attacks on security forces, which includes the use of explosives and shootings.

Former Tajikistan special operations colonel, police commander, and military expert **Gulmurod Khalimov** is a Syria-based ISIL member and recruiter. Khalimov was the commander of a special paramilitary unit in the Tajikistan Ministry of Interior. Khalimov appeared in a propaganda video confirming that he fights for ISIL.

In addition to the E.O. 13224 designations listed above, the Department of State has designated **Jaysh Rijal al-Tariq al Naqshabandi (JRTN)** as a Specially Designated Global Terrorists (SDGT) under E.O. 13224, and as a Foreign Terrorist Organization (FTO) under the Immigration and Nationality Act (INA). JRTN is a terrorist group that first announced insurgency operations against Coalition Forces in Iraq in December 2006 in response to the hanging of Saddam Hussein. JRTN claimed numerous attacks on Coalition Forces until their withdrawal in 2011. JRTN’s other goals include overthrowing the government of Iraq for a Ba’athist or similar regime. JRTN played an important role in some of ISIL’s most significant military advances, including the seizure of Mosul, Iraq’s second largest city.

Also under the FTO and E.O. 13224 authorities, the designations of Ansar Bayt al-Maqdis (ABM) have been amended to add several aliases, including **ISIL Sinai Province (ISIL SP)**. In November 2014, ABM pledged allegiance to ISIL, and has since used ISIL Sinai Province as its primary name. ISIL leadership accepted ABM’s pledge that same month. ISIL Sinai Province continues to attack Egyptian targets.

* * * *

On September 21, 2015, the Department amended the designation of the Islamic State of Iraq and the Levant to add the additional aliases the Islamic State, ISIL, and ISIS. 80 Fed. Reg. 58,804 (Sep. 30, 2015). On September 22, 2015, the Department amended the designation of Ansar Bayt al-Maqdis to include new aliases (as described in the September 29 media note excerpted above): ISIL Sinai Province, also known as Islamic State-Sinai Province, also known as Wilayat Sinai, also known as Sinai Province, also known as The State of Sinai, also known as Islamic State in the Sinai. 80 Fed. Reg. 58,806 (Sep. 30, 2015).

On October 29, 2015, the State Department designated Maghomed Maghomedzakirovich Abdurakhmanov pursuant to E.O. 13224. 80 Fed. Reg. 72,130 (Nov. 18, 2015). A November 13, 2015 media note, available at <http://www.state.gov/r/pa/prs/ps/2015/11/249469.htm>, provides the following background information on Abdurakhmanov's designation:

Abdurakhmanov was also added to the UN 1267/1989 al-Qaida Sanctions List, requiring all member states to implement an assets freeze, a travel ban, and an arms embargo against Maghomed Maghomedzakirovich Abdurakhmanov.

Abdurakhmanov was accused of beheading three individuals in Syria and was subsequently arrested by Turkish authorities in July 2013. In July 2015, a Turkish court sentenced him and an associate to seven and a half years in prison for being members of a terrorist organization.

Emrah Erdogan was designated pursuant to E.O. 13224 in December 2015. 80 Fed. Reg. 77,691 (Dec. 15, 2015). A December 9, 2015 media note, available at <http://www.state.gov/r/pa/prs/ps/2015/12/250497.htm>, contains further information about Emrah Erdogan:

Erdogan has also been added to the UN 1267/1989 al-Qaida Sanctions List, requiring all member states to implement an assets freeze, a travel ban, and an arms embargo against Erdogan.

As a member of al-Qa'ida and al-Shabaab, Erdogan—a German national born in Turkey—recruited foreign terrorist fighters, participated in fighting, and raised funds for both groups. He was known to have trained with al-Shabaab and to have carried out attacks in Kenya and Uganda before being apprehended in Dar es Salaam, Tanzania; and extradited to Germany. Emrah Erdogan was sentenced to and is currently serving seven years in prison in Germany for joining militant groups in Pakistan and Somalia and for phoning in a false terror threat of attacks in Pakistan and Germany in November 2010.

The State Department also continued to review designations and delist persons who had been designated under E.O. 13224. On August 26, 2015 the Department revoked the designation of Revolutionary Organization 17 November as a Specially

Designated Global Terrorist pursuant to Section 1(b) of E.O. 13224. 80 Fed. Reg. 53,382 (Sep. 3, 2015). On November 3, 2015, the Department revoked the designation of Nasir al-Wahishi. 80 Fed. Reg. 72,470 (Nov. 19, 2015).

(2) OFAC

(a) OFAC designations

OFAC designated numerous individuals (including their known aliases) and entities pursuant to Executive Order 13224 during 2015. 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 80 Fed. Reg. 13,468 (Mar. 13, 2015) (three individuals—Fouzi Reda Darwish FAWAZ, Mustapha Reda Darwish FAWAZ, and Abdallah Asad TAHINI—and three entities—AMIGO SUPERMARKET LIMITED, KAFK ENTERPRISES LIMITED, and WONDERLAND AMUSEMENT PARK AND RESORT LTD.); 80 Fed. Reg. 30,762 (May 29, 2015) (one individual—Issam SHAMMOUT—and two entities—AL-NASER AIRLINES and SKY BLUE BIRD AVIATION); 80 Fed. Reg. 34,791 (June 17, 2015) (three individuals—Kassem HEJEIJ, Husayn Ali FA'UR, and Adham Husayn TABAJA—and four entities—CAR CARE CENTER, AL-INMAA ENGINEERING AND CONTRACTING, AL-INMAA FOR ENTERTAINMENT AND LEISURE PROJECTS, and AL-INMAA GROUP FOR TOURISM WORKS, LLC); 80 Fed. Reg. 38,275 (July 2, 2015) (one individual—Abdul RASHID BALUCH); 80 Fed. Reg. 46,648 (Aug. 5, 2015) (one individual—Abd Al Nur SHALAN); 80 Fed. Reg. 48,136 (Aug. 11, 2015) (two individuals—'Abd al-Latif Bin 'Abdallah Salih Muhammad AL-KAWARI, Sa'd bin Sa'd Muhammad Shariyan AL-KA'BI); 80 Fed. Reg. 55,414 (Sep. 15, 2015) (four individuals—Mahir Jawad Yunis SALAH, Mohammed Reda Mohammed Anwar AWAD, Salih AL-ARURI, and Abu Ubaydah Khayri Hafiz AL-AGHA—and one entity—ASYAF INTERNATIONAL HOLDING GROUP FOR TRADING AND INVESTMENT); 80 Fed. Reg. 59,854 (Oct. 2, 2015) (fifteen individuals—Husayn Al-Salihin Salih AL-SHA'IRI, Bajro IKANOVIC, Mu'tassim Yahya 'Ali AL-RUMAYSH, Nasir Muhammad 'Awad al-Ghidani AL-HARBI, Muwaffaq Mustafa Muhammad AL-KARMUSH, Mounir Ben Dhaou Ben Brahim Ben HELAL, Tuah FEBRIWANSYAH, Muhammad Sholeh IBRAHIM, Tarad Mohammad ALJARBA, Aqsa MAHMOOD, Omar HUSSAIN, Hafiz Saeed KHAN, Ali Musa AL-SHAWAKH, Morad LAABOUDI, and Sami Jasim Muhammad AL-JABURI); 80 Fed. Reg. 60,749 (Oct. 7, 2015) (one individual—Aseel MUTHANA); 80 Fed. Reg. 60,957 (Oct. 8, 2015) (three individuals—Islam Seit-Umarovich ATABIYEV, Zaurbek GUCHAYEV, and Akhmed CHATAYEV); 80 Fed. Reg. 65,287 (Oct. 26, 2015) (one individual—Torek AGHA); 80 Fed. Reg. 70,080 (Nov. 12, 2015) (two individuals—Fadi Hussein SERHAN and Adel Mohamad CHERRI—and four entities—VATECH SARL, LE-HUA ELECTRONIC FIELD CO. LIMITED, AERO SKYONE CO. LIMITED, and LABICO SAL OFFSHORE); 80 Fed. Reg. 75,899 (Dec. 4, 2015) (two individuals—Mohammed NUR, and Mustapha CHAD).

(b) *OFAC de-listings*

In 2015, OFAC determined that ten persons that had been designated pursuant to E.O. 13224 should be removed from the Treasury Department's list of Specially Designated Nationals and Blocked Persons. Effective February 26, 2015, OFAC delisted one individual (Youssef NADA) and eight entities (ASAT TRUST REG., BA TAQWA FOR COMMERCE AND REAL ESTATE COMPANY LIMITED, BANK AL TAQWA LIMITED, NADA INTERNATIONAL ANSTALT, NADA MANAGEMENT ORGANIZATION SA, WALDENBERG, AG, YOUSSEF M. NADA, and YOUSSEF M. NADA & CO. GESELLSCHAFT M.B.H.). 80 Fed. Reg. 13,467 (Mar. 13, 2015). On June 24, 2015, OFAC delisted Son Hadi BIN MUHADJIR. 80 Fed. Reg. 38,275 (July 2, 2015).

c. *Annual certification regarding cooperation in U.S. antiterrorism efforts*

See Chapter 3 for discussion of the Secretary of State's 2015 determination regarding countries not cooperating fully with U.S. antiterrorism efforts.

d. *State sponsor of terrorism designation*

See discussion in Section 3 *supra* of the determination to rescind Cuba's designation as a state sponsor of terrorism ("SST").

7. **Russia and Ukraine**

a. *Sanctions in response to Russia's actions in Ukraine*

On March 11, 2015, OFAC designated 14 individuals and one entity pursuant to E.O. 13660, "Blocking Property of Certain Persons Contributing to the Situation in Ukraine," and one entity pursuant to E.O. 13685, "Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to the Crimea Region of Ukraine." 80 Fed. Reg. 13,957 (Mar. 17, 2015). For background on E.O. 13660, see *Digest 2014* at 646. For background on E.O. 13685, see *Digest 2014* at 651-52.

OFAC issued General Licenses 5, 6, 7, 8, and 9 under the Ukraine-related sanctions program in 2015. 80 Fed. Reg. 45,276 (July 29, 2015). General License No. 5 authorizes transactions and activities that would have been prohibited by E.O. 13685 but are necessary to wind down operations involving the Crimea region of Ukraine. General License No. 6 authorizes noncommercial, personal remittances to or from the Crimea region of Ukraine or for or on behalf of an individual ordinarily resident in the Crimea region of Ukraine. General License No. 7 authorizes the operation of accounts in U.S. financial institutions for individuals ordinarily resident in the Crimea region of Ukraine. General License No. 8 authorizes transactions related to the receipt and transmission of telecommunications and mail. General License No. 9 authorizes the

exportation of certain services and software incident to the exchange of Internet-based communications.

On July 30, 2015, OFAC blocked the property and interests in property of: four individuals and one entity pursuant to E.O. 13660; seven individuals and eight entities pursuant to E.O. 13661, “Blocking Property of Additional Persons Contributing to the Situation in Ukraine”; and six entities pursuant to E.O. 13685. 80 Fed. Reg. 47,990 (Aug. 10, 2015). Simultaneously, OFAC identified eighteen entities as subject to the prohibitions of Directive 1 (as amended) of September 12, 2014, pursuant to E.O. 13662, “Blocking Property of Additional Persons Contributing to the Situation in Ukraine” and seventeen entities as subject to the prohibitions of Directive 2 (as amended) and Directive 4 of September 12, 2014, pursuant to E.O. 13662. *Id.* The Federal Register notice lists all the persons and explains the bases for their designations. For background on E.O. 13662 and Directives 1, 2, and 4, see *Digest 2014* at 647-49.

b. *Magnitsky Act*

For background on the Sergei Magnitsky Rule of Law Accountability Act of 2012 (“Magnitsky Act”), see *Digest 2013* at 505-06.

8. Targeted Sanctions Relating to Threats to Democratic Process and Restoration of Peace, Security, and Stability

a. *Burundi*

On July 2, 2015, the Department of State announced that it was suspending several forms of assistance to Burundi in response to actions taken by the Government of Burundi, and particularly President Pierre Nkurunziza. The July 2 press statement announcing the suspension is excerpted below and available at <http://www.state.gov/r/pa/prs/ps/2015/07/244595.htm>. See Chapter 11 for a discussion of Burundi’s termination as a beneficiary under the African Growth and Opportunity Act.

* * * *

Burundian President Pierre Nkurunziza’s continued disregard for the Arusha Agreement has resulted in dozens of deaths, the exodus of over 144,000 Burundians to neighboring countries, and a freefall in the Burundian economy causing suffering to millions of Burundians. The Burundian Government’s decision to push forward with the June 29 parliamentary elections despite the complete absence of the necessary conditions for credible elections and widespread calls, including from the African Union and United Nations, to delay the voting further exacerbated an already dire situation.

With presidential elections now scheduled for July 15, the United States joins with the African Union, the United Nations, the European Union, and other regional bodies and leaders in urging President Nkurunziza to place the welfare of Burundi’s citizens above his own political

ambitions and participate in dialogue with the opposition and civil society to identify a peaceful solution to this deepening crisis. This solution should include the delay of the July 15 presidential elections until conditions are in place for free, fair, and peaceful elections.

Due to the precarious political and security situation in Burundi and the Government of Burundi's unwillingness to engage in good faith efforts to negotiate a solution, the United States has today suspended several security assistance programs on which it has cooperated with Burundi. In response to the abuses committed by members of the police during political protests, we are suspending all International Law Enforcement Academy and Anti-Terrorism Assistance training that we provide to Burundian law enforcement agencies.

Recognizing that Burundi's National Defense Force has generally acted professionally in protecting civilians during protests, the United States continues to value our partnership with the Burundian military and urges them to maintain professionalism and respect for the rule of law. However, due to the instability caused by the Burundian Government's disregard for the Arusha Agreement and its decision to proceed with flawed parliamentary elections, the United States is unable to conduct peacekeeping and other training in Burundi. As a result, the United States has suspended upcoming training for the Burundian military under the Department of Defense's Section 1206 Train and Equip program, as well as training and assistance under the Africa Military Education Program. We remain deeply concerned that the current crisis will further hamper our ability to support the important contribution of the Burundian military to international peacekeeping.

Finally, during our upcoming review of Burundi's eligibility for the trade preferences available to it under the African Growth and Opportunity Act, we will be taking into consideration ongoing violence and instability and the Government of Burundi's lack of respect for the rule of law in determining their eligibility for these trade preferences moving forward.

* * * *

On November 22, 2015, President Obama issued Executive Order 13712. 80 Fed. Reg. 73,633 (Nov. 25, 2015). He found the situation in Burundi, "which has been marked by the killing of and violence against civilians, unrest, the incitement of imminent violence, and significant political repression," constitutes the basis for declaring an emergency under IEEPA. Section 1 identifies as being subject to blocking and denial of entry into the U.S. the persons listed in the Annex to the order and:

(ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(A) to be responsible for or complicit in, or to have engaged in, directly or indirectly, any of the following in or in relation to Burundi:

- (1) actions or policies that threaten the peace, security, or stability of Burundi;
- (2) actions or policies that undermine democratic processes or institutions in Burundi;
- (3) human rights abuses;
- (4) the targeting of women, children, or any civilians through the commission of acts of violence (including killing, maiming, torture, or

rape or other sexual violence), abduction, forced displacement, or attacks on schools, hospitals, religious sites, or locations where civilians are seeking refuge, or through other conduct that may constitute a serious abuse or violation of human rights or a violation of international humanitarian law;

(5) actions or policies that prohibit, limit, or penalize the exercise of freedom of expression or freedom of peaceful assembly;

(6) the use or recruitment of children by armed groups or armed forces;

(7) the obstruction of the delivery or distribution of, or access to, humanitarian assistance; or

(8) attacks, attempted attacks, or threats against United Nations missions, international security presences, or other peacekeeping operations;

(B) to be a leader or official of:

(1) an entity, including any government entity or armed group, that has, or whose members have, engaged in any of the activities described in subsection (a)(ii)(A) of this section; or

(2) an entity whose property and interests in property are blocked pursuant to this order;

(C) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of:

(1) any of the activities described in subsection (a)(ii)(A) of this section; or

(2) any person whose property and interests in property are blocked pursuant to this order; or

(D) 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.

The persons listed in the Annex are Alain Guillaume Bunyoni (Minister of Public Security); Cyrille Ndayirukiye (Former Defense Minister); Godefroid Niyombare (Major General) and Godefroid Bizimana.

On December 18, 2015, OFAC designated four additional individuals under E.O. 13712. 80 Fed. Reg. 80,462 (Dec. 24, 2015). A State Department press statement, "United States Imposes New Sanctions, Calls for Immediate Burundi Talks," available at <http://www.state.gov/r/pa/prs/ps/2015/12/250797.htm>, includes the following about the crisis in Burundi:

The United States is gravely concerned about the ongoing crisis in Burundi and the potential for additional violence and has imposed new targeted sanctions against four individuals whose actions threaten the peace, security, and stability of Burundi.

Our senior officials remain engaged at the highest levels with regional leaders to support immediate, internationally-mediated peace talks. The United

States continues to call upon Burundian President Nkurunziza, his government, and the opposition to de-escalate tensions, refrain from further violence, and fully participate in talks. We stand ready to support the African Union and the region in taking all necessary steps – including possible deployment of an intervention force – to prevent further violence and achieve a consensual, political resolution to this crisis.

b. *Venezuela*

On March 8, 2015, President Obama issued Executive Order 13692, “Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela.” 80 Fed. Reg. 12,747 (Mar. 11, 2015). The predicate finding underlying the order is that the situation of Venezuela:

including the Government of Venezuela's erosion of human rights guarantees, persecution of political opponents, curtailment of press freedoms, use of violence and human rights violations and abuses in response to antigovernment protests, and arbitrary arrest and detention of antigovernment protestors, as well as the exacerbating presence of significant public corruption, constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States.

Seven persons are listed in the Annex as being subject to the sanctions in E.O. 13692, which include both blocking property and a prohibition on entry into the United States. In addition, Section 1(a)(ii) of the E.O. authorizes the Secretaries of Treasury and State to designate additional persons determined to meet the following criteria:

(A) to be responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or to have participated in, directly or indirectly, any of the following in or in relation to Venezuela:

(1) actions or policies that undermine democratic processes or institutions;

(2) significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014;

(3) actions that prohibit, limit, or penalize the exercise of freedom of expression or peaceful assembly; or

(4) public corruption by senior officials within the Government of Venezuela;

(B) to be a current or former leader of an entity that has, or whose members have, engaged in any activity described in subsection (a)(ii)(A) of this section or of an entity whose property and interests in property are blocked pursuant to this order;

- (C) to be a current or former official of the Government of Venezuela;
- (D) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of:
 - (1) a person whose property and interests in property are blocked pursuant to this order; or
 - (2) an activity described in subsection (a)(ii)(A) of this section; or
- (E) 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.

The White House issued a fact sheet on the new executive order, available at <https://www.whitehouse.gov/the-press-office/2015/03/09/fact-sheet-venezuela-executive-order>, and excerpted below.

* * * *

... The targeted sanctions in the E.O. implement the Venezuela Defense of Human Rights and Civil Society Act of 2014, which the President signed on December 18, 2014, and also go beyond the requirements of this legislation.

We are committed to advancing respect for human rights, safeguarding democratic institutions, and protecting the U.S. financial system from the illicit financial flows from public corruption in Venezuela.

This new authority is aimed at persons involved in or responsible for the erosion of human rights guarantees, persecution of political opponents, curtailment of press freedoms, use of violence and human rights violations and abuses in response to antigovernment protests, and arbitrary arrest and detention of antigovernment protestors, as well as the significant public corruption by senior government officials in Venezuela. The E.O. does not target the people or the economy of Venezuela.

Specifically, the E.O. targets those determined by the Department of the Treasury, in consultation with the Department of State, to be involved in:

- actions or policies that undermine democratic processes or institutions;
- significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014;
- actions that prohibit, limit, or penalize the exercise of freedom of expression or peaceful assembly; or
- public corruption by senior officials within the Government of Venezuela.

The E.O. also authorizes the Department of the Treasury, in consultation with the Department of State, to target any person determined:

- to be a current or former leader of an entity that has, or whose members have, engaged in any activity described in the E.O. or of an entity whose property and interests in property are blocked or frozen pursuant to the E.O.; or
- to be a current or former official of the Government of Venezuela;

Individuals designated or identified for the imposition of sanctions under this E.O., including the seven individuals that have been listed today in the Annex of this E.O., will have their property and interests in property in the United States blocked or frozen, and U.S. persons are prohibited from doing business with them. The E.O. also suspends the entry into the United States of individuals meeting the criteria for economic sanctions.

We will continue to work closely with others in the region to support greater political expression in Venezuela, and to encourage the Venezuelan government to live up to its shared commitment, as articulated in the OAS Charter, the Inter American Democratic Charter, and other relevant instruments related to democracy and human rights.

The President imposed sanctions on the following seven individuals listed in the Annex to the E.O.:

1. Antonio José Benavides Torres: Commander of the Strategic Region for the Integral Defense (REDI) of the Central Region of Venezuela's Bolivarian National Armed Forces (FANB) and former Director of Operations for Venezuela's Bolivarian National Guard (GNB).
 - Benavides Torres is a former leader of the GNB, an entity whose members have engaged in significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014. In various cities in Venezuela, members of the GNB used force against peaceful protestors and journalists, including severe physical violence, sexual assault, and firearms.
2. Gustavo Enrique González López: Director General of Venezuela's Bolivarian National Intelligence Service (SEBIN) and President of Venezuela's Strategic Center of Security and Protection of the Homeland (CESPPA).
 - González López is responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or has participated in, directly or indirectly, significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014. As Director General of SEBIN, he was associated with the surveillance of Venezuelan government opposition leaders.
 - Under the direction of González López, SEBIN has had a prominent role in the repressive actions against the civil population during the protests in Venezuela. In addition to causing numerous injuries, the personnel of SEBIN have committed hundreds of forced entries and extrajudicial detentions in Venezuela.
3. Justo José Noguera Pietri: President of the Venezuelan Corporation of Guayana (CVG), a state-owned entity, and former General Commander of Venezuela's Bolivarian National Guard (GNB).
 - Noguera Pietri is a former leader of the GNB, an entity whose members have engaged in significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014. In various cities in Venezuela, members of the GNB used excessive force to repress protestors and journalists, including severe physical violence, sexual assault, and firearms.
4. Katherine Nayarith Haringhton Padron: national level prosecutor of the 20th District Office of Venezuela's Public Ministry.
 - Haringhton Padron, in her capacity as a prosecutor, has charged several opposition members, including former National Assembly legislator Maria Corina Machado and, as

- of February 2015, Caracas Mayor Antonio Ledezma Diaz, with the crime of conspiracy related to alleged assassination/coup plots based on implausible—and in some cases fabricated—information. The evidence used in support of the charges against Machado and others was, at least in part, based on fraudulent emails.
5. Manuel Eduardo Pérez Urdaneta: Director of Venezuela’s Bolivarian National Police.
 - Pérez Urdaneta is a current leader of the Bolivarian National Police, an entity whose members have engaged in significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014. For example, members of the National Police used severe physical force against peaceful protesters and journalists in various cities in Venezuela, including firing live ammunition.
 6. Manuel Gregorio Bernal Martínez : Chief of the 31st Armored Brigade of Caracas of Venezuela’s Bolivarian Army and former Director General of Venezuela’s Bolivarian National Intelligence Service (SEBIN).
 - Bernal Martínez was the head of SEBIN on February 12, 2014, when officials fired their weapons on protestors killing two individuals near the Attorney General’s Office.
 7. Miguel Alcides Vivas Landino: Inspector General of Venezuela’s Bolivarian National Armed Forces (FANB) and former Commander of the Strategic Region for the Integral Defense (REDI) of the Andes Region of Venezuela’s Bolivarian National Armed Forces.
 - Vivas Landino is responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or has participated in, directly or indirectly, significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014.

* * * *

c. Burma

In 2015, the United States continued to modify sanctions in response to the government of Burma’s implementation of democratic reforms, while maintaining targeted sanctions on those who pose a threat to Burma’s peace and stability. On April 23, 2015, the State Department released a press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/04/241034.htm>, announcing the delisting of Win Aung and two of his businesses that had been designated pursuant to E.O. 13448, “Blocking Property and Prohibiting Certain Transactions Related to Burma.” The Federal Register notice of the unblocking of Win Aung identifies the two entities (DAGON INTERNATIONAL LIMITED and DAGON TIMBER LIMITED) that were delisted on the same effective date, April 23, 2015. 80 Fed. Reg. 23,856 (Apr. 29, 2015).

Effective July 9, 2015, OFAC removed from its SDN list the names of three individuals whose property had been blocked pursuant to E.O. 13310 “Blocking Property of the Government of Burma and Prohibiting Certain Transactions” and E.O. 13448. 80 Fed. Reg. 41,560 (July 15, 2015). The individuals are Thidar ZAW, Maung BO, and Soe WIN.

The Treasury Department issued General License 20 relating to Burma on December 7, 2015. The State Department released a media note on December 7, explaining the rationale for the General License—a technical fix to allow Burmese trade while maintaining sanctions on designated persons. The State Department media note is excerpted below and available in full at

<http://www.state.gov/r/pa/prs/ps/2015/12/250427.htm>.

* * * *

In response to reports of unintended interruptions of Burmese trade due to sanctions concerns with a key Rangoon port, the Treasury Department issued General License 20 (GL 20) today. GL 20 is a technical fix to support exports to and from Burma, while maintaining the integrity of U.S. sanctions and pressure on Specially Designated Nationals (SDNs).

GL 20 is aimed at solving a discrete set of problems connected to use of critical infrastructure, as sanctions concerns were disproportionately affecting exports to and from Burma. GL 20 addresses this by authorizing certain ordinarily incident transactions with SDNs in relation to exports to or from individuals or entities not subject to sanctions. Prior to GL 20, these exports may have been subject to U.S. sanctions if they transited critical Burmese infrastructure—such as ports, toll roads, or airports—in a way that involved ordinarily incident transactions in which an SDN, or any other person whose property or interests in property are blocked pursuant to the Burma sanctions, had an interest.

The United States remains committed to maintaining pressure on Burma's SDNs. GL 20 does not permit business dealings with SDNs outside the scope of transactions ordinarily incident to exports to and from Burma. For example, GL 20 does not authorize new investment with an SDN, including expansion of or upgrades to transportation facilities. Calibrated sanctions remain in place. These include, but are not limited to: a ban on new investment with the Ministry of Defense and SDNs; and a ban on the importation into the United States of Burmese-origin rubies, jadeite, and jewelry containing them.

GL 20 is not a response to the recent election and does not signal a change in U.S. sanctions policy toward Burma. Its duration is limited to six months, unless renewed or revoked. The outcome of Burma's recent elections remains to be implemented as Aung San Suu Kyi's National League for Democracy, the current government, and the military work toward a political transition that reflects the outcome of the elections and the will of the Burmese people.

Despite structural flaws, the elections were an important step forward in Burma's democratic process. The U.S. government will continue to review all of our policies in light of continued progress on a range of issues; including a full political transition to democratic civilian government; the peace process; respect for human rights of all Burma's diverse people, including the Rohingya population; and constitutional reforms.

* * * *

d. Zimbabwe

Effective September 3, 2015, OFAC removed from its list of those designated under the Zimbabwe sanctions program the names of three individuals (Louise S. NKOMO, Lovemore SEKERAMAYI, and Nathan Marwirakuwa SHAMUYARIRA) and one entity (ORYX NATURAL RESOURCES) whose property and interests in property had been blocked pursuant to Executive Order 13288 of March 6, 2003, "Blocking Property of Persons Undermining Democratic Institutions in Zimbabwe," as amended by Executive Order 13391, "Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe," and Executive Order 13469 of July 25, 2008, "Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe." 80 Fed. Reg. 54,370 (Sep. 9, 2015)

e. Liberia

On November 12, 2015, President Obama issued Executive Order 13710, terminating the emergency that had been declared in 2004 with respect to former Liberian President Charles Taylor. 80 Fed. Reg. 71,679 (Nov. 16, 2015). President Obama found that circumstances had changed in Liberia, noting in particular:

Liberia's significant advances to promote democracy and the orderly development of its political, administrative, and economic institutions, including presidential elections in 2005 and 2011, which were internationally recognized as freely held; the 2012 conviction of, and 50-year prison sentence for, former Liberian President Charles Taylor and the affirmation on appeal of that conviction and sentence; and the diminished ability of those connected to former Liberian President Charles Taylor to undermine Liberia's progress.

On December 1, 2015, OFAC identified 46 individuals and entities as no longer subject to the blocking provisions of Section 1(a) of E.O. 13348 and removed them from the Specially Designated Nationals List and Blocked Persons (SDN List) as of the effective date of Executive Order 13710. 80 Fed. Reg. 75,897 (Dec. 4, 2015). Two individuals were identified who, although they were delisted pursuant to E.O. 13348, would remain listed and subject to blocking pursuant to E.O. 13413 "Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo." *Id.*

f. South Sudan

On March 3, 2015, the UN Security Council adopted Resolution 2206, establishing a targeted sanctions regime for South Sudan. On July 1, 2015, Ambassador Power released a statement on the Security Council sanctions imposed on six South Sudanese individuals under UNSCR 2206. Her statement is excerpted below and available at <http://usun.state.gov/remarks/6386>.

* * * *

Today, the Security Council took strong action in support of a peaceful end to the conflict in South Sudan by sanctioning six South Sudanese individuals for fueling the ongoing conflict and contributing to the devastating humanitarian crisis in their country.

Major-General Marial Chanuonng Yol Mangok; Lieutenant-General Gabriel Jok Riak; Major-General Santino Deng Wol; Major-General Simon Gatwech Dual; Major-General James Koang Chuol; and Major-General Peter Gadet will now be subject to a global travel ban and asset freeze for their contributions to a conflict that has left more than 6.5 million people in need of humanitarian assistance and forced more than 2 million from their homes.

As the members of the Security Council demonstrated today, those who commit atrocities and undermine peace will face consequences. The United States joins other members of the Security Council in demanding that both parties immediately cease offensive military action and commit themselves to the difficult but necessary task of negotiating a peace agreement. Today's Council action also supports negotiation efforts by designating military leaders who all have committed abuses or violated the Cessations of Hostilities agreement. This step also responds directly to the May 22 and June 13 AU Peace and Security Council statements, which called on the Security Council to sanction those undermining the peace process.

The United States is appalled by recent reports of the targeting of women and girls for sexual abuse, including gang rape, and the burning alive of civilians in their homes, as detailed in UNMISS's June 29 human rights report on the Upper Nile region. Such allegations must be fully investigated and perpetrators held accountable. In the meantime, the way to avoid further designations is to put an end to such violence against civilians, stop the fighting and come to a peace agreement.

Next week, South Sudan will celebrate four years as an independent state. In the intervening years, however, South Sudan's political leadership has squandered the international goodwill that accompanied its independence and pursued political and economic self-interest that has produced only violence, displacement and suffering for the South Sudanese people. Political and military leaders on all sides of this conflict must put aside their self-serving ambitions, end the fighting, and engage in negotiations to establish a transitional government. The Security Council will continue to closely monitor the situation in South Sudan and stands ready to impose additional sanctions as may be warranted by the situation on the ground.

* * * *

On July 2, 2015, OFAC designated two individuals (Simon Gatwech Dual and Gabriel Jok Riak) pursuant to E.O. 13664, "Blocking Property of Certain Persons With Respect to South Sudan." 80 Fed. Reg. 39,836 (July 10, 2015).

g. 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 August 21, 2015, OFAC blocked the property of three individuals and two entities, supplemented information about an individual whose property is blocked, and removed the listing of one individual whose property had been blocked, pursuant to E.O. 13667. 80 Fed. Reg. 51,871(Aug. 26, 2015). On December 18, 2015, OFAC blocked the property of two individuals pursuant to E.O. 13667. 80 Fed. Reg. 80,462 (Dec. 24, 2015).

h. Côte d'Ivoire

On July 30, 2015, OFAC delisted two individuals who had been subject to the blocking provisions of E.O. 13396, "Blocking Property of Certain Persons Contributing to the Conflict in Côte d'Ivoire (Alcide Ilahiri DJEDJE and Pascal Affi N'GUESSAN). 80 Fed. Reg. 47,988 (Aug. 10, 2015).

i. Libya

On November 13, 2015, OFAC unblocked the property of Humayd 'ABD-AL-SALAM and removed him from the SDN list. 80 Fed. Reg. 72,146 (Nov. 18, 2015). He had been designated pursuant to E.O. 13566.

j. Balkans

Effective June 11, 2015, OFAC unblocked the property and interests in property of one individual (Milenko VRACAR) and one entity (PRIVREDNA BANKA SARAJEVO AD) designated under E.O. 13219, "Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans," as amended by E.O. 13304 "Termination of Emergencies With Respect to Yugoslavia and Modification of Executive Order 13219 of June 26, 2001." 80 Fed. Reg. 33,338 (Jun. 11, 2015).

k. Yemen

On February 24, 2015, the UN Security Council adopted resolution 2204 on Yemen. U.N. Doc. S/RES/2204 (2015). Resolution 2204 renews the sanctions regime in resolution 2140 (2014), which authorizes the sanctions committee established pursuant to resolution 2140 to designate individuals or entities as "engaging in or providing support for acts that threaten the peace, security or stability of Yemen." On April 14, 2015, the UN Security Council adopted resolution 2216 on Yemen. U.N. Doc. S/RES/2216 (2015). The resolution imposes a targeted arms embargo on Ali Abdullah Saleh, Abdullah Yahya Al Hakim, Abd Al-Khaliq Al-Huthi, and the individuals and entities designated by the sanctions committee established pursuant to resolution 2140 (2014), as well as the individuals and entities listed in the annex of the resolution, and those acting on their behalf or at their direction in Yemen. The resolution also lists, in an annex, additional

persons subject to the measures imposed in resolution 2140 (2014). For background on resolution 2140, see *Digest 2014* at 659-60.

On April 14, 2015, the United States designated two individuals pursuant to E.O. 13611, "Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen." 80 Fed. Reg. 23,329 (Apr. 27, 2015). For background on E.O. 13661, see *Digest 2012* at 530-31. The designated individuals are Ahmed Ali SALEH, former ambassador to the United Arab Emirates and former commander of the Republican Guard; and Abdel-Malek HOUTH, a leader of the Houthi group.

9. Transnational Crime

On April 16, 2015, OFAC designated three individuals pursuant to Executive Order 13581, "Blocking Property of Transnational Criminal Organizations." 80 Fed. Reg. 27,231 (May 12, 2015). For background on E.O. 13581, see *Digest 2011* at 518-19. On April 21, 2015, OFAC designated one additional individual and one entity pursuant to E.O. 13581. 80 Fed. Reg. 23,639 (Apr. 28, 2015). On November 12, 2015, OFAC designated two entities pursuant to E.O. 13581. 80 Fed. Reg. 72,147 (Nov. 18, 2015). On December 9, 2015, OFAC designated one individual pursuant to E.O. 13581. 80 Fed. Reg. 77,416 (Dec. 14, 2015).

10. Malicious Activities in Cyberspace

On April 1, 2015, President Obama issued Executive Order 13694, "Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities." 80 Fed. Reg. 18,077 (Apr. 2, 2015). The President issued the order based on his finding "that the increasing prevalence and severity of malicious cyber-enabled activities originating from, or directed by persons located, in whole or in substantial part, outside the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. The order includes property blocking provisions as well as visa sanctions. Section 1(a) of E.O. 13694, describing those who are subject to sanction, follows.

* * * *

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:

(i) any person determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be responsible for or complicit in, or to have engaged in, directly or indirectly, cyber-enabled activities originating from, or directed by persons located, in whole or in substantial part, outside the United States that are reasonably

likely to result in, or have materially contributed to, a significant threat to the national security, foreign policy, or economic health or financial stability of the United States and that have the purpose or effect of:

(A) harming, or otherwise significantly compromising the provision of services by, a computer or network of computers that support one or more entities in a critical infrastructure sector;

(B) significantly compromising the provision of services by one or more entities in a critical infrastructure sector;

(C) causing a significant disruption to the availability of a computer or network of computers; or

(D) causing a significant misappropriation of funds or economic resources, trade secrets, personal identifiers, or financial information for commercial or competitive advantage or private financial gain; or

(ii) any person determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State:

(A) to be responsible for or complicit in, or to have engaged in, the receipt or use for commercial or competitive advantage or private financial gain, or by a commercial entity, outside the United States of trade secrets misappropriated through cyber-enabled means, knowing they have been misappropriated, where the misappropriation of such trade secrets is reasonably likely to result in, or has materially contributed to, a significant threat to the national security, foreign policy, or economic health or financial stability of the United States;

(B) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, any activity described in subsections (a)(i) or (a)(ii)(A) of this section or any person whose property and interests in property are blocked pursuant to this order;

(C) 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

(D) to have attempted to engage in any of the activities described in subsections (a)(i) and (a)(ii)(A)-(C) of this section.

* * * *

On December 31, 2015, OFAC issued regulations to implement E.O. 13694. 80 Fed. Reg. 81,752 (Dec. 31, 2015). The Cyber-Related Sanctions Regulations were published in December 2015 in abbreviated form, to be supplemented with a more comprehensive set of regulations “which may include additional interpretive and definitional guidance, including regarding ‘cyber-enabled’ activities, and additional general licenses and statements of licensing policy. *Id.*

B. EXPORT CONTROLS

1. General

On May 21, 2015, Puneet Talwar, Assistant Secretary of State for the Bureau of Political-Military Affairs, delivered remarks at the Aerospace Industries Association annual spring Board of Governors meeting, held in Williamsburg, Virginia. Mr. Talwar's remarks are excerpted below and are also available at <http://www.state.gov/t/pm/rls/rm/2015/242717.htm>.

* * * *

Now, many of you know that there are serious challenges in today's defense trade market. It's a competitive marketplace with other technology. The defense budget is tight here at home. Other governments can be more aggressive and often have fewer restrictions on what they are willing to sell and to whom.

We also realize that our licensing and regulatory system is imperfect... that sometimes the waits are too long or the process too opaque. And that's exactly why we are implementing Export Control Reform—to unshackle ourselves from Cold War regulations and adapt to the 21st century... to focus our efforts on a narrower set of items that really matter... and to provide greater clarity and transparency to you in industry.

But Export Control Reform is not a panacea. Which is why we're also refining other tools at our disposal.

Today, I'd like to discuss three objectives we have outlined in this area—and three specific actions we are taking to improve our defense trade advocacy.

First, when we in government work together, we are much more effective and powerful. It's true that there are many players in the security cooperation enterprise and we do a lot to coordinate. I could throw so many acronyms and names at you: the Arms Transfer Technology Steering Group; the Security Cooperation Enterprise Group; the Senior Warfighter Integration Group's work to expedite procurement.

But there are instances—specific sales—that require a tailored, unified effort to advocacy. That's why we are building a single group, the Defense Advocacy Working Group, to identify areas that require heightened communication and an extra advocacy effort. At our different agencies, we share the same goals, but we don't always synchronize our actions as well as we should. One central list and one central advocacy working group will lock in coordination from start to finish.

I'll give you an example. Over the past year, we've piloted this process for our advocacy with Poland, which as many of you know is engaged in a historic \$45 billion defense modernization program. Across every agency, we supported and advocated for U.S. solutions to Poland's missile defense needs. Deputy Assistant Secretary Greg Kausner and Admiral Rixey travelled to Warsaw. You may have seen in the press that the Defense Department put PATRIOTs on display at a strategic time. And we had senior-level engagement to help move the

ball forward. And as a result, the successful sale means supporting American jobs at home, deepening interoperability, and strengthening the security of Poland, a stalwart NATO ally.

This approach is proven—and we are now working to build on the success we saw with Poland elsewhere around the world.

Second, we in government need to project power in a more coordinated way at trade shows. Running into each other for the first time at the pavilions just doesn't cut it. We need to do a better job coordinating our meetings, delivering consistent messages, and identifying areas we want to target. Some of you have likely seen progress already, as we are getting more in sync with each other. We want to build on this progress and are establishing an interagency working group to ensure that this coordination becomes institutionalized. Admiral Rixey's deputy, Jenn Zakriski and I will be going to the Paris Air Show next month, and we're looking forward to arriving ready with a common strategy for targeted outreach and advocacy.

Third, we need to be more transparent and responsive to industry. As our partners in the private sector, you should be able to ask us any time about our objectives. And you shouldn't have to go agency to agency to get answers.

That's why, starting in July, we are launching a senior-level, quarterly industry outreach forum to have a two-way conversation with you. This quarterly forum will allow us to get input from you, assess upcoming sales, and build an advocacy strategy rooted in unity.

I know these three changes may not seem earthshattering. But as leaders of large companies, you know that sometimes different arms of your organizations don't talk to each other as well as they should. You've probably spent a lot of time on breaking down stovepipes, and you know it can have a huge impact. When we have all the oars in the water, rowing at the same time, we improve the outcome for all of us.

Yes, these are targeted actions, but we think their impact can be quite significant. Coordinating earlier and more often. Projecting our power, together, at trade shows. And continuing to deepen our engagements with industry.

Again, we have to do these things because it's in our interest. Because the demands for our leadership are growing. Because we are more engaged in more places than ever before. You can see it in the headlines—whether it's in the GCC or talks with Iran—but you can also see it in the trendlines that we're so focused on, in the Asia-Pacific, where 60 percent of the world's population is... where half of all GDP growth outside the U.S. is expected to come from in the next four years... where over half the world's maritime commerce flows. And it's security that underpins the economic growth—and the tremendous potential—that we are seeing in that region.

* * * *

2. Export Control Litigation

Defense Distributed, et al. v. United States Department of State, et al.

On April 29, 2015, plaintiffs—Defense Distributed, a non-profit organization that designs firearms, and the Second Amendment Foundation (“SAF”)—filed an action against the Department of State, Secretary of State, Directorate of Defense Trade Controls (“DDTC”), and DDTC employees, asserting five claims related to a prepublication approval requirement imposed for the export of “technical data” related to “defense

articles” under the International Traffic in Arms Regulations (“ITAR”). *Def. Distributed v. U.S. Dep’t of State*, 121 F. Supp. 3d 680, 688 (W.D. Tex. 2015). Specifically, the plaintiffs asserted that the requirement constituted: “(1) an ultra vires government action; (2) a violation of their rights to free speech under the First Amendment; (3) a violation of their right to keep and bear arms under the Second Amendment; and (4) a violation of their right to due process of law under the Fifth Amendment. Plaintiffs also contend the violations of their constitutional rights entitled them to monetary damages under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).” *Id.* The plaintiffs sought “a preliminary injunction enjoining the enforcement of any prepublication approval requirement against unclassified information under the ITAR,” *id.*, specifically as to computer files used for the three-dimensional “printing” of firearms and components that Defense Distributed sought to make publicly available through its website. Excerpts below (with footnotes omitted) from the opinion denying the preliminary injunction explain why the district court concluded that the plaintiffs did not show a substantial likelihood of success on the merits of their First and Second Amendment claims.

* * * *

Plaintiffs next argue Defendants’ interpretation of the AECA violates their First Amendment right to free speech. In addressing First Amendment claims, the first step is to determine whether the claim involves protected speech, the second step is to identify the nature of the forum, and the third step is to assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

As an initial matter, Defendants argue the computer files at issue do not constitute speech and thus no First Amendment protection is afforded. . . . Although the precise technical nature of the computer files at issue is not wholly clear to the Court, Plaintiffs made clear at the hearing that Defense Distributed is interested in distributing the files as “open source.” That is, the files are intended to be used by others as a baseline to be built upon, altered and otherwise utilized. Thus, at least for the purpose of the preliminary injunction analysis, the Court will consider the files as subject to the protection of the First Amendment.

* * * *

The ITAR, on its face, clearly regulates disclosure of “technical data” relating to “defense articles.” The ITAR thus unquestionably regulates speech concerning a specific topic. Plaintiffs suggest that is enough to render the regulation content-based, and thus invoke strict scrutiny. Plaintiffs’ view, however, is contrary to law. The Fifth Circuit rejected a similar test, formulated as “[a] regulatory scheme that requires the government to ‘examine the content of the message that is conveyed’ is content-based regardless of its motivating purpose,” finding the proposed test was contrary to both Supreme Court and Fifth Circuit precedent. *Asgeirsson*, 696 F.3d at 460.

The ITAR does not regulate disclosure of technical data based on the message it is communicating. The fact that Plaintiffs are in favor of global access to firearms is not the basis

for regulating the “export” of the computer files at issue. Rather, the export regulation imposed by the AECA is intended to satisfy a number of foreign policy and national defense goals, as set forth above. Accordingly, the Court concludes the regulation is content-neutral and thus subject to intermediate scrutiny. *See United States v. Chi Mak*, 683 F.3d 1126, 1135 (9th Cir.2012) (finding the AECA and its implementing regulations are content-neutral).

The Supreme Court has used various terminologies to describe the intermediate scrutiny standard. ...The Court will employ the Fifth Circuit’s most recent enunciation of the test, under which a court must sustain challenged regulations “if they further an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 641 (5th Cir.2012)

The Court has little trouble finding there is a substantial governmental interest in regulating the dissemination of military information. Plaintiffs do not suggest otherwise. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010) (noting all parties agreed government’s interest in combating terrorism “is an urgent objective of the highest order”). Nor do Plaintiffs suggest the government’s regulation is directed at suppressing free expression. Rather, they contend the regulations are not sufficiently tailored so as to only incidentally restrict their freedom of expression.

* * * *

Plaintiffs’ challenge here is based on their contention that Defendants have applied an overbroad interpretation of the term “export.” Specifically, Plaintiffs argue that viewing “export” as including public speech, including posting of information on the Internet, imposes a burden on expression which is greater than is essential to the furtherance of the government’s interest in protecting defense articles.

But a prohibition on Internet posting does not impose an insurmountable burden on Plaintiffs’ domestic communications. This distinction is significant because the AECA and ITAR do not prohibit domestic communications. As Defendants point out, Plaintiffs are free to disseminate the computer files at issue domestically in public or private forums, including via the mail or any other medium that does not provide the ability to disseminate the information internationally.

* * * *

The Court also notes, as set forth above, that the ITAR provides a method through the commodity jurisdiction request process for determining whether information is subject to its export controls. *See* 22 C.F.R. § 120.4 (describing process). The regulations include a ten day deadline for providing a preliminary response, as well as a provision for requesting expedited processing. 22 C.F.R. § 120.4(e) (setting deadlines). Further, via Presidential directive, the DDTC is required to “complete the review and adjudication of license applications within 60 days of receipt.” 74 Fed.Reg. 63497 (December 3, 2009). Plaintiffs thus have available a process for determining whether the speech they wish to engage in is subject to the licensing scheme of the ITAR regulations.

Accordingly, the Court concludes Plaintiffs have not shown a substantial likelihood of success on the merits of their claim under the First Amendment.

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The Second Amendment provides: “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. The Supreme Court has recognized that the Second Amendment confers an individual right to keep and bear arms. *See District of Columbia v. Heller*, 554 U.S. 570, 595, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). The Fifth Circuit uses a two-step inquiry to address claims under the Second Amendment. The first step is to determine whether the challenged law impinges upon a right protected by the Second Amendment—that is, whether the law regulates conduct that falls within the scope of the Second Amendment’s guarantee. The second step is to determine whether to apply intermediate or strict scrutiny to the law, and then to determine whether the law survives the proper level of scrutiny. *Nat’l Rifle Ass’n*, 700 F.3d at 194.

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While the founding fathers did not have access to such [three-dimensional printing] technology, Plaintiffs maintain the ability to manufacture guns falls within the right to keep and bear arms protected by the Second Amendment. Plaintiffs suggest, at the origins of the United States, blacksmithing and forging would have provided citizens with the ability to create their own firearms, and thus bolster their ability to “keep and bear arms.” While Plaintiffs’ logic is appealing, Plaintiffs do not cite any authority for this proposition, nor has the Court located any. The Court further finds telling that in the Supreme Court’s exhaustive historical analysis set forth in *Heller*, the discussion of the meaning of “keep and bear arms” did not touch in any way on an individual’s right to manufacture or create those arms. The Court is thus reluctant to find the ITAR regulations constitute a burden on the core of the Second Amendment.

The Court will nonetheless presume a Second Amendment right is implicated and proceed with the second step of the inquiry, determining the appropriate level of scrutiny to apply. Plaintiffs assert strict scrutiny is proper here, relying on their contention that a core Second Amendment right is implicated. However, the appropriate level of scrutiny “depends on the nature of the conduct being regulated *and* the degree to which the challenged law burdens the right.” *Nat’l Rifle Ass’n*, 700 F.3d at 195 (emphasis added).

The burden imposed here falls well short of that generally at issue in Second Amendment cases. SAF members are not prevented from “possess[ing] and us[ing] a handgun to defend his or her home and family.” *Id.* at 195 (citations omitted). . . . In this case, SAF members are not prohibited from manufacturing their own firearms, nor are they prohibited from keeping and bearing other firearms. Most strikingly, SAF members in the United States are not prohibited from acquiring the computer files at issue directly from Defense Distributed. The Court thus concludes only intermediate scrutiny is warranted here. *See also Nat’l Rifle Ass’n of Am., Inc. v. McCraw*, 719 F.3d 338, 347–48 (5th Cir.2013), *cert. denied* *700, — U.S. —, 134 S.Ct. 1365, 188 L.Ed.2d 297 (2014) (applying intermediate scrutiny to constitutional challenge to state statute prohibiting 18–20–year–olds from carrying handguns in public).

As reviewed above, the regulatory scheme of the AECA and ITAR survives an intermediate level of scrutiny, as it advances a legitimate governmental interest in a not unduly

burdensome fashion. *See also McCraw*, 719 F.3d at 348 (statute limiting under 21-year-olds from carrying handguns in public advances important government objective of advancing public safety by curbing violent crime); *Nat'l Rifle Ass'n*, 700 F.3d at 209 (“The legitimate and compelling state interest in protecting the community from crime cannot be doubted.”). Accordingly, the Court finds Plaintiffs have not shown a substantial likelihood of success on the merits.

3. Export Control Reform

In 2015, the U.S. Government continued to propose new rules to carry out extensive export control reforms. *See Digest 2013* at 515-16 for a discussion of the initial sets of new rules reforming U.S. export controls. Rules proposed in 2015 include revisions to several categories of the U.S. Munitions List, 80 Fed. Reg. 34,572 (Jun. 17, 2015), 80 Fed. Reg. 25,821 (May 5, 2015); revisions to definitions in the ITAR, 80 Fed. Reg. 31,525 (Jun. 3, 2015); and revisions to licensing and registrations provisions of the ITAR, 80 Fed. Reg. 30,001 (May 26, 2015), 80 Fed. Reg. 29,565 (May 22, 2015).

Cross References

Visa Waiver Program changes relating to terrorism, **Chapter 1.B.2.**

Visa restrictions and limitations, **Chapter 1.B.3.**

Foreign terrorist organizations, **Chapter 3.B.1.**

Organized crime, **Chapter 3.B.5.**

Designations under the International Religious Freedom Act, **Chapter 6.L.1.a.**

Relations with Cuba, **Chapter 9.A.3.**

Aviation arrangement with Cuba, **Chapter 11.A.3.**

Termination of Burundi as beneficiary under AGOA, **Chapter 11.D.2.b.**

Syria, **Chapter 17.B.2.**

Burundi, **Chapter 17.B.3.**

Central African Republic, **Chapter 17.B.4.**

South Sudan, **Chapter 17.B.8.**

Burma, **Chapter 17.B.9.**

Yemen, **Chapter 17.B.11**

North Korea, **Chapter 19.B.6.a.**

Iran, **Chapter 19.B.6.b.**

Syria chemical weapons, **Chapter 19.D.2.**

CHAPTER 17

International Conflict Resolution and Avoidance

A. MIDDLE EAST PEACE PROCESS

On January 15, 2015, U.S. Permanent Representative to the UN Samantha Power addressed a Security Council debate on the Middle East. Her remarks regarding Middle East peace are excerpted below. Ambassador Power's January 15, 2015 remarks—which also address Syria and Lebanon—are available in full at <http://usun.state.gov/remarks/6340>.

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Lastly, let me turn to the Middle East. For decades, the United States ...has worked to try to help achieve a comprehensive end to the Israeli-Palestinian conflict. Immense though the challenges may be, we firmly believe that they can and must be overcome because the status quo is unsustainable. We remain committed to achieving the peace that both Palestinians and Israelis deserve: two states for two peoples, with a sovereign, viable and independent Palestine living side by side, in peace and security, with a Jewish and democratic Israel.

As you know, on December 30th, the United States voted against a Security Council draft resolution. We made our position clear: the resolution, which was hastily put to a vote, would have taken us further from, and not closer to, an atmosphere that makes it possible to achieve two states for two peoples. Since that vote, the United States, represented in particular by Secretary Kerry, has reached out to both parties in an effort to try to reduce tensions and find a path forward. The Quartet Envoys will meet at the end of this month to discuss the way ahead.

We continue to oppose unilateral actions by both sides that we view as detrimental to the cause of peace. Palestinian efforts to join the Rome Statute of the International Criminal Court and to accede to a number of international treaties are counter-productive and will not advance the aspirations of the Palestinian people for a sovereign and independent state. We urge both

parties to exercise maximum restraint and avoid steps that threaten to push Israeli-Palestinian relations into a cycle of further escalation.

As we continue to work towards Israeli-Palestinian peace, we share the UN's deep concern regarding the situation in Gaza. All sides must work together to accelerate efforts and increase support for rebuilding through the Gaza reconstruction mechanism. The humanitarian needs are considerable, particularly in the harsh winter months. In December, the United States announced an initial \$100 million contribution for UNRWA's 2015 needs, including in Gaza. We encourage other states to make pledges, and to promptly deliver the funds that they have already promised to fully meet those urgent needs.

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The Middle East "Quartet"—the United States Secretary of State, the Foreign Minister of the Russian Federation, the UN Secretary General, and the EU High Commissioner—met on February 8, 2015 in Munich, Germany and issued a statement, excerpted below and available at <http://www.state.gov/r/pa/prs/ps/2015/02/237291.htm>.

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Recalling its previous statements, the Quartet discussed the situation in the region. The Quartet underlined the importance of the parties resuming negotiations as soon as possible, with a view to reaching a just, lasting and comprehensive peace on the basis of UN Security Council resolutions 242 and 338, the Madrid Principles including land for peace and the agreements previously reached between the parties. A sustainable peace requires the Palestinians' aspirations for statehood and sovereignty and those of Israelis for security to be fulfilled through negotiations based on the two-state solution.

To that end, the Quartet recalled the importance of the Arab Peace Initiative—with its vision for a comprehensive settlement of the Arab-Israeli conflict—and the vital role of Arab partners. The Quartet will remain actively engaged in preparing for a resumption of the peace process in the coming period, including regular and direct outreach to Arab states.

Pending the resumption of negotiations, the Quartet called on both parties to refrain from actions that undermine trust or prejudge final status issues.

The Quartet underscored the importance of ensuring that the acute fiscal challenges faced by the Palestinians are addressed and of supporting Palestinian institution-building efforts.

The Quartet is deeply concerned over the difficult situation in Gaza where the pace of reconstruction needs to be accelerated to address the basic needs of the Palestinian population and to ensure stability. The Quartet Principals stressed that donor funding is critical. They expressed support for the recent joint letter by Egypt and Norway, as well as the joint statement by the Secretary-Generals of the United Nations and the League of Arab States, urging donors to disburse as soon as possible their financial commitments made at the October 2014 Cairo Conference, including the funding of UN agencies carrying out vital operations in Gaza for both the refugee and non-refugee populations.

The Quartet Principals expressed their warm appreciation for the tireless work of outgoing UN Special Coordinator for the Middle East Peace Process, Robert Serry.

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The Quartet met again in New York on September 30 and issued a statement, excerpted below. The Quartet Principals' Statement of September 30, 2015 is also available at <http://www.state.gov/r/pa/prs/ps/2015/09/247665.htm>.

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The Quartet agreed to consult with Egyptian Foreign Minister Sameh Shoukry, Jordanian Foreign Minister Nasser Judeh, Saudi Arabian Foreign Minister Adel al-Jubeir, and Secretary-General of the League of Arab States Nabil Elaraby, as part of its regular and direct outreach to key Arab partners. The Quartet also agreed to hear from other stakeholders from the international community. The Quartet emphasized the importance of constructive international contributions to advancing a comprehensive peace and affirmed that it will continue its outreach efforts.

The Quartet reaffirmed its steadfast commitment to achieving a two-state outcome that meets Israeli security needs and Palestinian aspirations for Statehood and sovereignty, ends the occupation that began in 1967 and resolves all permanent status issues in order to end the conflict. It recalled its previous statements and relevant Security Council resolutions and pledged its active support for a just, comprehensive and lasting resolution of the Palestinian-Israeli conflict on the basis of United Nations Security Council resolutions 242 (1967) and 338 (1973). It noted that the intensifying threat of terrorism, sectarian extremism and radicalization in the Middle East reinforces the need to pursue a negotiated two-State solution.

The Quartet noted with deep concern recent violence and escalating tensions surrounding the holy sites in Jerusalem and called upon all parties to exercise restraint, refrain from provocative actions and rhetoric, and preserve unchanged the status quo at the holy sites in both word and practice.

The Quartet expressed its serious concern that current trends on the ground—including continued acts of violence against Palestinians and Israelis, ongoing settlement activity and the high rate of demolitions of Palestinian structures—are dangerously imperiling the viability of a two-State solution. The Quartet condemned in the strongest possible terms violence against Israeli and Palestinian civilians and reiterated that unilateral actions by either party cannot prejudice the outcome of a negotiated solution.

The Quartet underscored that the status quo is not sustainable and stressed the importance of both sides' demonstrating, through policies and actions, a genuine commitment to a two-State solution in order to rebuild trust and avoid a cycle of escalation. The Quartet expressed strong support for concrete and significant steps that will help stabilize the situation, reverse current trends by showing meaningful progress towards creating a two-State reality on the ground and restore hope among Palestinians and Israelis that a negotiated peace is possible.

The Quartet acknowledged Israel's recent steps to ease certain restrictions in the West Bank and Gaza. It noted that positive and significant policy shifts, particularly in Area C, will be critical to increasing the Palestinian Authority's ability to address key economic, security and institutional challenges, and can be advanced while respecting Israel's legitimate security needs. Consistent with the transition to greater Palestinian civil authority contemplated by prior

agreements, progress in the areas of housing, water, energy, communications, agriculture and natural resources will significantly increase economic opportunities, empower Palestinian institutions and enhance stability and security for both Israelis and Palestinians.

The Quartet stressed that the Palestinian commitment to building institutions, improving governance and strongly opposing incitement and violence in all forms remains critically important to laying the groundwork for a viable independent Palestinian State living side by side in peace and security with Israel. The Quartet expressed support for the Palestinians to achieve genuine national unity on the basis of the Palestine Liberation Organization (PLO) principles. The Quartet noted the importance of ensuring that the governance framework of the West Bank and Gaza is integrated under the single legitimate authority that takes control of the border crossings in Gaza, implements civil service integration and pays public sector salaries. The Quartet urged an immediate focus on accelerating efforts to address the dire situation in Gaza, emphasized the importance of increased access through legal crossings and called on all international partners to expedite the disbursement of their pledges made at the Cairo Conference in October 2014.

The Quartet stands ready to support initiatives to advance these objectives in order to achieve a comprehensive two-State solution. The Quartet stressed the importance of continued support from key stakeholders in the region, and noted the significance and importance of the Arab Peace Initiative with its vision for a comprehensive settlement of the Arab-Israeli conflict and the opportunity for building a regional security framework. ...

The Quartet Envoys will engage directly with the parties in order to explore concrete actions both sides can take to demonstrate their genuine commitment to pursuing a two-State solution, including encouraging efforts to agree on significant steps, consistent with prior agreements, that benefit Israelis and Palestinians. The Envoys will also build on their outreach to regional States and international partners to examine how they may contribute to a comprehensive resolution of the conflict and will report back to the Quartet Principals.

excerpts

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Secretary Kerry met with senior Palestinian and Israeli leadership in November to discuss how to advance the goals in the September 30th Quartet statement, Also in November, Prime Minister Netanyahu met with President Obama and Secretary Kerry to discuss how to resume the peace process. See U.S. explanation of vote on UN General Assembly resolutions on Israel, November 24, 2015, available at <http://usun.state.gov/remarks/7010>. See also discussion in Chapter 7 of U.S. opposition to bias against Israel at the UN.

B. PEACEKEEPING AND CONFLICT RESOLUTION

1. Peacekeeping Generally

President Obama convened a summit on peacekeeping for heads of state and government of UN member states in New York on September 28, 2015. Daily Comp. Pres. Docs. 2015 DCPD No. 00660 (Sep. 28, 2015). President Obama's remarks at the

summit are excerpted below. President Obama’s speech references an announcement of enhanced U.S. support for UN peace operations. That support is detailed in a September 28, 2015 Memorandum from the President to Heads of Executive Departments and Agencies. Daily Comp. Pres. Docs. 2015 DCPD No. 00663 (Sep. 28, 2015).

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The word “peacekeeping” does not appear in the Charter of the United Nations. But for the past seven decades, our collective ability to “maintain international peace and security” has often depended on the willingness of courageous U.N. peacekeepers to put their lives on the line in war-torn corners of the world.

Over the years—from El Salvador to Namibia, from Liberia to Timor-Leste—more than 1 million men and women in blue helmets have prevented violence and preserved peace. They have saved lives. They’ve given societies a chance to rebuild. Through bitter experience, in places like Bosnia and Rwanda, we’ve learned painful lessons, and we’ve worked to do better. Right now, as we speak, more than 100,000 troops and police are deployed around the world: training police in Haiti, promoting stability in Lebanon, protecting civilians in South Sudan. And down the decades, more than 3,300 peacekeepers, as well as many police and civilian staff, have made the ultimate sacrifice. The United Nations and the United States salutes them all.

We know that peace operations are not the solution to every problem, but they do remain one of the world’s most important tools to address armed conflict. And I called for this summit because U.N. peacekeeping operations are experiencing unprecedented strains. Old challenges persist: Too few nations bear a disproportionate burden of providing troops, which is unsustainable. Atop this, we’ve seen new challenges: more armed conflicts, more instability driven by terrorism and violent extremism, and more refugees.

As a consequence, peacekeepers head into more difficult and deadlier conflicts. They’re given ambitious mandates and charged with increasingly dangerous and complex missions. Just yesterday, a U.N. peacekeeper was killed in Darfur, and we’ve seen reports today of a tragic incident in the Central African Republic. Put simply, the supply of well-trained, well-equipped peacekeepers can’t keep up with the growing demand.

So we are here today, together, to strengthen and reform U.N. peacekeeping because our common security demands it. This is not something that we do for others, this is something that we do collectively because our collective security depends on it.

As the largest financial contributor to the U.N. peacekeeping operations, the United States intends to continue to do its part. And today I’m issuing new Presidential guidance—the first in more than 20 years—to expand our support for U.N. peace operations. Like the nations participating today, we’ll pledge additional resources. We’ll work to double the number of U.S. military officers serving in peacekeeping operations. We will offer logistical support, including our unrivaled network of air- and sealift. When there’s an urgent need and we’re uniquely positioned to help, we’ll undertake engineering projects like building airfields and base camps for new missions. And we’ll step up our efforts to help build the U.N.’s capacity, from identifying state-of-the-art technology to offering training to protection against IEDs.

And together, there’s much more we need to do together. So let me briefly suggest several key areas where we can focus. First, more nations need to contribute more forces. We are

joined today by countries from every region of the world. And I want to thank those who already do so much, and commend those who have come here prepared to do more. At this summit, more than 50 countries—from Bangladesh to Colombia, from Finland to China—are making commitments totaling more than 30,000 new troops and police. And they're stepping up with critical contributions like medical units, helicopters, and capabilities to counter IEDs, which will help peacekeepers be able to stay safe and succeed in their missions. This all represents significant progress, and over the coming years, I believe more nations can make even more contributions.

Second, we need to improve the protection of civilians. Unlike 20 years ago, today's U.N. peacekeepers have the clear authority to safeguard the innocent, but it is still applied unevenly. That's why the principles and best practices for civilian protection laid out in Kigali are so important. Because for innocent people caught in the crossfire in places like South Sudan, the actions of U.N. peacekeepers can mean the difference between life and death.

At the same time, we have to candidly acknowledge that abuse by peacekeepers has to end. I want to be very clear: The overwhelming number of peacekeepers serve with honor and decency in extraordinarily difficult situations. But we have seen some appalling cases of peacekeepers abusing civilians—including rape and sexual assault—and that is totally unacceptable. It's an affront to human decency. It undermines the core mission because it erodes trust with communities. It has a corrosive effect on global confidence in peacekeeping itself.

So, Mr. Secretary-General, we commend you for leading on this issue and insisting on accountability, and we know you cannot solve this problem alone. As leaders and as an international community, we have to insist on zero tolerance for abuse—zero.

Third, we need to reform and modernize peace operations because today's complex conflicts demand it. And that means putting in place the highest caliber, merit-based leadership teams for every single mission. It means making sure we get more women leaders into critical roles. It means planning the rules for operations in the field and not in conference rooms.

Our goal should be to make every new peace operation more efficient and more effective than the last. Beyond strengthening U.N. peacekeeping, the United States also supports developing new and deeper partnerships between the U.N. and the African Union to provide reliable support for AU peace operations. And we look forward to hearing concrete proposals from our African partners to advance this work.

Finally, we need to increase our support of the full range of U.N. diplomatic tools—including mediation, Envoys, and special political missions—which help us to prevent conflicts in the first place. We cannot expect peacekeeping operations to succeed unless the parties involved are willing and committed to making peace.

Now, if we do all these things, if we provide the support and embrace the reforms that I've described today, I believe we can strengthen peace operations for decades to come. Because we know—we can be certain—that in the years ahead, as conflicts arise, the call will go out to those men and women in blue helmets to restore calm and to keep the peace and to save lives. And when they go, their success and their lives will depend on whether they have the training and the forces and the capabilities and the global support they need to succeed in their mission. The decisions and the commitments we make today can help ensure that they do. I want to thank all of you for your partnership and the commitments that your nations are making here. We will hear some extraordinary commitments from a number of nations. And we are very proud that the international community has responded to this call in such a significant way. Rest assured that, in this critical work, the United States will be a strong partner to all of you.

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The outcome of the summit on peacekeeping was a joint statement by leaders of UN member states declaring their support for the institution of UN peacekeeping on the 70th anniversary of the UN. Daily Comp. Pres. Docs. 2015 DCPD No. 00661 (Sep. 28, 2015). Governments of the following countries joined in the declaration on UN peacekeeping: Armenia, Australia, Bangladesh, Cambodia, Chile, China, Colombia, Croatia, Czech Republic, Denmark, Ethiopia, Finland, Fiji, France, Georgia, Germany, Ghana, India, Indonesia, Italy, Japan, Malaysia, Nepal, Netherlands, Norway, Pakistan, Peru, Republic of Korea, Romania, Rwanda, Turkey, Senegal, Serbia, Sierra Leone, Spain, Sri Lanka, Sweden, Thailand, Ukraine, United States, United Kingdom, Uruguay, and Vietnam. The joint statement follows.

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As the United Nations marks its seventieth anniversary, we recognize that, for sixty-seven years, its Member States have called and depended upon United Nations peacekeeping operations to help maintain international peace and security around the world. Since 1948, UN peacekeeping has evolved through tragedy and triumph to meet new security threats and challenges as the world itself, and environments in which peacekeepers are deployed, has changed dramatically. We salute the sacrifices of the brave peacekeepers, who deploy to volatile and dangerous locations throughout the world to serve humanity and the cause of peace. Today, we celebrate the essential role that UN peacekeeping plays in bringing security, hope and peace to millions of people, redouble our efforts to ensure that peacekeeping operations succeed in meeting this challenge and underscore our commitment to the highest standards of professionalism and conduct.

We believe that the effectiveness of UN peacekeeping operations is the responsibility of all Member States and relies particularly on partnerships among the Security Council, Troop and Police Contributing Countries, financial contributors, host countries, the UN Secretariat and regional organizations. We, therefore, welcome the convening of the regional meetings on peacekeeping held in Ethiopia, Indonesia, Rwanda, the Netherlands and Uruguay, with the aim of strengthening cooperation among relevant actors, as well as contributing to improving the UN peacekeeping architecture overall. We underscore the need to enhance consultations between the members of the Security Council and relevant Member States contributing personnel to UN peacekeeping operations to seek a shared understanding of the mandates and a common commitment to their implementation.

Today, we recommit ourselves to modernizing UN peacekeeping operations to ensure their success. We are committed to doing our part to further strengthen peacekeeping, underscored by the additional significant commitments to UN peacekeeping announced today, which will help meet persistent capacity gaps, improve the performance and capabilities of uniformed personnel, support rapid deployment and reinforce and enhance the foundation for future peacekeeping efforts. To achieve this goal, we also call on Member States to join us in making additional commitments to UN peacekeeping.

These contributions must be accompanied by reforms in how UN peacekeeping is organized and supported. We welcome the efforts to advance the cause of reform through the report of the Secretary-General, entitled “The Future of Peace Operations: Implementation of the Recommendations of the High-Level Independent Panel on Peace Operations,” and the report of the High-Level Independent Panel on Peace Operations (hereinafter, “the Panel”) and look forward to discussing the Secretary-General’s recommendations, where applicable, in an appropriate intergovernmental forum. We underscore the need for a truly integrated mission planning and assessment process that fuses operations and logistics with political goals; strengthened evaluation of operational readiness and performance; improved human resources management and procurement practices that enable missions to deploy more quickly, effectively and flexibly; intelligence capabilities, which identify threats to UN personnel and facilitate the effective implementation of mandates; capable and accountable leadership in peacekeeping operations and merit-based leadership selection, with due consideration for geographical representation; and a more effective peace and security bureaucracy at the UN Headquarters. We stress the need to increase the participation of women and incorporate gender perspectives in UN peacekeeping.

We affirm that proper conduct by, and discipline over, all personnel deployed in UN peacekeeping operations are vital to their effectiveness. In particular, sexual exploitation and abuse by UN peacekeepers, including all civilian staff deployed to UN peacekeeping operations, against anyone is unacceptable. We reaffirm our support for the UN “zero tolerance” policy on all forms of sexual exploitation and abuse. We call on the Secretary-General to continue to strengthen the Organization’s prevention, enforcement and remediation efforts. We are committed to taking serious and concerted action to combat sexual exploitation and abuse, including rigorous vetting and training of uniformed personnel to be deployed to UN peacekeeping operations, as well as swift and thorough investigations, appropriate accountability measures and timely reporting to the United Nations on all incidents.

We underline that the protection of civilians is a solemn responsibility we all share. Failure to protect civilians not only risks lives, but also undermines the credibility and legitimacy of UN peacekeeping. We are committed to ensuring that our uniformed personnel deployed in peacekeeping operations are properly trained on UN policies and guidance on the protection of civilians, including on the use of force consistent with the operation’s mandate and rules of engagement. We underline our commitment to investigate and, as appropriate, discipline uniformed personnel if they fail to fulfill their mandate to protect civilians. In this regard, we take note of the initiative by Member States to develop, as relevant, the best practices set out in the Kigali Principles.

We express our firm commitment to the safety and security of UN peacekeepers. We note with concern the evolving threats they face working in dangerous environments. We underscore the critical importance of strengthening casualty response. We call on all Member States and the UN to prioritize the generation of capabilities in these areas, to work to ensure the availability and appropriate control over aviation assets to improve medical evacuation and to strengthen UN standards of emergency care. We underscore the importance of respect for the freedom of movement of UN peacekeepers. We call on host countries to cooperate fully with, and provide unhindered access to, UN peacekeepers to enable them to carry out their duties, in accordance with their mandates.

We acknowledge the critical role played by subregional and regional organizations in confronting some of the world’s most difficult stabilization challenges, and underscore our

commitment to supporting deeper partnerships and cooperation between the UN and such regional organizations to address threats to international peace and security. We underscore that UN peacekeeping operations are a means to support sustainable political solutions to armed conflicts and to contribute to the conditions for durable peace. We highlight that UN peacekeeping operations are most effective when they support an end to violent conflicts, shore up the confidence of all parties to pursue the peaceful resolution of disputes and aid in advancing the cause of peace. We affirm the primary importance of efforts to mitigate and prevent conflict, including through the use of UN mediation, good offices and special political missions.

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On November 5, 2015, Ambassador David Pressman, Alternate Representative to the UN for Special Political Affairs, addressed the UN General Assembly Fourth Committee's comprehensive review of peacekeeping operations. His remarks are excerpted below and available at <http://usun.state.gov/remarks/6961>.

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The Secretary-General has laid before us a detailed and comprehensive plan for enabling UN peacekeepers to carry out their mandates in dangerous and difficult environments.

The United States sees several key priorities: preventing atrocities and protecting civilians; empowering and enabling those in the field to respond rapidly and flexibly to changing situations; firmly establishing the rule of law; and preventing and ensuring accountability for serious misconduct, in particular, sexual exploitation and abuse.

The protection of civilians remains the central task of today's peacekeeping missions, and we recognize the importance of the Kigali Principles, as President Obama said in September. In addition, we are very conscious of the critical work being done in UN peace operations by specialized protection advisors, who focus on the special needs and vulnerabilities of children and the prevention of and response to conflict-related sexual violence, and we must ensure that these issues receive the continuing attention they deserve.

We welcome the 10th annual gathering next week of all of the Police Commissioners from UN peacekeeping operations to consult in New York City, and we also welcome and value the Commissioners' briefing to the UN Security Council and hope that becomes an annual tradition as well. This year's 'Police Week' will take place in the context of the Secretary-General's instruction for a full external review of police functions, structure and capacity, as well as the Police Division's continuing work to develop a strategic guidance framework for UN policing and to establish common standards for training and performance for the 110 nations that contribute policing support. As we learned in South Sudan, not all Formed Police Units have the training to manage de facto IDP camps. Having a strategic guidance framework for UN policing and establishing common standards for training and performance ensures that all Police Contributing Countries will have a common police operational background and leadership skills needed to systematically manage the variety of tasks needed to protect civilians.

As with the development of clear, shared standards for military specialties common to peacekeeping, a common standard for UN policing ensures consistency, particularly with regard to cooperating with and developing the capacity of host country police. We may recall the

example of Timor-Leste back in the early 2000s, where a number of Police Contributing Countries provided both UN and bilateral trainers, operating from equally good but incompatible police traditions. And unfortunately, this undercut and slowed efforts to develop the Timorese police.

These are ambitious undertakings, particularly given the relatively limited resources for both police and rule of law activities. Police operations, in conjunction with the development of credible rule of law institutions, are essential to building a solid foundation for durable peace that allows peacekeeping operations to make a smooth transition from post-conflict peacekeeping. We see a particular need to integrate police planning from the beginning and at every stage of peace operations, with a clear understanding of the distinctions between police and military responsibilities, and when there should be a nimble shift between the primacy of police and military functions, as was recently demonstrated in the Central African Republic. After the recent outbreak of violence in the Central African Republic, MINUSCA chose to have military contingents take the lead in Bangui. And this change in response is an important way to address the changing dynamics in fluid peacekeeping situations. We know that over time the way to prevent the resumption of violence is to get civilian police operations up and running, identify gaps and needs and address them. Otherwise, peacekeeping missions can get bogged down longer than necessary in simply providing security.

We have also had, sadly, many shocking reports over the past year on the sexual exploitation and abuse of vulnerable people by those who should protect them. The stories about extortion of sex from children are appalling. Leaders of UN missions must take seriously their responsibility to enforce the UN's own regulations. The UN is having grave difficulty enforcing prohibitions against transactional sex and exploitative sexual relationships with local residents. The persistent disregard by a few for the welfare of the local community stands in stark contradiction of the UN Charter's basic principle of respect for the dignity and worth of the human person, and the equal rights of men and women. The Secretary-General has been very clear about how he plans to prevent and respond to misconduct in the future and he has our full support.

There are almost 125,000 people serving in 16 UN peacekeeping missions around the world. So far this year, there have been 85 fatalities, 23 of them from malicious acts, and we mourn the loss of these courageous peacekeepers. The UN's member states have shown repeatedly a great willingness to participate in and to support UN peacekeeping operations. And we have a collective responsibility to ensure that these operations are as well run as possible—beginning with planning and analysis, ensuring that missions have the resources they need when they need them, building in the flexibility to respond quickly and appropriately to changing circumstances, and that we, collectively, maintain a continuing commitment to stay engaged, supporting the political steps necessary for peace after conflicts have stepped off center stage in the world's attention.

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On December 9, 2015, Ambassador Power provided testimony on UN peacekeeping before the Senate Foreign Relations Committee. Her testimony is excerpted below and available at <http://usun.state.gov/remarks/7028>.

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UN Peacekeepers play a vital role in the international community's efforts to address war, violence, and instability. As President Obama said in September, "We know that peace operations are not the solution to every problem, but they do remain one of the world's most important tools to address armed conflict." Peacekeepers can help resolve conflict, shore up stability, deny safe harbor to extremists, and protect civilians from atrocities—all of which serve core American interests and reflect deep American values, while ensuring greater burden-sharing by the international community.

This Administration has consequently been working aggressively to ensure that UN peacekeeping operations are better able to meet the demands of international peace and security, which as has been noted by both the Chairman and the Ranking Member, those requirements have changed considerably over just the last 20 years. Peacekeepers today are undertaking more missions; the number of uniformed personnel has risen from fewer than 20,000 fifteen years ago to over 100,000 today. They're assuming greater risk; two-thirds of peacekeepers are operating in active conflicts, the highest percentage in history. And they're assigned broad and increasingly complex responsibilities—ranging from disarming armed groups to facilitating the safe delivery of humanitarian aid to protecting civilians from those who wish them harm. Today, 98 percent of uniformed personnel in UN missions around the world are under orders to protect civilians as part of their mandate. ...

While peacekeeping has never been more important to American interests, it has also never been more demanding. And that is why in September President Obama issued the first presidential memorandum on multilateral peace operations in more than 20 years, directing a wide range of actions to strengthen and modernize UN operations—including by building partner capacity, providing U.S. support, and leading reform of UN peacekeeping. I just want to briefly, Mr. Chairman, touch on a few key lines of effort that we have pursued. These are described in greater detail in my written submission.

First, we are working to ensure that countries with the will to perform 21st century peacekeeping, that they have the capacity to do so. One way we are doing this is through the African Peacekeeping Rapid Response Partnership, or APRRP, which President Obama announced in August 2014. Through APRRP, the United States is investing in the capacity of six African countries that have proven themselves leaders in peacekeeping; in exchange, these countries have committed to maintain the forces and equipment necessary to deploy rapidly. This initiative builds upon the Global Peace Operations Initiative launched under President George W. Bush—which is our primary tool for building partner nation peacekeeping capacity—and it will help ensure that more soldiers deployed for peacekeeping missions will be fully prepared. I hope that the Senate and House will fully fund this important initiative in future years.

Second, we are expanding the pool of troop- and police-contributing countries, and bringing advanced militaries back into peacekeeping. In September, President Obama convened a historic high-level summit—the first of its kind—at the UN to rally new commitments to peacekeeping, marking the culmination of a year-long effort initiated by Vice President Biden at the previous UN General Assembly. Forty-nine countries participated and pledged nearly 50,000 additional troops and police. ...[M]ore of these troops will now come from advanced militaries, who bring with them equipment and expertise that is critically needed on the ground. We saw this in Mali in January this year, when Dutch attack helicopters helped Bangladeshi infantry repel rebels who had opened fire on their camp, where civilians were taking refuge. The United

States is making contributions in this respect as well—as one part of our unrivaled contribution to global peace and security—looking specifically for ways to leverage our military’s unique capabilities to support peacekeeping operations, including by enabling faster deployment by others.

Third, we are working to ensure a higher standard of performance and conduct once peacekeeping contingents are deployed, specifically in two critical areas: the complete fulfillment of their mandates, and the combatting of sexual exploitation and abuse. The additional troops generated by the President’s September summit will prove invaluable to both goals, by allowing the UN to be more selective as to which troops it deploys, and now giving it the leverage to repatriate poorly performing troops and police when necessary, and especially of course in instances where there are credible allegations of sexual abuse.

With respect to mandate, when peacekeepers deploy in volatile situations, they have to be prepared to use force to defend themselves, to protect civilians, and to otherwise carry out their mandated tasks. Too often in the past, peacekeepers have shied away, even when atrocities are being perpetrated. A report by the UN’s internal oversight office in March last year found that in 507 attacks against civilians from 2010 to 2013, peacekeepers virtually never used force to protect those coming under attack. Thousands of civilians likely lost their lives as a result. This cannot continue. And a growing number of leading troop contributors agree; the 50,000 additional troops and police should enable more capable, more willing troops and police to staff these missions.

The same is true on sexual exploitation and violence. And let me just state the obvious here: we share the outrage of everyone on this committee, all of the American people who are focused on this issue, peacekeepers must not abuse civilians. Sexual abuse and exploitation have no place ... in any society. It is especially abhorrent when committed by those who take advantage of the trust that communities are placing in the United Nations, and those responsible must be held accountable. Addressing this scourge will require continuing the important efforts begun by Secretary-General Ban Ki-moon to strengthen the implementation of a zero-tolerance policy—including bolstering reporting and accountability measures, and pledging to set up an immediate response team to investigate certain cases. It will also require more vigilance and follow-through from troop-contributing countries. There must also be far more transparency in these investigations, to track cases and ensure that justice is served. The UN should be able to take advantage now of this newly expanded pool of soldiers and police by suspending from peacekeeping any country that does not take seriously the responsibility to investigate and, if necessary, prosecute credible allegations.

The fourth and final priority, Mr. Chairman, is to press for bold institutional reforms within the UN itself. We have seen the UN secretariat make profound changes to peacekeeping, from improved logistics and sustainment, to a more comprehensive approach to crisis situations that integrates military, police, and civilian tools. But much, much more needs to be done, and we have spearheaded efforts to enact further reforms, including longer troop rotations to preserve institutional memory, penalties for troops who show up without the necessary equipment to perform their duties. And we will continue to work aggressively to cut costs. The UN has already—thanks to U.S. leadership—cut the per-peacekeeper costs by roughly 17 percent since 2008. We are also working to advance the reforms proposed by the Secretary-General’s High-Level Independent Panel on UN Peace Operations, which are intended to address inadequate planning, slow troop deployment, uneven mission leadership, breakdowns in command-and-

control, and a current set of rules around human resources and procurement designed for the conference rooms of New York, and not the streets of Bangui.

Let me conclude. In all of the areas I've just described, we've seen improvements, and the United States has played an instrumental role in making them possible. But there is much more to be done. We are not satisfied with peacekeepers fulfilling only parts, but not all, of their mandates; with peacekeepers standing up to protect civilians in some, but not all, situations; or with soldiers being held accountable for crimes or misconduct some, but not all, of the time. The role played by peacekeepers today is too important. For the sake of our own interests and security, as well as the millions of innocent people around the world whose lives may depend on peacekeepers, we will continue working to strengthen peacekeeping so that it is tailored for the 21st century threats peacekeepers face. We appreciate your interest and support and continued dialogue on these matters.

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2. Syria

a. Security Council

On December 18, 2015, the UN Security Council adopted Resolution 2254 on Syria.* Secretary Kerry's remarks upon adoption of the resolution are excerpted below and available at <http://www.state.gov/secretary/remarks/2015/12/250800.htm>.

* * * *

By approving Resolution 2254 today, this council is sending a clear message to all concerned that the time is now to stop the killing in Syria and lay the groundwork for a government that the long-suffering people of that battered land can support. After four and a half years of war, this is the first time we have been able to come together at the United Nations in the Security Council to embrace a road forward. During that time, one Syrian in 20 has been killed or wounded; one in five is a refugee; one in two has been displaced. The average life expectancy in Syria has dropped by 20 years.

We need to reverse the course, and that is the council's goal here this afternoon: to put an end to the indiscriminate bombing, the acts of terror, the torture, and the bloodshed. And our shared task is to find a way to make that happen.

In support of this objective, President Obama has set for my country three interrelated goals. The first is to support our friends and to ensure that the instability created by the civil war in Syria does not spread further beyond its borders. And that is why we're providing a record amount of humanitarian assistance, and it's why we're doing more to help Syria's neighbors, to strengthen their capacity to safeguard their territory and to defend against external threats.

* Editor's note: UN Security Council Resolutions 2209 and 2235 on Syria's use of chemical weapons are discussed in Chapter 19.

Second, we are determined, with our coalitional partners, to degrade and defeat the terrorist organization known as Daesh. In the past half year, the coalition and its partners have worked with Iraqi forces in liberating Tikrit, freeing Sinjar, removing terrorist commanders from the battlefield, cutting off terrorist supply lines, hitting their oil facilities, and depriving Daesh of more and more of the territory that it once controlled.

Now we are intensifying the pressure, helping our Iraqi partners retake most of Ramadi to squeeze supply routes into Mosul. And we are pushing ahead into northern Syria, assisting our partners along the Iraqi-Syrian border and on the recruiting and propaganda efforts. Further, as evidenced by the finance ministerial that was held right here in this very chamber yesterday, we are multiplying our efforts to cut Daesh off from the revenue sources that support its depravity, its criminality.

But the truth is that nothing would do more to bolster the fight against the terrorists than a broadly supported diplomatic process that gives the Syrian people a real choice—not a choice between Assad or Daesh, but between war and peace, between the violent extremes and a newly empowered political center. That is why we have joined with so many of you in support of an urgent diplomatic initiative. Again and again, countries not just around this dais today, but countless meetings in various parts of the world have reaffirmed the notion that there has to be a political settlement.

Well, this is the test. This is why we've joined here in a broader, more action-oriented effort than ever before attempted regarding Syria: to isolate the terrorists and to put Syria on the road to a political transition, envisioned by the Geneva communique, now embraced by the international community and the United Nations Security Council resolution.

As the council's action today reflects, we have made important progress in recent weeks, and progress that should give us all fresh grounds for encouragement. Last month in Vienna, the United States and other members of the International Syria Support Group agreed on a series of steps to stop the bleeding in Syria, to advance a political transition, to isolate the terrorists, and to help the Syrian people to be able to begin to rebuild their country. Last week in Riyadh, with the support of His Majesty King Salman and his government, a broad cross-section of Syrian opposition representatives came together to form a high committee for negotiation.

Under the resolution approved today, the purpose of those negotiations between the responsible opposition and the government is to facilitate a transition within Syria to a credible, inclusive, nonsectarian governance within six months. The process would lead to the drafting of a new constitution and arrangements for internationally supervised election within 18 months. I might add Geneva never had those dates. It is the Vienna process and the Vienna communique that has produced a six-month and 18-month time horizon, and it is the Vienna process that also has embraced the ceasefire concept as well as embraced a set of principles and values about the shape that a new Syria might be able to take as directed by Syrians for Syrians. It's our hope that a nationwide ceasefire can go into effect, excluding only Daesh and al-Nusra and any other group that we might decide at some time to designate.

So I would close by saying we're under no illusions about the obstacles that exist. There obviously remain sharp differences within the international community, especially about the future of President Assad. We have emphasized from the beginning that for this to work, the process has to be led and shaped and decided and implemented by the men and women of Syria. It cannot be imposed from the outside and we are not seeking to do so. But we've also seen in recent weeks—in Vienna, in Paris, and in other capitals, and then today here in New York—an

unprecedented degree of unity on the need to negotiate this political transition to defeat Daesh, and then, indeed, to end the war.

The resolution that we just approved is a milestone because it sets out specific concepts with specific timeframes. Accordingly, we need to work hard together to help these political talks to go forward, to prepare for a ceasefire, and to encourage all the parties in Syria to participate in good faith.

In closing, let me just underscore the urgency of our task. Like many of you, I've met with refugees in and out of refugee camps. I've met with survivors, as you have; met with caregivers, as you have; met with many of the people who have been on the front lines of this conflict. I've talked to women who have struggled to hold their families together despite constant danger, bitter cold, shortages of food, and great danger. I've heard the blood-chilling stories of doctors and relief workers who have been dealing with humanitarian trauma on a daily basis, month after month, year after year—now into the fifth year.

I am aware, as everybody in this chamber is, of the atrocities that have been committed and are being committed even as we sit here this afternoon, and being committed too often against innocent civilians.

Looking ahead, we know that Daesh can never be allowed to gain control in Syria. So we have a global imperative here to deal with a terrorist entity, but also to end the civil war and to bring legitimacy back to the governance of Syria. President Assad, in our judgment—and not everybody shares this—but the majority of the people in the ISSG believe that President Assad has lost the ability, the credibility, to be able to unite the country and to provide the moral credibility to be able to govern it into the future.

So I'd just say, not as a matter of ideology, not as a matter of choice, but purely as a matter of reality, as a matter of fact given the situation on the ground, that if the war is to end, it is imperative that the Syrian people agree on an alternative in terms of their governance. That logic is compelling and it provides a unifying principle for most people in our efforts going forward.

We have a lot of distance to travel—some would say miles to go. But the truth is that in the past two months, we have started from a standstill, from a nonexistent process, to have three separate meetings of the ISSG and now a United Nations Security Council embrace of a process. We have agreed on a plan of action, and the council's vote today is an important boost on the road to a political settlement. It is a particularly important step because it reaffirms this body's endorsement of the Geneva communique about the transitional governing body with full executive authority, and it also endorses the progress and the statements that we made in Vienna to set a timeline—a timeline for transition, a timeline for election, and standards for that election—the highest standards under the supervision of the United Nations for a free, fair, transparent, and accountable election. It also brings fundamental values and principles that can guide the shaping of Syria by Syrians for Syrians.

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Secretary Kerry, Russian Foreign Minister Sergey Lavrov, and UN Special Envoy Steffan de Mistura delivered remarks and answered questions after the resolution was adopted. Secretary Kerry's remarks are excerpted below and available at <http://usun.state.gov/remarks/7066>.

* * * *

...First of all, I want to express again my appreciation and the appreciation of all of the P5 members of the International Syria Support Group who worked through the day, and I appreciate Foreign Minister Lavrov's engagement and his commitment to trying to get to a place that everybody could be comfortable.

What we've achieved today is to pass a resolution in the United Nations Security Council for the first time since this war started that embraces a roadmap for actually trying to end it—a roadmap to try to bring about a peaceful resolution through the political process, obviously. For years now, country after country and at meeting after meeting, we have reinforced the notion that there's no military solution; there has to be a political solution. The only problem is the only thing playing out was the military track, and there was no political track.

So now, finally, after two meetings in Vienna and the meeting here, and today's unanimous vote in the Security Council, there is a clear United Nations-embraced, Security Council-endorsed political track that reflects the hard work of the International Syria Support Group, which, for the first time, is a group that contains all of the parties engaged in support or in opposition to the Assad regime.

So we have Iran, Russia, the Organization of Islamic Communities, the—some 20 entities, 20 states altogether, all of the immediate neighbors, all of the stakeholders—and all of them are committed to a set of principles for how to move forward—not just principles, actually, but for very specific timelines and framework—specifically, a embrace of the Geneva communique, which specifically talks about a transitional governing body by—arrived at by mutual consent, with full executive authority, that begins a transition in Syria and that also embraces the beginning of a constitutional reform process.

When I was in Moscow with President Putin, he reiterated to me that President Assad agreed with him to engage in this political process, to engage in the constitutional reform process, to embrace an election. And so we begin with a clarity about the steps that need to be taken. We also have a timeframe that that transitional process needs to try to be achieved within the target time of six months. In addition, the election needs to take place within 18 months, same starting time. So after nine—six months of the transition, you're about a year away, hopefully—or less—from an election.

It also embraced a ceasefire, and a ceasefire is critical to the capacity of the parties to come together and be able to negotiate and to begin to deal with the problem of refugees, displaced people, the humanitarian crisis of Syria. I think all of us—and I speak for the United States, which is the largest donor, I think \$4.5-plus billion to refugees—it doesn't do any good just to keep writing the check and replenishing the pool that keeps growing. We have to start to end the supply of refugees and begin to provide people with a life that is built on this political process.

That's our goal. No one is sitting here today suggesting to anybody that the road ahead is a gilded path. It's complicated. It will remain complicated. But this at least demands that the parties come to the table. And importantly, the opposition has begun its own meetings. The Saudi Arabians in Riyadh held an important gathering. Staffan de Mistura, to everybody's agreement, will be the convener and the person who melds the appropriate entities to be—to create the dynamic necessary to create a negotiation that has the potential of being successful.

So we are in a place where we also are calling on the parties to provide for the capacity for humanitarian assistance to reach the people who need it. We call on people to cease the use

of certain kinds of weapons—barrel bombs, other weapons—and to stop, obviously, immediately, attacks against civilians. And obviously, with the ceasefire, that becomes more broad and more broadly enforceable, and that is critical.

In addition, we are very hopeful that this process will result in the people of Syria being able to reclaim their future. One of the guiding principles of this agreement is that Syrians must ultimately decide the future of Syria. And we have jealously guarded that principle in the context of the lead-up to these negotiations. The International Syria Support Group will continue to do exactly what its name implies. We will support the process. We will support Staffan de Mistura, support the United Nations, support the parties in helping them to come to the table.

So again, I thank my co-convenor in this endeavor, Sergey Lavrov, who has helped to bring disparate parties to the table in an effort to try to build a base structure here that we have not had in all of the years of meetings and all of the years of the war.

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... [E]verybody understands that in January, we hope and expect to be at the table and be able to implement a full ceasefire. And that means all the barrel bombs would stop, all the bombing, all the shooting, all the attacks on either side. And the modalities of that ceasefire are being worked on by the United Nations and will be set out over the course of these next weeks. So that's why we believe this has greater gravamen—because of the fact that it may, in fact, be part of the context of a real ceasefire.

Finally, with respect to ... the assistance to the parties. There was an agreement reached actually before we came here in the discussions in Paris that everybody will be better served by honoring one or two or three countries' perceptions of a group as a terrorist group. And if some other country or party is knowingly funding that entity in the context of a negotiation—if we get to the negotiation in the context of a ceasefire, countries will cease support for those groups even if they are not designated as a terrorist entity. And that's a pretty far-reaching step. The enforcement of it will be the magic of it, but it is a significant thing that all parties agreed to, in fact, do that if indeed the negotiations open and a ceasefire takes hold.

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b. *International cooperation outside of the Security Council*

As Secretary Kerry mentioned after the Syria plan was agreed in December, the groundwork was laid for the plan in previous meetings of the International Syria Support Group. After the Group met in Vienna in October, Secretary Kerry, Sergey Lavrov, and Steffan de Mistura made themselves available to the press for remarks and questions. Secretary Kerry's remarks on the outcome in Vienna are excerpted below. A transcript of the joint press availability is available at <http://www.state.gov/secretary/remarks/2015/10/249019.htm>. See also October 30, 2015 statement on the Group meeting in Vienna, available at <http://damascus.usembassy.gov/statedept103015en1.html>.

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...[T]he foreign ministers ... came here today ... with the conviction that the fighting and the killing absolutely has to end. And it's up to us to try to find a way to do that.

Our shared task is to find a way to use the tools of diplomacy in order to make that happen. This is a relatively large diplomatic group that met today because there are a lot of people who are stakeholders because there are a lot of neighbors, and there are a lot of people who are supporting, one way or the other, one side or another. And so it will take pressure from many different directions to reverse the escalation of conflict and to lay a credible groundwork for peace.

Daesh and other terrorist organizations, we all believe, can never be allowed to unite or govern Syria. The United States position regarding Syria, I emphasize, has not changed. Sergey Lavrov and Prime Minister Zarif and I and others agree to disagree. The United States position is there is no way that President Assad can unite and govern Syria. And we believe that Syrians deserve a different choice, and our goal is to work with Syrians from many factions to develop that choice.

But we can't allow that difference to get in the way of the possibility of diplomacy to end the killing and to find the solution. And that is a significance of the decision that was really made here today was that even though we acknowledge the difference, we know it is urgent to get to the table and to begin the process of real negotiations. So we're employing a two-pronged approach. Speaking for the United States, we are intensifying our counter-Daesh campaign and we are intensifying our diplomatic efforts in order to end the conflict. And we believe these steps are mutually reinforcing. And that is why today President Obama made an announcement about stepping up the fight against Daesh. He authorized a small complement of U.S. Special Operations Forces to deploy to northern Syria where they will help to coordinate local ground forces and coalition efforts in order to counter Daesh.

But at the end of the day, the United States and our coalition partners believe that there is absolutely nothing that would do more to fight Daesh than to achieve a political transition that strengthens the governance capacity of Syria, sidelines the person that we believe attracts so many foreign fighters and so much terror, and unite the country against extremism. Make no mistake, the answer to the Syrian civil war is not found in a military alliance with Assad, from our point of view. But I am convinced that it can be found through a broadly supported diplomatic initiative aimed at a negotiated political transition, consistent with the Geneva communique.

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The participants agreed today that Syria's unity, independence, territorial integrity, and secular character are fundamental. We agreed that Syria's state institutions will remain intact. We agreed that the rights of all Syrians, regardless of ethnicity or religious denomination, must be protected. We agreed that it is imperative to accelerate all diplomatic efforts to end the war. We agreed that humanitarian access must be assured throughout the territory of Syria, and the participants will increase support for internally displaced persons, refugees, and their host countries.

We agreed that Daesh and other terrorist groups as designated by the UN Security Council and as agreed by the participants must be defeated. Pursuant to the 2012 Geneva

communique and UN Security Council Resolution 2118, we invited the UN to convene representatives of the Government of Syria and the Syrian opposition for a political process leading to a credible, inclusive, non-sectarian governance followed by a new constitution and elections. We agreed that these elections must be administered under UN supervision to the satisfaction of the government and to the highest international standards of transparency and accountability, free and fair, with all Syrians, including the diaspora, eligible to participate. We agreed that this political process will be Syrian-led and Syrian-owned and that the Syrian people will decide the future of Syria. And we agreed together with the United Nations to explore modalities for and implementation of a nationwide ceasefire to be initiated on a date certain and in parallel with this renewed political process.

We will spend the coming days working to narrow remaining areas of disagreement and to build on the areas of agreement, and we will reconvene within two weeks to continue these discussions.

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The International Syria Support Group met in Vienna on November 14, 2015. The State Department released a media note summarizing the meeting, which is available at <http://www.state.gov/r/pa/prs/ps/2015/11/249511.htm>, and excerpted below.

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Meeting in Vienna on November 14, 2015 as the International Syria Support Group (ISSG), the Arab League, China, Egypt, the EU, France, Germany, Iran, Iraq, Italy, Jordan, Lebanon, Oman, Qatar, Russia, Saudi Arabia, Turkey, United Arab Emirates, the United Kingdom, the United Nations, and the United States to discuss how to accelerate an end to the Syrian conflict. ...

...[T]he participants engaged in a constructive dialogue to build upon the progress made in the October 30 gathering. The members of the ISSG expressed a unanimous sense of urgency to end the suffering of the Syrian people, the physical destruction of Syria, the destabilization of the region, and the resulting increase in terrorists drawn to the fighting in Syria.

The ISSG acknowledged the close linkage between a ceasefire and a parallel political process pursuant to the 2012 Geneva Communique, and that both initiatives should move ahead expeditiously. They stated their commitment to ensure a Syrian-led and Syrian-owned political transition based on the Geneva Communique in its entirety. The group reached a common understanding on several key issues.

The group agreed to support and work to implement a nationwide ceasefire in Syria to come into effect as soon as the representatives of the Syrian government and the opposition have begun initial steps towards the transition under UN auspices on the basis of the Geneva Communique. The five Permanent Members of the UN Security Council pledged to support a UNSC resolution to empower a UN-endorsed ceasefire monitoring mission in those parts of the country where monitors would not come under threat of attacks from terrorists, and to support a political transition process in accordance with the Geneva Communique.

All members of the ISSG also pledged as individual countries and supporters of various belligerents to take all possible steps to require adherence to the ceasefire by these groups or individuals they support, supply or influence. The ceasefire would not apply to offensive or defensive actions against Da'esh or Nusra or any other group the ISSG agrees to deem terrorist.

The participants welcomed UN Secretary General Ban's statement that he has ordered the UN to accelerate planning for supporting the implementation of a nationwide ceasefire. The group agreed that the UN should lead the effort, in consultation with interested parties, to determine the requirements and modalities of a ceasefire.

The ISSG expressed willingness to take immediate steps to encourage confidence-building measures that would contribute to the viability of the political process and to pave the way for the nationwide ceasefire. In this context, and pursuant to clause 5 of the Vienna Communique, the ISSG discussed the need to take steps to ensure expeditious humanitarian access throughout the territory of Syria pursuant to UNSCR 2165 and called for the granting of the UN's pending requests for humanitarian deliveries. The ISSG expressed concern for the plight of refugees and internally displaced persons and the imperative of building conditions for their safe return in accordance with the norms of international humanitarian law and taking into account the interests of host countries. The resolution of the refugee issue is important to the final settlement of the Syrian conflict. The ISSG also reaffirmed the devastating effects of the use of indiscriminate weapons on the civilian population and humanitarian access, as stated in UNSCR 2139. The ISSG agreed to press the parties to end immediately any use of such indiscriminate weapons.

The ISSG reaffirmed the importance of abiding by all relevant UN Security Council resolutions, including UNSCR 2199 on stopping the illegal trade in oil, antiquities and hostages, from which terrorists benefit.

Pursuant to the 2012 Geneva Communique, incorporated by reference in the Vienna statement of October 30, and in U.N. Security Council Resolution 2118, the ISSG agreed on the need to convene Syrian government and opposition representatives in formal negotiations under UN auspices, as soon as possible, with a target date of January 1. The group welcomed efforts, working with United Nations Special Envoy for Syria Staffan de Mistura and others, to bring together the broadest possible spectrum of the opposition, chosen by Syrians, who will decide their negotiating representatives and define their negotiating positions, so as to enable the political process to begin. All the parties to the political process should adhere to the guiding principles identified at the October 30 meeting, including a commitment to Syria's unity, independence, territorial integrity, and non-sectarian character; to ensuring that State institutions remain intact; and to protecting the rights of all Syrians, regardless of ethnicity or religious denomination. ISSG members agreed that these principles are fundamental.

The ISSG members reaffirmed their support for the transition process contained in the 2012 Geneva Communique. In this respect they affirmed their support for a ceasefire as described above and for a Syrian-led process that will, within a target of six months, establish credible, inclusive and non-sectarian governance, and set a schedule and process for drafting a new constitution. Free and fair elections would be held pursuant to the new constitution within 18 months. These elections must be administered under UN supervision to the satisfaction of the governance and to the highest international standards of transparency and accountability, with all Syrians, including the diaspora, eligible to participate.

Regarding the fight against terrorism, and pursuant to clause 6 of the Vienna Communique, the ISSG reiterated that Da'esh, Nusra, and other terrorist groups, as designated by the UN Security Council, and further, as agreed by the participants and endorsed by the UN Security Council, must be defeated. The Hashemite Kingdom of Jordan agreed to help develop among intelligence and military community representatives a common understanding of groups

and individuals for possible determination as terrorists, with a target of completion by the beginning of the political process under UN auspices.

The participants expect to meet in approximately one month in order to review progress towards implementation of a ceasefire and the beginning of the political process.

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Syrian opposition groups met in Riyadh in December to discuss a political settlement to end the conflict in Syria and establish a representative negotiating body to participate in negotiations on a transition to a democratic Syria. The United States welcomed the outcome of the Riyadh conference in a December 10, 2015 press statement by Secretary Kerry, available at <http://www.state.gov/secretary/remarks/2015/12/250530.htm>. Secretary Kerry's press statement includes the following:

As I conveyed to Foreign Minister Al-Jubeir today, we appreciate Saudi Arabia's leadership in convening this broad and representative group of 116 participants, who agreed today on the structure of their negotiating body to represent them in the political process. We appreciate that this extremely diverse group of Syrians put aside differences in the interest of building a new Syria.

With the progress made in both Vienna and now in Riyadh, the International Syria Support Group continues to build a foundation for constructive negotiations in January under UN auspices, regarding a political transition in accordance with the Geneva Communique of 2012. While this important step forward brings us closer to starting negotiations between the Syrian parties, we recognize the difficult work ahead, and remain determined to continue toward a political settlement that brings an end the conflict.

3. Burundi

The United States repeatedly urged the Government of Burundi to abide by the Arusha Accords and preserve peace in that country. On June 2, 2015, the State Department issued a press statement reiterating U.S. opposition to President Nkurunziza's decision to disregard the term limit provision of the Arusha Agreement. The June 2, 2015 press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/06/243100.htm>, also condemns other actions taken by the government:

The government's troubling actions to severely restrict political space and press freedoms, violently disrupt political protests, pressure the Constitutional Court and Electoral Commission, and reported use of an armed ruling-party youth militia to intimidate protestors and political opponents contradicts the basic principles of democratic governance and starkly contradicts President

Nkurunziza's claim that he is dedicated to respecting the Arusha Agreement and the rule of law.

On October 28, 2015, the UN Security Council issued a presidential statement on Burundi. The United States welcomed the Security Council's statement on Burundi in a State Department press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/10/248940.htm>, below.

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Like the African Union's communiqué of October 17, the Security Council statement put particular stress on the urgency of convening an inclusive inter-Burundian dialogue, among the government and peaceful stakeholders within and outside the country. As such, the Security Council reemphasized the importance of the mediation efforts led by Ugandan President Yoweri Museveni on behalf of the East African Community and as endorsed by the African Union (AU).

The United States stresses the Security Council's call for any dialogue to be inclusive and represent the voices of the citizens of Burundi. We also welcome the Security Council's strong condemnation of all violations and abuses of human rights and acts of unlawful violence committed in Burundi, both by security forces as well as by militias and other illegal armed groups, and its expressed determination to seek accountability for the perpetrators of such acts.

We are encouraged by the leadership of the United Nations in addressing the ongoing crisis in Burundi, particularly through Secretary General Ban Ki-Moon's public offer in his October 27 statement of "any support necessary to advance the implementation of the measures agreed upon by the members of the AU Peace and Security Council."

The United States stands ready to support the AU, the East African Community (EAC) and its designated mediator, President Museveni, and the citizens of Burundi to urgently conduct such a dialogue, which represents the best path forward to resolving the insecurity which has plagued Burundi since President Nkurunziza's decision to run for a third-term in contravention of the Arusha Peace and Reconciliation Agreement.

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On November 12, 2015, Ambassador Power delivered remarks at the Security Council after the adoption of Resolution 2248 on Burundi. Her remarks are excerpted below and available at <http://usun.state.gov/remarks/6973>.

* * * *

... I want to stress internationally facilitated dialogue among Burundi's stakeholders is absolutely critical. It is not enough for us to do what we have been doing, which is to support the EAC-led political process—we do support it, the Security Council most definitely supports it—

but there must be a robust political process and that process must be invigorated. So I think that's a very important message out of the Council today.

The other piece of this important resolution, I think, is as the situation has deteriorated in recent months, the UN presence has been getting smaller and smaller. So at just the time that we need more eyes and ears on the ground, we have had fewer and fewer UN personnel. And indeed that presence is slated to wind down entirely by January. So what this does is halt that trend ...and indeed put the UN in a position now where it can assess what the best form a UN presence should take. So that's, I think, the second important feature of this resolution.

And then the third is, because of Burundi's history, but also because of some of the very divisive rhetoric and the sheer number of people who have been killed here in recent days, it is clear that contingency planning is needed; it is needed in the sub-region, it is needed in the region, and it is needed here at the UN. And so I think this resolution sets that contingency planning in motion and is very important for that reason.

I think Council unity today is also a very important signal and we will continue to shine a spotlight on what is happening in Burundi, and again look forward as a Council—but also as the United States, working bilaterally to do everything we can again to push political dialogue, to make sure we're prepared for contingencies, and to stand up for the rights of Burundians who are living in great fear right now.

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See Chapter 16 for a discussion of sanctions relating to the crisis in Burundi. In a December 18, 2015 announcement of additional sanctions, available at <http://www.state.gov/r/pa/prs/ps/2015/12/250797.htm>, the Department of State also urged peace talks:

The United States is gravely concerned about the ongoing crisis in Burundi and the potential for additional violence ...

Our senior officials remain engaged at the highest levels with regional leaders to support immediate, internationally-mediated peace talks. The United States continues to call upon Burundian President Nkurunziza, his government, and the opposition to de-escalate tensions, refrain from further violence, and fully participate in talks. We stand ready to support the African Union and the region in taking all necessary steps—including possible deployment of an intervention force—to prevent further violence and achieve a consensual, political resolution to this crisis.

On December 19, 2015, the UN Security Council, with the United States serving as President, issued a press statement on the situation in Burundi. The press statement is excerpted below and available at <http://usun.state.gov/remarks/7064>.

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The members of the Security Council reiterated their deep concern about the continuing escalation of violence in Burundi, as well as the increased cases of human rights violations and abuses, the persisting political impasse and the attendant serious humanitarian consequences. They condemned all acts of violence, whomever perpetrates it, and the persistence of impunity, as well as of the inflammatory statements made by Burundian political leaders. They strongly condemned the attacks carried out against military barracks in Bujumbura and in Bujumbura Rural, as well as the alleged summary executions perpetrated in the aftermath of the attacks, and underscored the importance of holding those responsible for such acts accountable.

They recalled the adoption, on December 17, of the Human Rights Council resolution condemning human rights violations and abuses in Burundi by all actors and deciding to organize and dispatch an expert mission to Burundi to swiftly investigate violations and abuses of human rights.

The members of the Security Council welcomed the meeting of the African Union Peace and Security Council (PSC) of 17 December where the communique on the situation in Burundi (PSC/PR/COMM. (DLXV)) was adopted.

They called for urgent acceleration of the mediation efforts led by President Yoweri Museveni of Uganda on behalf of the East African Community (EAC) and as endorsed by the African Union (AU) and urged all parties of Burundi to fully cooperate with the mediator, and given the urgency of the situation, should mediation efforts not restart immediately alternative options might be considered by the AU and UN. The members of the Security Council recalled their conviction that only a genuine and inclusive dialogue, based on respect for the Constitution and Arusha Agreement, would best enable the Burundian stakeholders to find a consensual solution to the crisis facing their country. They highlighted the importance of the decision by the AU PSC to hold such dialogue outside Burundi, in a venue to be determined by the Mediation, and in the required conditions of security, highlighted the need to facilitate the participation and effective representation of all Burundian stakeholders and their viewpoints on issues on which they disagree.

The members of the Security Council took note with interest of the decision by the AU PSC to authorize the deployment of an African Prevention and Protection Mission in Burundi (MAPROBU) to address the situation in Burundi and urged all Burundian stakeholders to fully cooperate with the mission in support of the effective implementation of its mandate. The members of the Security Council underlined the importance for African Members States to pledge troops and police and stressed the importance for the AU to take the necessary steps for the urgent development of the concept of operation of MAPROBU and other planning level documents. They also stressed the importance of dialogue and coordination between the AU and the UN.

As requested by the Security Council resolution 2248 (2015), they recalled the utmost importance of United Nations contingency planning to develop options for the international community to respond to any further deterioration of the situation and underscored the importance of urgently deploying the UN team in Burundi under the leadership of the Special Adviser to Conflict Prevention, including Burundi, M. Jamal Benomar, to coordinate and work with the Government of Burundi, African Union and other partners to assess the situation and develop options to address political and security concerns.

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4. Central African Republic

a. *Accord on disarmament*

On May 11, 2015, the United States congratulated the people of the Central African Republic on successfully completing the Bangui Forum, and the conclusion of an accord on disarmament, signed by armed groups and the transitional government that came in response to the desires for peace expressed at the Forum. The May 11, 2015 State Department press statement on the situation in the Central African Republic is available at <http://www.state.gov/r/pa/prs/ps/2015/05/242137.htm>, and includes the following additional U.S. responses to developments in the Central African Republic:

We further welcome the signature by armed groups of an agreement to halt the recruitment of child soldiers and to release all child soldiers currently in their ranks and children associated with the conflict. This agreement is a hopeful sign for the children of the Central African Republic, who have too long suffered terribly in this conflict. The United States calls on all armed groups to follow through on these commitments without delay.

The United States will continue to stand with the people and transitional leadership of the Central African Republic as they advance this vibrant national conversation and translate into action the recommendations of the Bangui Forum for a better future for the country and its people.

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On September 28, 2015, the Department of State issued a press statement condemning violence in the Central African Republic that began on September 25, 2015 and calling for perpetrators to be held accountable. The press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/09/247412.htm>, includes the following:

We call upon those who engaged in violence, or are considering further violence, to lay down their weapons and return home. Those guilty of committing or inciting violence, including leaders of anti-Balaka militias and ex-Seleka groups, must be held accountable for their actions. We fully support the efforts of the Central African and international forces to reestablish order and bring these perpetrators to justice. The era during which such individuals have been able to carry out their malevolent actions with impunity must come to an end.

We express our full support for President Catherine Samba-Panza and her transitional government. We further support the ongoing transition process, including efforts to ensure that all eligible Central Africans have the right to vote in upcoming elections, and pledge continued U.S. assistance in support of the ongoing transition.

The United States remains committed to helping the Central African Republic establish the peace and stability its citizens deserve. It is only with peace and stability that job creation, economic development, and prosperity will ultimately be possible for current and future generations of Central Africans.

b. *Sexual exploitation and abuse by international soldiers*

The United States fully supported the UN investigation into reports of sexual exploitation and abuse of children by international soldiers in the Central African Republic. On June 5, 2015, when the UN Secretary General announced the establishment of an external independent review of the allegations, Ambassador Power issued a statement, available at <http://usun.state.gov/remarks/6558>, in which she welcomed the external independent review:

The Secretary General's establishment of this review is an opportunity for the UN to learn how it and member states can best safeguard the dignity and welfare of vulnerable people; ensure swift action to make certain potential abuses are investigated and halted; protect those who expose abuses; and provide appropriate privacy and other protection for witnesses who come forward with allegations of abuse. There are many questions that need to be answered, and we view this as an important opportunity for member states—and the people of the Central African Republic—to learn what went wrong at every point in this process.

Alongside this independent review, it is essential that all countries whose soldiers are alleged to have been involved in such abuses fully, urgently, and transparently investigate all claims to ensure that justice is served. Any individual found to have committed such heinous abuses must be held accountable.

President Obama's September 28, 2015 Memorandum to Heads of Executive Departments and Agencies regarding peacekeeping also expresses U.S. support for UN actions to address sexual exploitation and abuse. Daily Comp. Pres. Docs. 2015 DCPD No. 00663 (Sep. 28, 2015). The statement on the subject from the September 28 Memorandum follows. The Memorandum is also discussed in Section B.1, *supra*.

Ending Sexual Exploitation and Abuse (SEA). The United States fully supports the UN's zero tolerance policy against SEA by UN personnel and supports aggressive action by the Secretary General to root it out of peacekeeping, including by strengthening mechanisms for investigating SEA allegations. The Departments of State and Defense will ensure that any U.S.-provided peacekeeping training includes a component on the prevention of SEA. They will condition peacekeeping training or related assistance on the commitment of the [Troop-Contributing Countries ("TCCs") and Police-Contributing Countries ("PCCs")] to ensure that adequate disciplinary measures for SEA violations exist.

In cases in which TCCs and PCCs lack the capacity either to investigate credible allegations or hold those responsible to account for alleged SEA by their own nationals, the United States Government will explore means to assist them in doing so, including through capacity building. The Departments of State and Defense will engage the UN and TCCs and PCCs at senior levels to stress the imperative of investigating allegations thoroughly and prosecuting where appropriate. The Department of State will discourage the UN from deploying uniformed personnel from those TCCs and PCCs that routinely block investigations or fail to hold those responsible for SEA to account and will identify such TCCs and PCCs in its annual country reports on human rights.

On December 17, 2015, when the independent review panel submitted its report on abuse in CAR, Ambassador Power released another statement, noting that the panel's report documents "a woefully inadequate response by the UN to credible allegations of sexual exploitation and abuse." Ambassador Power's December 17 statement is available at <http://usun.state.gov/remarks/7060>, and further states:

We are horrified by the Panel's findings of inaction around these crimes. It is chilling to read the Panel's detailing of poor judgment and "gross institutional failure," including by the very parts of the UN entrusted with defending human rights and protecting children. These actions—and decisions not to act—undermine the UN's legitimacy and betray its most sacred principles. Also alarming is the Panel's finding of several cases of abuse of authority.

We are troubled by the Panel's conclusion that the independence of the Office of Internal Oversight Services (OIOS)—whose impartiality is critically important to ensuring a culture of accountability and transparency at the UN—was compromised. We encourage the new head of OIOS to institute structural changes to address the systematic failures documented in the report.

... Now the world is looking to the UN to take urgent and comprehensive steps to make sure this never happens again. All UN Member States must throw their weight behind significant reforms at the UN to ensure that the grave abuses alleged are swiftly and effectively investigated and prosecuted, and that those found responsible are held accountable.

5. Mali

The United States condemned violence in Mali and called on the parties to comply with previous ceasefire commitments while striving for a durable peace agreement. In an April 29, 2015 State Department press statement, for example, available at <http://www.state.gov/r/pa/prs/ps/2015/04/241328.htm>, the United States condemned recent violence in Menaka, Timbuktu, and Goundam. The April 29, 2015 press statement goes on to say:

...We recall that in statement by the President of the United Nation's Security Council on February 6, 2015, the Council expressed its readiness to consider appropriate measures, including targeted sanctions, against those who resume hostilities and violate the ceasefire.

The United States urges the parties to seize the opportunity offered by the peace process, in which all relevant regional and international partners are involved, to build a lasting peace in Mali. We reiterate our strong support for the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). Recognizing the legitimate aspiration of all Malians to enjoy lasting peace and development, the United States emphasizes that all parties have a responsibility to all of the communities in Mali and to the international community to reach a durable peace agreement.

On May 15, 2015, the State Department issued a press statement welcoming formal commitments made in Algiers and Bamako to reach a peace accord in Mali. The press statement is available at <http://www.state.gov/r/pa/prs/ps/2015/05/242484.htm>, and includes the following:

... We urge all Malian parties to sign the Accord to underscore their concrete commitment to peace and to continue to engage constructively to implement the Accord.

We commend the Government of Mali for its commitment to the peace process and its openness to dialogue. We also thank the Government of Algeria for the leading mediation role it has played in the peace process as well as the efforts made by the International Mediation Team.

We are deeply concerned by ongoing reports of fighting, and we call on all parties to respect the existing cease-fire agreements and commit to resolving differences through dialogue.

The United States remains committed to helping the Malian people as they work to achieve a durable peace. We reiterate our support to the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and its efforts to assist the Malian people to consolidate peace.

On June 20, 2015, the Accord for Peace and Reconciliation in Mali was signed in Bamako, Mali. The U.S. Department of State issued a press statement on June 21, 2015 praising the peace deal. The press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/06/244061.htm>, congratulates the people of Mali, commends the parties for their willingness to compromise and use dialogue to resolve their differences, and thanks the Algerian government for mediating negotiations.

6. Democratic Republic of the Congo

On January 29, 2015, the U.S. Department of State issued a press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/01/236968.htm>, welcoming the start of military operations against the Democratic Forces for the Liberation of Rwanda (“FDLR”). Excerpts follow from the press statement.

* * * *

The United States welcomes the announcement by the Government of the Democratic Republic of the Congo (DRC) of the start of military operations against the Democratic Forces for the Liberation of Rwanda (FDLR), an armed group that has inflicted immeasurable suffering on the civilian population of eastern DRC and Rwanda for over 20 years. The UN Security Council has mandated the UN Organization Stabilization Mission in the DRC (MONUSCO) to protect civilians and, in support of the DRC authorities, to neutralize armed groups including the FDLR. Last July, the International Conference on the Great Lakes Region (ICGLR) and the Southern African Development Community (SADC) gave the FDLR, including its leadership, a clear deadline of January 2, 2015 to surrender fully and unconditionally or face military consequences. However, the FDLR failed to deliver on its promise to surrender and instead used this period to continue to commit human rights abuses, recruit new combatants, and pursue its illegitimate political agenda.

In October, the ICGLR and SADC heads of state reaffirmed that military action should take place in the absence of a full surrender of the FDLR, and on January 8, the UN Security Council reiterated the need to neutralize the FDLR through immediate military operations.

The United States fully supports DRC military operations with MONUSCO against those members of the FDLR who have failed to surrender. We encourage the DRC and MONUSCO to continue their coordination and joint planning and to take immediate steps to end the threat from the FDLR.

We stress the importance of these military operations being conducted in a way that protects and minimizes the impact on civilians, in accordance with international law, including international humanitarian law, and in line with the UN’s human rights due diligence policy. The neutralization of the FDLR will contribute to long-term peace and stability for the people of the Great Lakes region.

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7. Sudan

On May 8, 2015, the U.S. Department of State issued a press statement expressing its grave concern about ongoing fighting in Sudan’s Darfur region and Southern Kordofan and Blue Nile states. The May 8 press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/05/242039.htm>, goes on to say:

Actions by the Sudanese government and armed opposition groups, especially following the return of some elements of the Justice and Equality Movement (JEM), have displaced countless civilians this year and exacerbated an already serious humanitarian crisis.

We urge the Sudan Revolutionary Front (SRF), all other armed groups, and the Government of Sudan to cease hostilities, to respect their obligations under international humanitarian law, in particular with regard to the protection of civilians, and to ensure safe, timely, and unhindered access for aid organizations as called for by the United Nations Security Council (UNSC).

...

We condemn the recent attacks against the United Nations-African Union Mission in Darfur (UNAMID) peacekeepers in Kass, South Darfur state. The UNSC has made clear that UNAMID is authorized to defend itself against attacks, as occurred in this incident. We call on the Government of Sudan to bring the perpetrators of such violence to account and to take all necessary action to prevent future attacks. The Government of Sudan has the responsibility to defuse tensions in the area and prevent future attacks on UNAMID personnel.

On October 20, 2015, the United States welcomed the Sudan Revolutionary Front's declaration of a six-month cessation of hostilities in a State Department press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/10/248404.htm>. The State Department press statement is excerpted below.

* * * *

The United States welcomes the Sudan Revolutionary Front's October 18, 2015 declaration of a six-month unilateral cessation of hostilities beginning at midnight on October 21 in Darfur and the states of Southern Kordofan and Blue Nile.

We urge the Government of Sudan to build on its own stated commitment by also declaring a unilateral cessation of hostilities for the same time period and covering the same areas. We encourage both the Government of Sudan and the SRF to work under the auspices of the African Union High-Level Implementation Panel to translate their cessation of hostilities declarations into a sustainable end to Sudan's conflicts, initially by ensuring a cessation of hostilities is properly monitored by a neutral third party. If respected by all parties to the conflict, a cessation of hostilities will help facilitate the delivery of humanitarian assistance to Sudanese citizens affected by the conflicts in Darfur, Southern Kordofan, and Blue Nile. To that end, we call on both parties in conjunction with the UN to finalize the modalities by which humanitarian assistance will be delivered to people in need.

A true cessation of hostilities will contribute to a genuine dialogue to address the underlying causes of the armed conflicts that have plagued Sudan for far too long. There is no military solution to Sudan's conflicts. Further fighting only increases the suffering of the Sudanese people. The United States calls on all parties to the conflicts in Sudan to seize this opportunity to end the wars and begin a path towards lasting peace.

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8. South Sudan

On January 23, 2015, the State Department issued, as a media note, the joint statement of the governments of the United States, the United Kingdom, and Norway (the “Troika”) on South Sudan peace negotiations. The media note containing the joint statement is available at <http://www.state.gov/r/pa/prs/ps/2015/01/236238.htm>. The January 23, 2015 Joint Statement of the Troika follows.

* * * *

The members of the Troika (the United States, the United Kingdom, and Norway) are gravely concerned with the continued lack of progress in the South Sudan peace negotiations.

We commend the Intergovernmental Authority on Development (IGAD) and the IGAD Special Envoys for their steadfast commitment to the peace process, and welcome the strong message from People’s Republic of China Foreign Minister Wang Yi calling on the parties to make peace. We recall IGAD’s determination, as articulated in its summit communiqué of January 31, 2014, to inclusive negotiations toward an agreement that addresses necessary reforms to the security sector and economic governance, creates institutions for justice and accountability, catalyzes a revived permanent constitutional process, and forms a transitional government leading to credible elections.

IGAD has made every effort to realize these goals despite obstruction from both the government of South Sudan and the Sudan People’s Liberation Movement – In Opposition (SPLM-IO). We are deeply disappointed in the continued unwillingness of either party to make the compromises needed to achieve a viable peace agreement. Over the past two months, statements by both parties have suggested they have distanced themselves from previous commitments, and violations of the cessation of hostilities agreement have continued. We call on both parties to recommit to negotiate with a spirit of urgency and compromise, refrain from all further military action immediately and form a Transitional Government of National Unity.

We look forward to guidance from the African Union Peace and Security Council, convened on the margins of the African Union Summit in January, on how the report of the AU Commission of Inquiry will be used to support the peace process and inform the development of mechanisms for accountability and reconciliation in South Sudan.

Furthermore, we reiterate our determination to address the grave humanitarian situation in South Sudan. Today, over a year after the beginning of the conflict, nearly 2 million South Sudanese have been displaced, over 100,000 are under the direct protection of the UN Mission in South Sudan, and the country remains at risk of a food security crisis. Along with other international donors, we will continue to stand with the people of South Sudan who are needlessly suffering as a result of this conflict.

We recognize the recent agreement in Arusha, Tanzania to reconcile the SPLM and encourage the parties to use the upcoming IGAD summit of 29 January to secure peace for the people of South Sudan. In the face of this deplorable humanitarian crisis, there can be no excuse for further delay in negotiations or for continued violence.

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The Troika issued a joint statement on February 6, 2015, expressing disappointment at the failure of the leaders of South Sudan to reach a peace agreement at their talks. The February 6, 2015 State Department media note containing the joint statement is available at <http://www.state.gov/r/pa/prs/ps/2015/02/237262.htm>. Excerpts follow from the February 6 joint statement.

* * * *

After the last round of Intergovernmental Authority on Development (IGAD)-led peace talks ended in only a partial agreement, the Troika expresses its disappointment that South Sudan's leaders failed to achieve significant progress toward a peace agreement.

Over a year since the conflict began millions remain displaced, thousands are dead and the country is in ruins despite the commendable efforts of IGAD and its mediation team to achieve a peace agreement. Ignoring the untold suffering of their people, South Sudan's leaders have refused to make the necessary compromises to reach a peace agreement for the people of South Sudan who deserve and expect nothing less. We call on the parties to fully respect the Cessation of Hostilities agreement of January 23, 2014, and avoid all further violence. We urge the parties return to negotiations on February 19, 2015 prepared to compromise to achieve a peace agreement by March 5, 2015 and form a transitional government by July 1, 2015.

The Troika believes that the publication of the Commission of Inquiry's findings and its recommendations on accountability are necessary to ensure that such violence against civilians cannot be undertaken with impunity. The people of South Sudan and in particular the victims deserve no less and it will in the long run enable greater accountability and give rise to more robust political stability.

* * * *

On May 20, 2015, continuing violence in South Sudan, including attacks on civilians and the UN Mission, prompted press statements by the State Department and the U.S. Mission to the UN. In the State Department press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/05/242671.htm>, the United States condemned "the intensified fighting and violence in Unity, Upper Nile, and Jonglei states in South Sudan by the Sudan People's Liberation Army, the armed opposition, and forces led by General Johnson Olony that have led to massive new displacements and had a devastating effect on civilians." Ambassador Power's statement for the U.S. Mission to the UN, available at <http://usun.state.gov/remarks/6463>, "mortar attacks on the United Nations Mission in South Sudan (UNMISS) compound in Melut, South Sudan, that resulted in the death of four people, including one child, and severely injured eight others." Both statements called on all armed groups and the Government of South

Sudan to abide by the terms of the January 2015 Cessation of Hostilities Agreement. See *Digest 2014* at 694-95. The State Department press statement goes on to say:

Violations of international humanitarian norms, including the outright targeting of civilians already vulnerable to greater harm, especially women and children, and grave human rights abuses and violations of international humanitarian law by all sides are unacceptable. The international community will hold those who perpetrate such abuses and violations to account. We call on all sides to silence the guns immediately, permit the UN Mission in South Sudan to investigate the sites of all alleged human rights abuses and violations of international humanitarian law, and allow all humanitarian workers immediate, free and unobstructed access to conflicted-affected communities regardless of their locations.

Additional excerpts follow from Ambassador Power's statement on the violence in South Sudan.

* * * *

Today's attacks are only the latest in a series of brutally violent acts against civilians, including the raping and murder of children, resulting from increased fighting between the Government of South Sudan and the Sudan People's Liberation Army in Opposition, and their respective affiliated militias and other armed groups, in Unity and Upper Nile States over the last two weeks. As this most recent incident underscores, the renewed fighting in South Sudan puts at risk UNMISS bases and protection of civilian sites; and it does so at a time when across the country more than 3 million people are lacking sufficient food and more than 2 million are internally displaced.

The international community is footing the bill for President Salva Kiir's and opposition leader Riek Machar's shameful disregard for the devastating humanitarian crisis facing the people of South Sudan. Political and military leaders on all sides of this conflict must put aside their self-serving ambitions, bring an end to the fighting, implement the Cessation of Hostilities Agreement to which both have already agreed, and engage in negotiations for a comprehensive and inclusive peace agreement to establish a transitional government and bring about a reform process that addresses the root causes of this conflict.

South Sudan's political leaders continue to refuse to prioritize the well-being of their own people, necessitating an increase in international pressure on the South Sudanese parties so that they accept and implement a credible peace agreement. In this vein, we will continue our work with the UN Security Council's South Sudan Sanctions Committee to gather and review evidence that might be useful for sanctions listings that target political spoilers and those who violate and abuse human rights and violate international humanitarian law.

We regret that South Sudan's political leaders repeatedly fail to heed international humanitarian law's prohibition on intentionally targeting civilians. Additionally, all parties should regard UNMISS sites as inviolable and the work of UNMISS personnel should be respected, supported and protected as they endeavor to protect the more than 120,000 internally

displaced people sheltering at UNMISS bases and the many others outside these bases who are displaced by the ongoing fighting.

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On June 2, 2015, the United States Department of State issued a press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/06/243112.htm>, in which it condemned the Government of South Sudan for expelling UN Deputy Special Representative and Humanitarian Coordinator for the UN Mission in South Sudan (“UNMISS”) Toby Lanzer. The press statement further explains:

... The expulsion of Mr. Lanzer is an affront to the international community working to bring peace and stability to South Sudan, and demonstrates a callous disregard for the suffering of the South Sudanese people. The government’s priority should be bringing an end to the violence that has already displaced more than 2 million of its citizens—half a million of whom are now refugees in neighbouring countries—and left 4.6 million facing extreme, life-threatening hunger.

The United States has contributed more than \$1.1 billion in emergency aid to house, feed, provide medical services and improve water, sanitation, and hygiene services for the people of South Sudan. We strongly support the work of the UN Mission in South Sudan and that of Mr. Lanzer who has been instrumental in addressing the dire humanitarian needs of conflict-affected communities and has been a strong partner and advocate for vulnerable populations in South Sudan.

We join UN Secretary-General Ban Ki-moon and other governments in calling on the Government of South Sudan to reverse its decision and to cooperate fully with all United Nations entities present in South Sudan, as well as other international organizations working on behalf of the South Sudanese people.

On August 26, 2015, President Salva Kiir of South Sudan signed a peace agreement, which had been signed on August 17 by rebel leader Riek Machar. The United States had threatened enhanced international sanctions if President Kiir did not sign the agreement. White House National Security Advisor Susan E. Rice issued the following statement (available at <https://www.whitehouse.gov/the-press-office/2015/08/26/statement-national-security-advisor-susan-e-rice-south-sudan-peace>) on August 26, 2015 on President Kiir’s decision to sign the agreement.

* * * *

The United States welcomes President Kiir’s decision to accept the terms of peace and sign the regionally-sponsored peace agreement today in South Sudan. However, we do not recognize any reservations or addendums to that agreement. The United States believes this is the necessary first step toward ending the conflict and rebuilding the country. Now the hard work begins.

Implementing this agreement will require commitment and resolve from all parties to the conflict as well as South Sudan's regional and international partners. The United States will support the people of South Sudan as they begin the implementation process, but it is imperative that the parties remain committed to peace. We will work with our international partners to sideline those who stand in the way of peace, drawing upon the full range of our multilateral and bilateral tools.

The United States is grateful for the constructive role played by the Intergovernmental Authority on Development and the African Union to secure an agreement. Together, we must help South Sudan implement the agreement, to stave off famine, to stand steadfast and united against those who block the path to peace, and to hold accountable those who have committed atrocities. At this moment of opportunity, the United States stands in solidarity with the people of South Sudan, and with all those working to build the peaceful future that they so deserve.

* * * *

The Troika issued a further joint statement on South Sudan on October 6, 2015. The joint statement appears below and is available as a State Department media note at <http://www.state.gov/r/pa/prs/ps/2015/10/247949.htm>.

* * * *

The Troika (Norway, the United Kingdom and the United States) express serious concern about President Salva Kiir Mayardit's October 2 announcement that he plans to replace South Sudan's 10 states with 28 new states. This announcement directly contradicts the Government of South Sudan's commitment to implement the peace agreement it signed on August 26. One of the primary tasks of the soon to be formed Transitional Government of National Unity is to initiate and oversee a process to complete a permanent constitution that will address such fundamental issues as the structure of the state.

We recognize that the people of South Sudan have long been interested in the issues of federalism and decentralization. However, we strongly urge President Kiir to defer action on this fundamental matter until the Transitional Government of National Unity is formed and a national constitutional dialogue can take place.

We strongly condemn the current resumption of fighting in Unity State. This underscores the urgent need for all South Sudanese stakeholders and members of the IGAD Plus to move forward with the full and timely implementation of the peace agreement, especially the prompt establishment of the Joint Monitoring and Evaluation Commission and mandated security arrangements. We also call on the Opposition to resolve outstanding security-related issues and both to allow for full and unfettered humanitarian access.

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The United States Department of State issued a press statement on October 20, 2015 welcoming the appointment of former President of Botswana Festus Mogae to

chair oversight of the South Sudan peace agreement. The press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/10/248403.htm>, includes the following:

The Department of State commends the Inter-Governmental Authority on Development (IGAD) for selecting former Botswanan President Festus Mogae as the Chairperson of the Joint Monitoring and Evaluation Commission (JMEC) for South Sudan. A prominent leader of accomplishment and moral authority, President Mogae will lead a group of international experts responsible for overseeing and supporting the implementation of all aspects of the agreement. The United States welcomes his appointment and will work closely with him and other international partners to help the South Sudanese people revitalize their dream of achieving peace and building a new nation.

The United States for decades has been one of the closest partners and friends to the people of South Sudan. The U.S. Special Envoy Donald Booth has been deeply involved in the peace process and will continue to work with all the partners, including President Mogae and the JMEC, in the implementation of the August peace agreement. Through successful implementation, we seek to restore the spirit of hope and promise shared by South Sudanese people upon independence in 2011. We look forward to receiving President Mogae in Washington, D.C. in the coming weeks to coordinate our efforts to accomplish this goal.

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On November 25, 2015, the Troika issued another joint statement on South Sudan, urging South Sudan's leaders to abide by the peace agreement by forming a transitional government within the established 90-day timeline. The State Department media note containing the joint statement is available at <http://www.state.gov/r/pa/prs/ps/2015/11/250012.htm>. The November 25, 2015 joint statement also commends President Mogae and JMEC for their efforts:

We commend Festus Mogae, the Chairman of the Joint Monitoring and Evaluation Commission (JMEC), for beginning to implement the agreement by announcing this week that he will host the JMEC's first meeting in Juba on 27 November. It is vital that all parties participate fully. We call on the Opposition and former detainees to attend the JMEC launch and on all South Sudanese parties to work with President Mogae. Those who decide not to participate will be further delaying the implementation of the peace agreement, which will only deepen an already grave humanitarian crisis and prolong the suffering of the South Sudanese people.

On December 22, 2015, the United States welcomed the return of the Sudanese People's Liberation Movement In Opposition to Juba to cooperate with the Government of Sudan via the Joint Monitoring and Evaluation Commission ("JMEC"). The December

22, 2015 State Department press statement called the return an “important milestone in the implementation of the peace agreement.” The press statement is available at <http://www.state.gov/r/pa/prs/ps/2015/12/250847.htm>. The United States also called on the parties to work together “in the spirit of unity and compromise to solidify the reforms outlined in the peace agreement and to establish the Transitional Government of National Unity in full cooperation with JMEC Chairperson, President Festus Mogae.”

9. Burma

On October 15, 2015, the United States Department of State issued a statement welcoming the signing of a nationwide ceasefire agreement in Burma. The statement, available at <http://www.state.gov/r/pa/prs/ps/2015/10/248222.htm>, appears below.

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The United States commends all sides for their ongoing efforts to bring an end to the longest-running civil conflict in the world. The signing of the text of the Nationwide Ceasefire Agreement (NCA) by the government and eight ethnic armed groups is a critical first step in a long process of building a sustainable and just peace in Burma. We recognize that some groups were not able to sign today, and we understand and respect their concerns.. We welcome their commitment to continue discussions within their communities and with the government about the necessary conditions for signing at a future date, and we urge the government to engage constructively in a dialogue with these groups to pursue a more inclusive peace.

We call on all NCA signatories to adhere to the spirit and letter of the agreement they have signed today. Military action undertaken by or against any signatory or non-signatory to this agreement undermines the trust-building necessary for lasting peace, stability, and security for all.

Dialogue among all parties will be essential to ensuring continued progress toward national trust-building and lasting peace. We urge all parties to continue to engage with each other and civil society representatives in the spirit of unity and compromise, particularly in the process to finalize a political dialogue framework and the conduct of the political dialogue itself. We expect all groups that continue to pursue peace through dialogue to be allowed to do so without exception or threat of penalty. We remain concerned by reports of continued military offensives in Kachin and Shan States and the lack of humanitarian access to many of the more than 100,000 internally displaced persons in those areas. We strongly urge all parties to honor their commitment to ensure unfettered access for humanitarian assistance to all those in need, without exception or delay.

The United States will watch closely and support full implementation of all agreements, the NCA, existing bilateral ceasefires, and the political dialogue that follows. We remain committed to the historic process of peace building and national reconciliation in Burma in the months and years to come.

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10. Ukraine

See Chapter 9 for U.S. statements on Ukraine's territorial integrity and sovereignty, with internationally recognized borders inclusive of Crimea and eastern Ukraine.

On February 12, 2015, the United States welcomed the agreement reached by the OSCE-led Trilateral Contact Group on a cease-fire and heavy weapons withdrawal in eastern Ukraine. The February 12 package of commitments was intended to amplify and implement the September 2014 Minsk Agreements. See *Digest 2014* at 348-49 for discussion of the Minsk Agreements. Secretary Kerry's February 12, 2015 press statement, available at <http://www.state.gov/secretary/remarks/2015/02/237439.htm>, credited Chancellor Merkel and President Hollande and their diplomatic teams for facilitating the agreement. Secretary Kerry's statement expresses U.S. readiness to assist the process toward peace:

The parties have a long road ahead before achieving peace and the full restoration of Ukraine's sovereignty. The United States stands ready to assist in coordination with our European Allies and partners. We will judge the commitment of Russia and the separatists by their actions, not their words. As we have long said, the United States is prepared to consider rolling back sanctions on Russia when the Minsk agreements of September 2014, and now this agreement, are fully implemented. That includes a full cease-fire, the withdrawal of all foreign troops and equipment from Ukraine, the full restoration of Ukrainian control of the international border, and the release of all hostages.

On February 16, 2015, the United States called on Russia and Russian-backed separatists in eastern Ukraine to abide by the cease-fire and implement the commitments agreed to in Minsk in 2014. See February 16, 2015 State Department press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/02/237525.htm>. The U.S. statement expressed grave concern at the violence in Dabaltseve and its surrounding area; Sieverodonetsk; Luhansk; and Donetsk city. An OSCE Special Monitoring Mission ("SMM") facilitates the cease-fire in Ukraine but Russian-backed separatists refused to implement the cease-fire and the OSCE monitors were not given security guarantees for access in Debaltseve.

On February 17, 2015, Ambassador Power provided the U.S. explanation of vote on a Security Council resolution proposed by Russia. Ambassador Power's statement, available at <http://usun.state.gov/remarks/6372>, is excerpted below.

* * * *

...the idea that Russia—which manufactured and continues to escalate the violence in Ukraine—has tabled a resolution today calling for the conflict’s peaceful solution, is ironic, to say the least. Bitterly ironic, given that this Council has dedicated some thirty meetings to calling on Russia to stop escalating the very same conflict, and given the human consequences that are growing daily.

Even as Russia puts forward this resolution, separatists that Russia has trained, armed and that it fights alongside are laying ruthless and deadly siege to the Ukrainian-held city of Debaltseve, approximately 30 to 40 kilometers beyond lines established by the September Minsk agreements. Throughout the day, we’ve heard conflicting reports as to whether Debaltseve has fallen. According to press reports, the so-called “road of life” leading out of Debaltseve has become a “road of death,” littered with the bodies of Ukrainian soldiers. At just the time this Council is calling for the cease-fire that was supposed to take effect Saturday night at midnight, Russia is backing an all-out assault.

... Russia and the separatists it supports have refused to guarantee the safety of impartial OSCE monitors who have been trying for days to enter the area – a commitment that ...Russia and the separatists made on February 12th at Minsk.

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...[T]he United States has maintained the same position across thirty meetings before this Council with respect to Ukraine. Let me reiterate that position. We are for peace in Ukraine. We are for Ukraine’s sovereignty, independence, territorial integrity and unity. We are for ending the violence in eastern Ukraine that has taken more than 5,600 lives since last April, and displaced already approximately one million people. We are for all of the signatories to the agreements signed in Minsk in September 2014—particularly Russia and the separatists they back—fulfilling the commitments that they have made. And we are for the “Package of Measures for the Implementation of the Minsk Agreements” of September 5 and September 19th, the package of measures endorsed last week by the leaders of Ukraine, Russia, Germany and France. To be clear, the February 12th implementation package is a roadmap to fulfilling commitments made by these same signatories in the September Minsk Agreements.

President Hollande, President Poroschenko, Chancellor Merkel, and President Putin each made this clear when they endorsed the implementation package on February 12th and issued their joint declaration that they “remain committed to the implementation of the Minsk Agreements.” The “Minsk Agreements” ... refer to those signed on September 5 and September 19 by the same signatories, while the “measures for implementation” in the title make clear that the February 12th package was designed to begin carrying out the September agreements, and not to supplant them, as Russia has now begun to argue.

The United States rejects any interpretation of this resolution that would abrogate the parties’ earlier commitments. All parties must implement all of the commitments made in the September Minsk agreements. The implementation steps agreed upon in the February 12th package include a comprehensive cease-fire; the withdrawal of heavy weapons from the September line of contact; the release of all hostages; and the eventual restoration of Ukraine’s territorial sovereignty and control of its international border.

* * * *

But we call on Russia to translate hope into real action; to translate hope into real results, and to do so urgently.

Today's Council session is an effort to throw the Council's weight behind an agreement already jeopardized by statements by the separatists dismissing the full cease-fire, by their continued attacks on Debaltseve, and by the separatists' refusal—together with Russia's—to allow access to the OSCE's Special Monitoring Mission. We are looking to Russia, which manufactured and fueled this conflict, to ... honor the resolution it tabled today supporting efforts to end it.

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On June 5, 2015, Ambassador Power again condemned Russian-backed separatists for violations of the cease-fire and Minsk commitments at a Security Council meeting on Ukraine. Ambassador Power's remarks are available at <http://usun.state.gov/remarks/6556>, and excerpted below.

* * * *

On June 3rd, combined Russian-separatist forces launched multiple, coordinated attacks west of the Minsk line of contact in Donetsk. The attacks were concentrated on the towns of Marinka and Krasnohorivka.

The Russian Federation and its separatist allies have offered multiple—often conflicting—explanations for these attacks.

* * * *

... Russia has argued that the attacks were justified because the areas that are actually part of the separatist-controlled territory under the Minsk agreements are these areas. They are not. This was the case Russia made about Marinka and Krasnohorivka yesterday, at a meeting of the OSCE. We've seen this tactic before; when combined Russian-separatist forces encircled and attacked Debaltseve immediately after signing the package of measures at Minsk on February 12th, 2015. As a separatist commander Eduard Basurin told *Reuters* on February 15th, "Of course we can open fire [on Debaltseve]...The territory is internal: ours. And internal is internal. But along the line of confrontation there is no shooting."

The problem with this line of argument is, quite simply, that it is false. At no point did the Minsk Agreements recognize Marinka and Krasnohorivka as separatist-controlled territory. Nor did they grant the separatists control over Debaltseve or other areas combined Russian-separatist forces have seized, or tried to seize. Yet for Russia and the separatists, it seems the contact line can shift to include the territories that they feel they deserve.

The Kyiv-born surrealist master Mikhail Bulgakov put this problem a different way: "The tongue can conceal the truth, but the eyes, never!" In this case, the objective eyes in eastern Ukraine belong to the OSCE's Special Monitoring Mission, the SMM. And what they tell us is that, on the evening of June 2nd and early morning of June 3rd, "SMM observed the movement of

a large amount of heavy weapons in DPR-controlled areas—generally in a westerly direction toward the contact line—close to Marinka, preceding and during the fighting.” So, to repeat: according to the SMM, heavy weapons from the Russian-backed separatist side moved westward “*preceding* as well as *during* the fighting.”

The SMM tried to contact high-ranking DPR personnel over an hour-and-a-half period on the morning of June 3rd, but reported, “Either they were unavailable or did not wish to speak to the SMM.” The eyes do not conceal the truth. And the truth here is that the recent violence was rooted in a combined Russian-separatist assault.

* * * *

The Ukrainian government has made good faith efforts to honor that consensus— notwithstanding the seemingly endless violations by Russia and the separatists—and deliver on the commitments made at Minsk. Ukraine is holding direct dialogue with the separatists, a bitter pill to swallow, but one they have swallowed for the sake of peace and for the sake of the implementation of the Minsk Agreements. At the same time, Ukraine has undertaken critical efforts, with the participation of Ukrainian civil society, to address pervasive problems it inherited from its predecessors, like widespread corruption, as well as to pursue crucial reforms such as decentralization. Ukraine cooperates with the international monitors and bodies, and has committed to address identified areas of concern. The United States will continue to raise tough issues and these areas of concern, including some raised here today by the briefers, with the Government of Ukraine, and we will support the government and Ukrainian people as they continue their efforts toward meaningful reform.

Yet Russia—and the separatists it trains, arms, fights alongside, and with whom it shares command and control systems in eastern Ukraine—continues to ignore this consensus, flouting the commitments it made at Minsk. It goes right on applying its playbook in new territories—as though this Council and the world are too blind, or too easily deceived to notice.

We must not let ourselves be deceived. The consequences of Russia’s contempt for Minsk and the rules undergirding our international peace and security are too great—both for the integrity of the international system, and for the rights and welfare of the Ukrainian people. We cannot fail to see and fail to act. We must not stop applying pressure until Ukrainians get the stable democracy, the territorial integrity, and sovereignty they yearn for and deserve. Thank you.

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The United States also called on the Russian government and Russian-backed separatists to allow humanitarian access to all areas of eastern Ukraine. See, *e.g.*, October 29, 2015 statement by U.S. Ambassador to the OSCE Daniel B. Baer to the Permanent Council in Vienna, available at <http://ukraine.usembassy.gov/statements/osce-10292015.html>. Ambassador Baer stated:

The United States calls on the Russian government to unequivocally condemn restrictions on humanitarian aid in Ukraine, and to get the separatists it backs to lift all restrictions without delay. In addition, we call for an end to the

uninspected Russian so-called “humanitarian convoys.” Ukraine has entered into negotiations with Russia on a possible regime for inspecting assistance coming into Ukraine from Russia via rail or road, which we urge be concluded as soon as possible. Lingering doubts about what Russia is actually sending in these convoys can be cleared up instantly, and such inspections can help to build confidence for further bilateral negotiations on more difficult questions related to Minsk implementation.

On December 11, 2015, Ambassador Power again addressed the Security Council at a meeting on Ukraine. She called for full implementation of the September 2014 and February 2015 Minsk agreements. Her remarks, excerpted below, are available in full at <http://usun.state.gov/remarks/7037>.

* * * *

As we’ve heard today, the present situation in Ukraine looks different than it did when we last met in June, just a few days then after a combined Russian-separatist force offensive that coordinated attacks west of the ceasefire line in Donetsk.

But the horrific situation back in June cannot become the baseline for our assessments or our actions. While major combat is down since the September 1st ceasefire—and that’s extremely important for all of the lives affected—this crisis remains no less real, no less urgent, and no less troubling. There are still, as we’ve heard, daily ceasefire violations. And as has been described in great detail today, the citizens of Ukraine—all of Ukraine—continue to suffer enormously.

Let us be clear about why we are gathered again and what continues to drive this crisis.

We are here because Russia continues to occupy Ukraine’s autonomous region of Crimea, in defiance of international law, in defiance of its treaty obligations, the Helsinki Final Act, and the resolution passed by 100 members of the UN General Assembly that rejected the phony Crimea referendum and that called for Ukraine’s territorial integrity to be respected. Its authorities there have opened criminal cases against critics of the occupation and specifically targeted the Tatar community, subjecting them to beatings, arbitrary detentions, and police raids.

We are here because even today Moscow continues to arm, train, support, and fight alongside separatists in eastern Ukraine. On Wednesday, the OHCHR confirmed the continued “inflow of ammunition, weaponry and fighters from the Russian Federation into the territories controlled by the armed groups.” A robust combined Russian-separatist military force, led by Russian officers, continues to operate in Ukrainian territory.

We are here because Moscow and the separatists continue to obstruct international monitoring efforts, undermining the ceasefire and the prospects for peace. OSCE monitors face obstruction on a daily basis. And just this past weekend, OSCE monitors on patrol were threatened by separatists with automatic rifles.

We are here because—in blatant disregard for the commitments that have been made—the Russian-backed separatists continue to attack Ukrainian positions along the line of contact almost every day, at times with mortars banned under weapons withdrawal agreements.

Ukrainian soldiers and civilians continue to be killed or wounded in these attacks. And we cannot afford to get used to that.

The cumulative impact of Moscow's aggression remains the widespread and unnecessary suffering of Ukrainian civilians. Almost 1.5 million people are unable to return to their homes, their schools, and their daily lives. Winter has arrived, and as many as 300,000 people residing along the contact line are in need of blankets, fuel, and clothes to get them through the cold.

Yet despite the urgent need, few relief organizations are able to work in the separatist-controlled areas because, as we heard from John Ging, the separatists suspended and expelled UN and international humanitarian organizations in July. Only a fraction of the aid required by the two million people in need in these areas is getting through. We heard earlier a very moving account by the Ambassador from the Russian Federation on the plight of people living in Donbas, yet it is Russia's separatists that expelled humanitarian organizations and by-and-large haven't let them resume their function. We urge Moscow to finally honor the commitments that it made when it signed the Minsk Agreements and ensure that separatists lift restrictions and allow the immediate resumption of critically needed aid. We also encourage the Government of Ukraine to accelerate efforts to facilitate the movement of civilians and cargo across the contact line, and continue the provision of social, education, and economic benefits to internally displaced people and others in need.

There has also been a deeply concerning deterioration in the human rights situation in Donbas, as described in depth by the UN Human Rights Monitoring Mission. Their report this week notes "new allegations of killings, torture and ill-treatment, illegal detention, and forced labor" in separatist controlled areas. The self-appointed authorities in the east have systematically failed to stop, investigate, or hold to account those believed responsible for abuses and ill-treatment. The Mission also reported incidents in areas controlled by the Ukrainian government, and we urge the government to immediately investigate all serious and credible allegations.

Just as we know who is driving this conflict, we know what must be done to end it. The September 2014 and February 2015 Minsk agreements are the best and only way to achieve peace in eastern Ukraine. Over the six months since we last met, we have seen how even incomplete steps toward implementation of Minsk—like the September 1st ceasefire—can reduce casualties and provide space for progress on other fronts.

What is needed now—what is long overdue—is full implementation of the Minsk agreements.

All sides must seize the opportunity to bring this conflict to a peaceful end. This year has seen some progress in this direction, with fewer casualties and some limited weapons withdrawals, and now is the time to implement Minsk and settle this conflict. This would allow the people of Ukraine to resume normal life and focus on building the democratic, European society that Ukrainians have fought and in many cases died for.

Let me be specific about the path to peace laid out by the Minsk agreements. Most immediately, the daily violations of the ceasefire line must come to an end; heavy weapons must be withdrawn from the frontline, and the OSCE must be allowed full access all the way to the border. Legitimate local elections must then be held in Donbas. Minsk is crystal clear on the requirements for these elections: they must be held according to Ukrainian law and OSCE standards, and they must be held under OSCE's observation. In October, President Putin recommitted to these Minsk-required standards and agreed on the urgent need for the sides to agree on election mechanics that conform to these standards. But since then, Russia and the

separatists have rejected proposals by Ukraine and the OSCE because they included elements like free media access and the right of Ukrainian political parties to participate. While the rest of Ukraine held local elections on October 25th and November 15th, residents in the Donbas continue to be deprived of legitimately elected representatives, and Russia and its surrogates continue to stonewall the work of the Trilateral Contact Group.

Holding legitimate elections is the key to unlocking the remaining steps of Minsk and enabling the separatist-held territories to be peacefully reintegrated back into the Ukrainian political and legal system. As agreed in Paris in October, the elections must be followed by implementation of Ukraine's special status law and entry into force of the amnesty legislation. Constitutional reform must also occur, and Ukraine has been working toward this for many months—its draft amendments on decentralization were endorsed by the Venice Commission's international legal experts and in August received the first of two required approvals by Parliament. And finally, Russia and the separatists must fulfil other outstanding Minsk obligations, which include withdrawing all foreign fighters and military equipment, releasing all hostages and unlawfully detained persons – including Nadia Savchenko and Oleh Sentsov – and turning over control of the international border back to the sovereign Government of Ukraine.

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11. Yemen

Ambassador Power delivered remarks at a UN Security Council briefing on Yemen on December 22, 2015. She urged all parties to commit to a ceasefire, abide by international humanitarian law, and allow for a political transition in accordance with the Gulf Cooperation Council Initiative, the outcomes of the National Dialogue, and relevant Security Council resolutions. Her remarks are excerpted below and available at <http://usun.state.gov/remarks/7072>.

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...[L]istening to the remarks here this morning, one thing is clear: that the Security Council is united on Yemen.

We are united, to begin with, in our support for the work undertaken by the Special Envoy and his team over the last week in Switzerland and well beyond. You negotiated critical confidence-building measures, a mechanism to seek to de-escalate military tensions, and improved humanitarian access to all governorates—these are important steps forward, and we commend you for your work. As others have noted, after nearly nine months of fighting and more than 2,700 civilian deaths, such steps are long overdue and the United States stands ready to work with the rest of the Council to hold all sides to their commitments in advance of the resumption of talks next month.

Today has also shown that this Council has a common vision of what must happen next. As the negotiators are returning home from Switzerland, let me highlight three of the most important messages we have sent as a Council today.

First, all sides must do more to facilitate access for life-saving humanitarian assistance and shipments of the most basic commercial goods. ...

This has to stop. Recent events have shown that access can be improved even in the absence of a lasting political agreement. ...

Secondly, the Council today reaffirmed its conviction that the crisis will be solved not through military action, but—as we’ve all heard again and again—through political dialogue, like the one that the Special Envoy has managed to restart in Switzerland. This progress reinforces the message the Council previously sent through resolution 2216, which called unequivocally for a consensus-based political solution to the conflict based on dialogue.

Such dialogue will lead to peace only if all parties fully commit to its success and are willing to make hard compromises. The lack of trust among the parties after everything is understandable, particularly after the Houthis violate one agreement after another in their military push southward—the events that precipitated the current phase of the conflict. But for the sake of the Yemeni people, the warring parties must now come together to engage in good faith. They must be prepared to show flexibility and adhere to compromises once the talks conclude. Even when there may be provocations on the ground, everyone must be resolute in their commitment to return to a political transition based on the Gulf Cooperation Council Initiative, the outcomes of the National Dialogue, and relevant Security Council resolutions.

As the transition takes shape—and I realize we’re not there yet—it will be critical that it incorporate not only armed groups, but also Yemeni women and members of Yemeni civil society. And we commend you, Special Envoy, for your dedicated effort to this end. Such representatives must have the freedom to leave Yemen to take part in peace talks, and we hope that they are also able to leave Yemen to provide this Council with firsthand perspectives of conditions on the ground.

Third and finally, the Council made clear today that all sides must commit to a de-escalation of the hostilities and a lasting ceasefire. The ceasefire that began last week was imperfect, but it was a step. The United States joins others in welcoming President Hadi’s commitment to extending it, and we urge forces on the ground to respect this halt in attacks. To bolster this ceasefire, we hope that all parties will send empowered representatives to the UN’s proposed Coordination and De-escalation Committee without delay.

While urging all sides to respect this ceasefire, I also want to reiterate that all parties must fully abide by their obligations under international humanitarian law—which, as High Commissioner Zeid reported, has been violated repeatedly during this conflict with horrific consequences. Militias loyal to the Houthis and former President Ali Abdullah Saleh must stop any and all indiscriminate shelling of civilian areas, including in Taiz, and they must stop their cross-border attacks. We will also continue to urge the Saudi-led coalition to ensure lawful and discriminate targeting and to thoroughly investigate all credible allegations of civilian casualties, and make adjustments as needed to avoid such incidents.

Today’s Council session has sent a single, unified message about what must be done in Yemen. We stand behind the Special Envoy’s efforts and we urge all sides to continue moving toward a political transition. In the interim, we call on them to improve access, to de-escalate hostilities, and to commit to a lasting ceasefire.

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On December 23, 2015, the United States, in its capacity as President of the Security Council, issued a Security Council press statement on the situation in Yemen. The press statement follows and is available at <http://usun.state.gov/remarks/7083>.

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The members of the Security Council welcomed the participation of Yemeni parties in peace consultations from 15 to 20 December 2015, held under the auspices of the United Nations. They expressed their appreciation and reiterated their full support for the efforts of the United Nations and the Special Envoy of the Secretary-General for Yemen.

The members of the Security Council recalled Security Council resolutions 2014 (2011), 2051 (2012), 2140 (2014), 2201 (2015) and 2216 (2015), emphasizing the need for a peaceful, orderly, inclusive and Yemeni-led transition process. The members of the Security Council reiterated their demand for the full implementation of relevant Security Council resolutions, and reiterated their call from resolution 2216 (2015) on all Yemeni parties to resume and accelerate United Nations-brokered inclusive political consultations.

The members of the Security Council commended the parties and the Special Envoy for a productive round of talks, which provided a foundation for the next phases of the peace process. They welcomed the agreement of the parties to a cessation of hostilities, expressed deep concern at the number of violations of the cessation of hostilities committed during the talks, and emphasised that the cessation of hostilities and compliance with related Security Council resolutions should lead to a permanent and comprehensive ceasefire. In this regard, the members of the Security Council welcomed the commitment of the parties to continue the work of the Coordination and De-escalation Committee established at the talks in order to proactively reduce the number of violations, and urged all parties to adhere to the cessation of hostilities and to exercise maximum restraint if violations or reports of violations emerge.

The members of the Security Council welcomed the commitment of the parties at the talks to ensure safe, rapid and unhindered access for humanitarian aid delivery to all affected governorates, including in particular Taiz, and called on the parties to respect this commitment in the future. They encouraged the parties to urgently finalize agreements on the release of all non-combatant and arbitrary detainees, and to finalize agreement on a package of confidence-building measures.

The members of the Security Council noted with appreciation the progress made during the talks towards a framework for negotiations based firmly on resolution 2216 (2015) and other relevant United Nations Security Council resolutions, capable of leading to an end to the conflict. In this respect, the members of the Security Council called on all Member States to support the commitment of the Yemeni parties to the political dialogue.

The members of the Security Council urged the Yemeni parties to fulfill commitments made during the talks and welcomed their commitment to a new round of talks in mid-January 2016, building on the progress that has been achieved so far. They reaffirmed their call on Yemeni parties to engage without preconditions and in good faith, including by resolving their differences through dialogue and consultations, rejecting acts of violence to achieve political goals, and refraining from provocation and all unilateral actions to undermine the political transition. The members of the Security Council strongly condemned all violence,

attempts or threats to use violence to intimidate those participating in United Nations-brokered consultations and emphasized that such action is unacceptable.

The members of the Security Council emphasized that the United Nations-brokered inclusive political dialogue must be a Yemeni-led process, with the intention of brokering a consensus-based political solution to Yemen's crisis, in accordance with the Gulf Cooperation Council Initiative and its Implementation Mechanism, the outcomes of the comprehensive National Dialogue Conference and relevant Security Council resolutions.

The members of the Security Council expressed their support and appreciation for the efforts of the Secretary-General's Special Envoy for Yemen, who will continue to engage with all Yemeni stakeholders to take steps towards a durable ceasefire and a mechanism for the withdrawal of forces, relinquishment of all additional arms seized from military and security institutions, release of political prisoners and the resumption of an inclusive political transition process in accordance with Security Council resolution 2216 (2015). The members of the Council recognized the importance of United Nations ceasefire monitoring capacity to support the process.

The members of the Security Council expressed deep concern about the dire humanitarian situation in Yemen, which continues to worsen. The members of the Security Council recognized that over 80 per cent of the population—21 million people—require some form of humanitarian assistance and emphasized that the civilian impact of the conflict has been devastating, particularly for children and the 2.5 million internally displaced persons. The members of the Security Council expressed particular concern at the food security situation, with over 7 million people suffering severe food insecurity and a doubling in the number of children under five who are acutely malnourished. They recognized that functioning markets inside Yemen are essential to address the situation, as humanitarian assistance alone cannot overcome a humanitarian crisis of this scale.

The members of the Security Council noted that the humanitarian appeal for 2015 has been 52 per cent funded and urged the international community to contribute to the humanitarian appeal for 2016.

The members of the Security Council urged all parties to fulfill their commitments to facilitate the delivery of commercial goods, humanitarian assistance and fuel for civilian purposes to all parts of Yemen, as well as urgent measures to further ensure rapid, safe and unhindered humanitarian access. They also stressed the urgent need for commercially shipped food, medicine, fuel and other vital supplies to continue to enter Yemen through all of Yemen's ports without delay as a humanitarian imperative because of the heavy dependence of Yemen and its people on imported food and fuel. In that regard, they urged all parties to work with the new United Nations Verification and Inspection Mechanism. The members of the Security Council called upon all sides to comply with international humanitarian law, including to take all feasible precautions to minimize harm to civilians and civilian objects, to end the recruitment and use of children in violation of applicable international law, and to urgently work with the United Nations and humanitarian aid organizations to bring assistance to those in need throughout the country.

The members of the Security Council reiterated their strong commitment to the unity, sovereignty, independence and territorial integrity of Yemen.

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12. Protecting Civilians During Peacekeeping Operations

On February 12, 2014, Ambassador Jeffrey DeLaurentis, U.S. Alternate Representative to the United Nations, addressed the Security Council at a debate on the protection of civilians during UN peacekeeping operations. His remarks, available at <http://usun.state.gov/remarks/5942>, are excerpted below.

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...[A]rmed conflicts today are rarely fought between opposing military forces lined up against each other on an isolated battlefield. Instead, they tend to involve, on one side or perhaps both, irregular forces that live in close proximity to civilian populations. The result is that, when fighting takes place, civilians are often at grave risk either because they are intentionally targeted, or because they otherwise find themselves in the line of fire. Even when civilians do survive, the conflict may quickly drive them from their homes, exposing them to a new set of risks. The responsibility for protecting civilians in conflict, therefore, is both an important and a highly complicated one—a job we are still learning how to do effectively.

In recent years, this Council has regularly directed UN peace missions to protect civilians under imminent threat. Establishing a mandate, however, is a profoundly simple task compared to fulfilling one. The challenge we face goes beyond establishing goals to actually save and secure the lives of civilians in conflict. This challenge can be broken down into three core elements: prioritization, planning, and prevention.

The first of these elements is straightforward. The protection of civilians must be identified as a key priority in any peacekeeping mission from the very earliest stages. No one is helped, and the credibility of the UN is seriously damaged, when UN troops stand by while civilians are wounded or killed.

A second imperative is planning, a process that should begin as soon as the evidence of a potential crisis comes to the Council's attention. The best way to protect civilians is to act in time to keep conflicts from breaking out. With effective and early planning, peacekeeping missions can be designed with civilian protection uppermost in mind, with the right equipment and the best mix of military, police, and civilian personnel pre-positioned to respond to potential crises.

Part of planning is to learn from the past while acknowledging that no two situations are exactly alike. In Haiti, civilian protection has centered on efforts to return displaced families to their homes and to train an effective national police. In the Democratic Republic of the Congo, we are finally seeing the benefits of a mission that has emphasized civilian protection and that is backed by a strong political and diplomatic strategy. It is worth noting in this context that the UN mission in the DRC has developed a comprehensive plan for protecting civilians, which includes mapping specific threats and integrating that information into overall planning. Making such data available to mission commanders can spell the difference between success and failure.

All elements of the UN hierarchy have a role to play in planning for civilian protection. The Department of Peacekeeping Operations can facilitate the sharing of knowledge and best practices across missions, helping to disseminate lessons learned. But mission-specific planning remains critical and DPKO has a duty to assist each mission in developing a plan that fits the

unique circumstances it will face. Meanwhile, the members of this Council have a responsibility, through the questions we ask and the wording of the resolutions we adopt, to make clear the importance we attach to this issue.

This brings me to the third element in our discussion today—prevention. While we can make civilian protection a priority and devote ample resources to planning, we can still find ourselves trying to save lives in ways that were not foreseen. In Cote d’Ivoire in 2010, a political crisis required rapid adjustments to enable a democratic transition and contain civilian violence. Just recently, in South Sudan, UN Mission outposts served as emergency gathering points for more than 80,000 internally-displaced persons. Inside those overcrowded compounds, desperate families received security, food, water, and health care—babies were born, children studied, and the sick and wounded were treated.

Nothing is more predictable in international peacekeeping than the likelihood that unpredictable events will occur. The more flexibility we build into our preparations and deployments, the better off we will be. We have made progress, but we can do more to pre-position equipment and to consider in advance how we might transport peacekeepers to remote locations with relatively little notice and shift resources from one area to another. And we must do the best job we can in integrating information about changing political dynamics into our peacekeeping strategies. We cannot do everything; but we can at least act with wisdom and determination in response to what we have learned.

We should also continue to explore the promise of new technology. The deployment of unmanned aerial vehicles in MONUSCO has been useful in identifying hostile troop movements and locating civilian populations in need, helping better protect civilians and peacekeepers. Early warning networks should be part of any plan for protecting civilians, and the UN should strive to be connected, where appropriate, to all such networks.

Madam President, the protection of civilians is an integral part of the UN peacekeeping mission, and must therefore be given a top priority in the planning we do, the preparations we make, and the operations we implement on the ground. We must keep learning, and continually review our efforts to identify what we should be doing better. In the UN, the DPKO Best Practices Unit is driving this effort. We all have a responsibility to do our part—as UN officials, Security Council members, troop contributing nations, and members of the world community. Our credibility is at stake, but far more important, so are the lives of our neighbors. ...

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C. CONFLICT AVOIDANCE

1. Atrocities Prevention

On March 27, 2015, at the 28th session of the Human Rights Council, the United States delegation provided an explanation of its vote in favor of a resolution on the prevention of genocide but in opposition to proposed amendments to the resolution. The resolution was adopted on March 27, 2015. U.N. Doc. A/HRC/RES/28/34. The U.S. explanation of vote, available at <https://geneva.usmission.gov/2015/03/27/eov-on-item-3-resolution-entitled-prevention-of-genocide/>, states:

The United States strongly supports this important resolution on the prevention of genocide, and we urge Member States to vote NO on the amendments. We also call States to vote yes in favor of all paragraphs. We appreciate the comprehensive negotiation process on this resolution and are dismayed at the tabling of unclear and unhelpful amendments by some states at a very late stage and in a politicized fashion. Consequently, we view these amendments as hostile.

On April 24, 2015, Under Secretary of State for Civilian Security, Democracy, and Human Rights Sarah Sewall addressed the Chicago Council on Global Affairs on the third anniversary of the Atrocities Prevention Board on the subject of U.S. efforts at preventing mass atrocities. Under Secretary Sewall's remarks are excerpted below and available at <http://www.state.gov/j/remarks/241222.htm>.

* * * *

Three years ago yesterday, President Obama announced that mass atrocities prevention is both a core national security interest and a core moral responsibility. The President committed the United States to becoming a global leader in preventing large-scale violence against civilians worldwide, but he made clear that the U.S. cannot and should not intervene militarily every time there is an injustice or an imminent atrocities threat. Instead he called for the U.S. government to use its full arsenal of tools—diplomatic, political, financial, intelligence, and law enforcement—to prevent these terrible crimes.

As one such tool, the President established the Atrocities Prevention Board, referred to in government-speak as the APB, to put this prevention approach into practice. This interagency forum serves a horizon-scanning function by identifying atrocity risks by looking at early warning indicators and bringing together senior officials from across the executive branch to develop coordinated, whole-of-government responses to mitigate them.

The Atrocities Prevention Board speeds up the cogs of our government's bureaucracy by bringing attention to at-risk cases within the interagency policy process. To be clear, the APB was never envisioned as the singular solution to mass killings, nor is it meant to replace the work we are already engaged in to address atrocities. Rather, its role is to prompt coordination among the larger U.S. national security apparatus to better address these problems early on by recognizing warning signs. The APB's comparative advantage, then, is focusing on potential or ongoing violence that might escape attention in existing policy fora rather than expending its energy focusing on cases where threats to civilians—such as Assad's brutalities against the Syrian people—are well-recognized and are the subject of extensive work in regionally-focused policy discussions. This early warning, preventive approach gives the U.S. government additional reaction time to plan and implement appropriate de-escalation interventions. Another benefit of this whole-of-government approach is that when threats emerge, the APB can marshal attention, technical expertise, and occasionally financial resources from across the government to better support our embassy-led responses on the ground.

On this third anniversary of the APB, we are invigorated by the U.S. government's progress in further highlighting atrocities prevention into the foreign policy process and institutionalizing the capabilities, analysis, and expertise that is needed to do prevention work.

Since becoming Under Secretary for Civilian Security, I've worked to strengthen the State Department's internal response to the threat of mass atrocities and to build a closer relationship with our prevention partner, the U.S. Agency for International Development. I have also redirected the focus of State's Bureau of Conflict and Stabilization Operations (CSO), to provide dedicated expertise and a formal analysis, planning, and coordinating role in support of APB priorities. As the new hub for State's atrocities prevention work, the bureau works with USAID to produce assessments of the drivers of conflict in a targeted set of countries as well as corresponding risk assessments. This new analytical atrocities assessment framework allows CSO to work with the Department's regional bureaus to develop evidence-based, civilian-focused intervention options, including diplomatic, programmatic, multilateral, and economic efforts. CSO is also developing a growing collection of best practices that are informing more targeted, effective government responses.

The APB has also formalized and increased our coordination efforts. At the State Department, we've established an Anti-Atrocities Coordination Group to help facilitate State's work in at-risk countries, engage with regional experts who know the political, regional, and sub-national dynamics best, and help chart the course for institutionalizing the necessary atrocity prevention tools within the normal State processes. Finally, we continue to coordinate with our embassies on atrocity prevention work. Frontline officers are often the first to detect and report on emerging atrocity risks, and chiefs of mission can request that the APB conduct risk analysis of their host countries as well as identify appropriate interventions to mitigate the risk.

Let me provide some examples to illustrate how the U.S. Government identifies and responds to risks of extreme violence. When the Department's atrocities watchers grew concerned about escalating tensions in Burundi, they sounded the alarm. This concern immediately initiated the APB process, elevating the level of attention on the threat. The State Department and USAID put together an interagency team from both the regional and functional parts of the government to conduct a thorough analysis of risks for violence, which led to a broad diplomatic engagement and programmatic strategy that was operationalized by our embassy in Bujumbura. The APB process also galvanized over \$7 million in State and USAID funds to address the risks identified in the assessment through creative programming. For instance, the USG-financed projects provide conflict resolution training for community leaders, support a saving and lending program to improve economic opportunities for vulnerable youth, and empower civil society partners to monitor hate speech. With this additional funding, the Department was also able to deploy a prevention advisor to support the embassy in advance of Burundi's upcoming national elections beginning in May. By sounding the alarm early and laying the groundwork two years ago, we are now in a much better position to monitor and respond to the worrying signs of political tension that are coming to the surface in Burundi. Let me be clear, we remain deeply concerned about the rising tensions, and the international community and the region must be vigilant as we urge President Nkurunziza to respect of the two term limit provision the Arusha Accords and continue to press for credible, peaceful elections. We continue to call on all parties in Burundi to play a peaceful role in this electoral process and refrain from violence. We have warned anyone who might be considering violence that they will not be welcome in the United States and that, as appropriate, we will deny visas to anyone who orders, plans, or participates in [widespread or systematic] acts of violence [against

the civilian population based on political belief]. We will continue to monitor the situation in Burundi closely in the coming days and weeks and take steps to prevent, mitigate, and address violence.

Let's also look at the Central African Republic. When violence quickly escalated in that African nation in December 2013, the Board's atrocity prevention experts worked hand in hand with our regional bureaus as senior leaders from across government identified key interventions, including from DOD, USAID, and State. Together, over the last two years, we provided over \$100 million in peacekeeping and security assistance and over \$30 million in funding for conflict mitigation, reconciliation, justice and accountability, and governance. This has funded everything from community and grassroots peace and reconciliation programs to the purchase of vehicles and other equipment desperately needed by peacekeeping forces. This is in addition to the \$452 million we have provided in assessed funds to the UN for the UN peacekeeping mission (MINUSCA). With 2.5 million people—over half the country's population—in dire need of humanitarian assistance, we have also provided almost \$200 million in critical aid, saving thousands of lives. And we have married funding with increased diplomatic and public engagement, including naming a Special Representative and transmitting a peace message recorded by President Obama on local radio stations throughout the country at the height of the crisis.

Another example of this Administration's commitment to atrocity prevention is U.S. support for the counter-Lord's Resistance Army mission in the central Africa region that has led to dramatic results in protecting civilians from LRA atrocities. Over the past three years, the Ugandan-led African Union Regional Task Force—with Defense Department logistics and support from U.S. Special Operations Forces and State civilian liaisons—has removed three of the LRA's top five most senior and notorious commanders from the battlefield. The United States worked with leaders from the Task Force's member countries to ensure that LRA number-two commander Dominic Ongwen, who was transferred to the International Criminal Court in January, faced justice, and we continue to offer up to \$5 million in rewards for information leading to the arrest, transfer, or conviction of LRA leader Joseph Kony. During that time, defections and releases from the LRA have significantly increased, with more than 250 individuals putting down their arms and leaving the LRA, and the number of people killed by the LRA has dropped by over 75 percent. According to the U.N., the number of people displaced by the LRA decreased from approximately 400,000 one year ago to roughly 160,000 in 2014, the lowest number in a decade.

Obviously, the U.S. [government] has been focused on countering the Islamic State of Iraq and the Levant (ISIL) by building a strong multilateral coalition to address the spreading threat as it grew in Syria and then Iraq. In this case, the APB did not need to play a role in raising awareness of ISIL's atrocities; instead, it was able to play a value-added role by focusing attention on particular cases, helping to prompt swift action. For example, when ISIL drove tens of thousands of members of the Iraqi Yazidi religious minority from their homes last year, the APB again helped ensure a swift USG response by working with our Embassy and consulates in Iraq along with the State Department's Religious Freedom Office to collect credible information. This information helped inform the U.S. decision to launch strikes that degraded ISIL's capabilities and gave the local Kurdish military forces enough momentum to break the siege and free the Yazidis from Mount Sinjar.

We recently registered another achievement in advancing a preventive approach to mass atrocities—this time in Nigeria, which conducted a largely peaceful election last month. The

U.S. government has long been focused on preventing violence in Nigeria, and the APB worked to complement that focus by spurring contingency planning and advocating for more of an atrocity prevention focus into the normal interagency policy processes. To prevent the violence that left over 800 dead after the 2011 national vote, the APB provided support for the implementation of the USG's election assistance strategy for Nigeria, contributing to and enhancing multiple USG agencies' efforts to prevent violence and ensure transparency and credibility more than a year in advance of the election. And while there were dozens killed during this election, which is too many still, there was a dramatic decrease in violence—a decrease many attribute to increased transparency, credibility, and a democratic transfer of power. The APB also helped galvanize the interagency to more effectively address the horrific atrocities being committed by the violent extremist group, Boko Haram, identifying gaps in the regional governments' security approach, finding some new resources, and developing programs to strengthen the region's and local communities' capacity to respond. For example, the APB has contributed to ongoing efforts by the USG to work with the governments of Nigeria, Cameroon, Chad, Niger, and Benin to support their cooperative efforts to take on Boko Haram, which may eventually include a Multinational Joint Task Force to better coordinate these efforts, while at the same time supporting local communities and law enforcement efforts that address the root causes of the insurgency. In northeast Nigeria, USAID has launched an initiative to improve stability and strengthen democratic institutions. The program focuses on strengthening links between local government, civil society, and communities to mitigate and prevent conflict, increasing access to credible information, and reducing youth vulnerability to violent extremist influences. We are encouraged by the commitment of Nigeria's President-elect, Muhammadu Buhari, to tackle the Boko Haram threat.

In addition to amplify our prevention efforts, we are also seeking to encourage like-minded partners to adopt a similar approach. I recently led a group of State and USAID officials to meet with UN interlocutors who oversee issues of atrocity prevention, which resulted in a collaborative dialogue that I intend to regularize. We are also further highlighting mass atrocities prevention in ongoing bilateral and multilateral diplomatic discussions, such as the U.S.-EU Civilian Security and Development Dialogue.

Despite its important achievements and the President's commitment to elevating atrocity prevention as a U.S. foreign policy priority, challenges remain. Chief among these are resource constraints. While APB meetings do not require funding, effective prevention tools do depend on resources, particularly sources of funding that can be accessed and mobilized swiftly. While we have sometimes succeeded in marshaling funding to respond to an escalating crisis, in this constrained budget environment, we often see prevention needs that we are unable to meet before the crisis escalates. In a world of proliferating crises and limited resources, prevention work is more critical than ever.

Some observers have expressed dissatisfaction with the Obama Administration's commitment to preventing mass atrocities across the globe. I understand their perspective. The APB has not halted violence worldwide; in its three years of existence, it has not protected every civilian from governments, insurgents and terrorists. As imperfect as our current efforts are, they represent undeniable progress—both in further prioritizing atrocity prevention and in delivering concrete results. On the APB's third anniversary, we are certainly closer to realizing the President's intent that the United States government embraces the mission of preventing mass atrocities. It is my hope that three years from now, the United States will have made its tools, resources, and actions even more effective in preventing mass violence against civilians.

President Obama took a bold step by elevating concern about mass atrocities as a foreign policy priority. Atrocity prevention, he said, is not just a matter of values and a moral responsibility but also a core national security interest. The President acknowledged that “It can be tempting to throw up our hands and resign ourselves to man’s endless capacity for cruelty,” but he reminded us that Elie Wiesel and other holocaust survivors chose never to give up. Nor can the United States of America.

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On October 1, 2015, Ambassador Pressman delivered remarks at a high-level ministerial event on Security Council action against mass atrocities. Ambassador Pressman discussed the importance of acting to prevent or respond to mass atrocities. His remarks are excerpted below and available at <http://usun.state.gov/remarks/6851>.

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The President of the United States has stated that the prevention of mass atrocities and genocide is a core national security interest and also a core moral responsibility of the United States ...

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There is difference of course between pledging and doing.

Doing the hard work of responding to and preventing mass atrocities means organizing governments to be proactive and responsive to the earliest indicators of potential atrocities before they metastasize into actual ones. That is why President Obama established the Atrocities Prevention Board in our government to focus our government on the risk of mass atrocities, guide resources and programming to address those risks, and help to develop tools and options that can boost our chances for effective prevention before wide-spread violence breaks out and the costs of intervention become much greater.

Doing the hard work of preventing mass atrocities and genocide can mean many things.

It can mean supporting credible and impartial fact-finding and national and international justice mechanisms that are often our best defense against the danger of collective blame and thereby our best defense against collective revenge that can generate cycle upon cycle of mass atrocity. It’s why the United States has supported the establishment of the Central African Republic’s Special Criminal Court and is seeking to ensure the establishment of a credible accountability mechanism for South Sudan. It is why the United States fully supported the establishment of the ICTY and the ICTR and its residual mechanism, to ensure accountability for the atrocities committed in the former Yugoslavia and in Rwanda. And it is why, most recently, the United States also facilitated the surrender or transfer of two accused to the International Criminal Court.

Doing the hard work of preventing and responding to mass atrocities also means advocating for the Security Council’s action and engagement on crimes of unspeakable proportions. That is why the United States has supported robust Security Council action to respond to mass atrocities that were occurring in Central African Republic and in South Sudan

and it is why we supported, and continue to support, Security Council action to address the mass atrocities being perpetrated in Syria.

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Doing the hard work of preventing and responding to mass atrocities fundamentally means working together. Because no nation, no matter how strong, how powerful, how rich, can solve the world's problems—particularly problems as troubling as these—alone.

That is why the United States has supported robust protection of civilian mandates in peacekeeping missions authorized by the Security Council and has invested enormous energy into ensuring that UN peacekeeping can perform critical protection tasks by training tens of thousands of peacekeepers around the globe.

In short, the United States is committed to identifying, responding to, and preventing mass atrocities. This is what the United States already does. This is how the United States already conducts itself. This is what the United States will continue to do in the Security Council.

Unfortunately, the irresponsible use of the veto by Security Council members can deprive the United Nations of some of its most effective tools for preventing and responding to mass atrocities. In Syria, the Assad regime has committed widespread and systematic atrocities against its own people. Yet, four vetoes by members of the Security Council stood in the way of the Security Council taking timely and decisive action to end mass atrocities and prevent further atrocities from occurring.

The Security Council has the authority to play a critical role in stopping mass atrocities. With that authority comes great responsibility. All five permanent members—indeed, all members of the UN Security Council—have a responsibility to respond urgently when faced with mass atrocities that threaten international peace and security. The United States embraces this responsibility, and urges fellow Council members to do the same. ...

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2. Responsibility to Protect

Ambassador Pressman delivered remarks at the UN General Assembly interactive dialogue on the Responsibility to Protect (“R2P”) in New York on September 8, 2015. His remarks are excerpted below and available at <http://usun.state.gov/remarks/6821>.

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Thank you very much for organizing this important dialogue, and thank you for your commitment to stand up in the face of atrocity crimes and to efforts to prevent such violence.

As we look at the challenges we confront today, the critical importance of fulfilling the responsibility to protect is clear. All of our states have undertaken this responsibility, which has been recognized repeatedly, including through Security Council resolutions emphasizing that governments bear the primary responsibility to protect their populations from genocide, war crimes, and crimes against humanity.

Ten years ago, we collectively took a step together. Ten years on from our initial commitment to the concept of the responsibility to protect, our resolve must remain not only intact, but stronger than ever.

The 70th anniversary of the United Nations offers an important opportunity to reaffirm our support for, and to strengthen our ability to implement our commitments, including our commitment to take collective action to protect populations, in accordance with the Charter of the United Nations, if a state is manifestly failing to do so. While we may not always agree on a specific course of action in a specific case, particularly when national authorities are manifestly failing to protect their own populations, we must all continue to be guided by the principles we agreed upon ten years ago.

While today we can salute the unity reached ten years ago and hail our continued commitment to principles like those enshrined in the concept of the Responsibility to Protect – those achievements, without more, will mean little. They will mean little to the people of Syria who continue to suffer from atrocities. Those achievements, without more, will mean little to the people of Darfur who, ten years ago, were at the top of the international peace and security agenda and now, ten years later, as attention has faded, have confronted violence that has caused more displacement in the last year than at any point since the start of the conflict some ten years ago. Those achievements, without more, will mean little to the people who are supposed to benefit, the people who are supposed to be protected if our diplomatic consensus does not translate into political commitment and action. That means that we cannot tolerate status quo in places like Darfur; we cannot respond idly to failures to respect ceasefires in South Sudan; we must support the commencement of meaningful dialogue and end the dangerous brinkmanship in Burundi; and we must address head-on the politics of hate and discrimination in places like Burma. Fundamentally, it means consensus on the fundamentals of the concept must also lead to political commitments to act upon it.

Just as states have the primary responsibility to protect their populations, the international community also has a responsibility to encourage and help states in fulfilling those responsibilities. This year, let us look hard at how we can translate these commitments into meaningful actions; words into real tools of conflict and atrocity prevention.

We can and should make better use of existing research to help identify conditions that increase the risk of or susceptibility to atrocities. Indeed, the United Nations has published a Framework of Analysis for Atrocity Crimes. And this framework can assist both Member States and the UN Secretariat in looking more closely at situations of risk, and taking action. These tools, when used proactively, can help mitigate threats and save lives. Let us make sure we are using the best analysis and the best early warning.

We know that United Nations peacekeeping, peacebuilding, and special political missions are often on the front lines, mediating between parties to conflict, addressing factors that undermine stability, and protecting civilians directly, when necessary and mandated. Over the years, the United Nations and Member States have improved the peacekeeping tool kit to prevent and deter violence against civilians. ...

Colleagues, let us not forget that justice is a part of protection. Accountability is an essential element in the battle to deter and prevent the recurrence of atrocities. It is incumbent upon the international community to help governments create, maintain, and operate credible and effective national courts where possible, or to support international and other mechanisms where necessary and appropriate.

We should focus our attention on how the United Nations exercises its good offices, conducts mediation, and undertakes peacebuilding, and work with our partners here today to better support prevention efforts, and to halt a return to violence where once it has occurred.

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Cross References

Burundi, **Chapter 1.B.3.b.**

Temporary Protected Status for Syria and Yemen, **Chapter 1.C.1.**

Countering violent extremism, **Chapter 3.B.1.e.**

International tribunals, **Chapter 3.C.**

Palestinian Authority efforts to accede to treaties, **Chapter 4.A.1.**

Actions at the Human Rights Council regarding Syria, **Chapter 6.A.4.c.**

Sexual violence in conflict, **Chapter 6.B.2.**

Israel's participation at the UN, **Chapter 7.A.4.**

Palestinian membership in international organizations, **Chapter 7.B.**

Status of Ukraine in IAEA report, **Chapter 9.B.1.**

Libya, **Chapter 9.B.7.**

Recording Israel as place of birth on passport (Zivotofsky), **Chapter 9.C.**

Airline discrimination against Israeli passport holders, **Chapter 11.A.4.**

Termination of Burundi as beneficiary under AGOA, **Chapter 11.D.2.b.**

Syria-related sanctions, **Chapter 16.A.2.**

Sanctions relating to Sudan, **Chapter 16.A.4.**

Sanctions relating to Burundi, **Chapter 16.A.8.a**

Sanctions relating to Burma, **Chapter 16.A.8.c**

Sanctions relating to South Sudan, **Chapter 16.A.8.f.**

Sanctions relating to Central African Republic, **Chapter 16.A.8.g.**

Sanctions relating to Yemen, **Chapter 16.A.8.k**

Syria, **Chapter 18.A.2.**

Middle East nuclear weapon-free zone, **Chapter 19.B.4.d.**

Syria chemical weapons, **Chapter 19.D.2.**

CHAPTER 18

Use of Force

A. GENERAL

1. Use of Force Issues Related to Counterterrorism Efforts

a. *Request for an Authorization for Use of Military Force against ISIL*

On February 11, 2015, President Obama conveyed proposed legislation to Congress authorizing the use of force against the terrorist organization known as the Islamic State of Iraq and the Levant (“ISIL”). President Obama’s message to Congress accompanying the proposed legislation is excerpted below. Daily Comp. Pres. Docs. 2015 DCPD No. 00093.

* * * *

The so-called Islamic State of Iraq and the Levant (ISIL) poses a threat to the people and stability of Iraq, Syria, and the broader Middle East, and to U.S. national security. It threatens American personnel and facilities located in the region and is responsible for the deaths of U.S. citizens James Foley, Steven Sotloff, Abdul-Rahman Peter Kassig, and Kayla Mueller. If left unchecked, ISIL will pose a threat beyond the Middle East, including to the United States homeland.

I have directed a comprehensive and sustained strategy to degrade and defeat ISIL. As part of this strategy, U.S. military forces are conducting a systematic campaign of airstrikes against ISIL in Iraq and Syria. Although existing statutes provide me with the authority I need to take these actions, I have repeatedly expressed my commitment to working with the Congress to pass a bipartisan authorization for the use of military force (AUMF) against ISIL. Consistent with this commitment, I am submitting a draft AUMF that would authorize the continued use of military force to degrade and defeat ISIL.

My Administration's draft AUMF would not authorize long-term, large-scale ground combat operations like those our Nation conducted in Iraq and Afghanistan. Local forces, rather than U.S. military forces, should be deployed to conduct such operations. The authorization I propose would provide the flexibility to conduct ground combat operations in other, more limited circumstances, such as rescue operations involving U.S. or coalition personnel or the use of special operations forces to take military action against ISIL leadership. It would also authorize the use of U.S. forces in situations where ground combat operations are not expected or intended, such as intelligence collection and sharing, missions to enable kinetic strikes, or the provision of operational planning and other forms of advice and assistance to partner forces.

Although my proposed AUMF does not address the 2001 AUMF, I remain committed to working with the Congress and the American people to refine, and ultimately repeal, the 2001 AUMF. Enacting an AUMF that is specific to the threat posed by ISIL could serve as a model for how we can work together to tailor the authorities granted by the 2001 AUMF.

I can think of no better way for the Congress to join me in supporting our Nation's security than by enacting this legislation, which would show the world we are united in our resolve to counter the threat posed by ISIL.

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The draft of a proposed authorization for the use of military force against ISIL as provided to Congress appears below and is available at https://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf.

* * * *

JOINT RESOLUTION

To authorize the limited use of the United States Armed Forces against the Islamic State of Iraq and the Levant.

Whereas the terrorist organization that has referred to itself as the Islamic State of Iraq and the Levant and various other names (in this resolution referred to as "ISIL") poses a grave threat to the people and territorial integrity of Iraq and Syria, regional stability, and the national security interests of the United States and its allies and partners;

Whereas ISIL holds significant territory in Iraq and Syria and has stated its intention to seize more territory and demonstrated the capability to do so;

Whereas ISIL leaders have stated that they intend to conduct terrorist attacks internationally, including against the United States, its citizens, and interests;

Whereas ISIL has committed despicable acts of violence and mass executions against Muslims, regardless of sect, who do not subscribe to ISIL's depraved, violent, and oppressive ideology;

Whereas ISIL has threatened genocide and committed vicious acts of violence against religious and ethnic minority groups, including Iraqi Christian, Yezidi, and Turkmen populations;

Whereas ISIL has targeted innocent women and girls with horrific acts of violence, including abduction, enslavement, torture, rape, and forced marriage;

Whereas ISIL is responsible for the deaths of innocent United States citizens, including James Foley, Steven Sotloff, Abdul-Rahman Peter Kassig, and Kayla Mueller;

Whereas the United States is working with regional and global allies and partners to degrade and defeat ISIL, to cut off its funding, to stop the flow of foreign fighters to its ranks, and to support local communities as they reject ISIL;

Whereas the announcement of the anti-ISIL Coalition on September 5, 2014, during the NATO Summit in Wales, stated that ISIL poses a serious threat and should be countered by a broad international coalition;

Whereas the United States calls on its allies and partners, particularly in the Middle East and North Africa, that have not already done so to join and participate in the anti-ISIL Coalition;

Whereas the United States has taken military action against ISIL in accordance with its inherent right of individual and collective self-defense;

Whereas President Obama has repeatedly expressed his commitment to working with Congress to pass a bipartisan authorization for the use of military force for the anti-ISIL military campaign; and

Whereas President Obama has made clear that in this campaign it is more effective to use our unique capabilities in support of partners on the ground instead of large-scale deployments of U.S. ground forces: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the “Authorization for Use of Military Force against the Islamic State of Iraq and the Levant.”

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) AUTHORIZATION.—The President is authorized, subject to the limitations in subsection (c), to use the Armed Forces of the United States as the President determines to be necessary and appropriate against ISIL or associated persons or forces as defined in section 5.

(b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution (50 U.S.C. 1547(a)(1)), Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).

(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this resolution supersedes any requirement of the War Powers Resolution (50 U.S.C. 1541 et seq.).

(c) LIMITATIONS.—

The authority granted in subsection (a) does not authorize the use of the United States Armed Forces in enduring offensive ground combat operations.

SEC. 3. DURATION OF THIS AUTHORIZATION.

This authorization for the use of military force shall terminate three years after the date of the enactment of this joint resolution, unless reauthorized.

SEC. 4. REPORTS.

The President shall report to Congress at least once every six months on specific actions taken pursuant to this authorization.

SEC. 5. ASSOCIATED PERSONS OR FORCES DEFINED.

In this joint resolution, the term “associated persons or forces” means individuals and organizations fighting for, on behalf of, or alongside ISIL or any closely-related successor entity in hostilities against the United States or its coalition partners.

SEC. 6. REPEAL OF AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ.

The Authorization for Use of Military Force Against Iraq Resolution of 2002 (Public Law 107– 243; 116 Stat. 1498; 50 U.S.C. 1541 note) is hereby repealed.

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President Obama also delivered remarks on February 11, 2015 on the request for an authorization to use force against ISIL. Daily Comp. Pres. Docs. 2015 DCPD No. 00092 (Feb. 11, 2015). His remarks are excerpted below.

* * * *

Good afternoon. Today, as part of an international coalition of some 60 nations, including Arab countries, our men and women in uniform continue the fight against ISIL in Iraq and in Syria. More than 2,000 coalition airstrikes have pounded these terrorists. We’re disrupting their command and control and supply lines, making it harder for them to move. We’re destroying their fighting positions, their tanks, their vehicles, their barracks, their training camps, and the oil and gas facilities and infrastructure that fund their operations. We’re taking out their commanders, their fighters, and their leaders.

...[W]hen I announced our strategy against ISIL in September, I said that we are strongest as a nation when the President and Congress work together. Today my administration submitted a draft resolution to Congress to authorize the use of force against ISIL. I want to be very clear about what it does and what it does not do.

This resolution reflects our core objective to destroy ISIL. It supports the comprehensive strategy that we’ve been pursuing with our allies and our partners: a systemic and sustained campaign of airstrikes against ISIL in Iraq and Syria; support and training for local forces on the ground, including the moderate Syrian opposition; preventing ISIL attacks in the region and beyond, including by foreign terrorist fighters who try to threaten our countries; regional and international support for an inclusive Iraqi Government that unites the Iraqi people and strengthens Iraqi forces against ISIL; humanitarian assistance for the innocent civilians of Iraq and Syria, who are suffering so terribly under ISIL’s reign of horror.

* * * *

The resolution we’ve submitted today does not call for the deployment of U.S. ground combat forces to Iraq or Syria. It is not the authorization of another ground war, like Afghanistan or Iraq. The 2,600 American troops in Iraq today largely serve on bases, and yes, they face the risks that come with service in any dangerous environment. But they do not have a combat mission. They are focused on training Iraqi forces, including Kurdish forces.

As I’ve said before, I’m convinced that the United States should not get dragged back into another prolonged ground war in the Middle East. That’s not in our national security

interest, and it's not necessary for us to defeat ISIL. Local forces on the ground who know their countries best are best positioned to take the ground fight to ISIL, and that's what they're doing.

At the same time, this resolution strikes the necessary balance by giving us the flexibility we need for unforeseen circumstances. For example, if we had actionable intelligence about a gathering of ISIL leaders, and our partners didn't have the capacity to get them, I would be prepared to order our Special Forces to take action, because I will not allow these terrorists to have a safe haven. So we need flexibility, but we also have to be careful and deliberate. And there is no heavier decision than asking our men and women in uniform to risk their lives on our behalf. As Commander in Chief, I will only send our troops into harm's way when it is absolutely necessary for our national security.

Finally, this resolution repeals the 2002 authorization of force for the invasion of Iraq and limits this new authorization to 3 years. I do not believe America's interests are served by endless war or by remaining on a perpetual war footing. As a nation, we need to ask the difficult and necessary questions about when, why, and how we use military force. After all, it is our troops who bear the costs of our decisions, and we owe them a clear strategy and the support they need to get the job done. So this resolution will give our Armed Forces and our coalition the continuity we need for the next 3 years.

It is not a timetable. It is not announcing that the mission is completed at any given period. What it is saying is that Congress should revisit the issue at the beginning of the next President's term. It's conceivable that the mission is completed earlier. It's conceivable that after deliberation, debate, and evaluation, that there are additional tasks to be carried out in this area. And the people's representatives, with a new President, should be able to have that discussion.

In closing, I want to say that in crafting this resolution we have consulted with, and listened to, both Republicans and Democrats in Congress. We have made a sincere effort to address difficult issues that we've discussed together. In the days and weeks ahead, we'll continue to work closely with leaders and Members of Congress on both sides of the aisle. I believe this resolution can grow even stronger with the thoughtful and dignified debate that this moment demands. I'm optimistic that it can win strong bipartisan support and that we can show our troops and the world that Americans are united in this mission.

* * * *

On March 11, 2015, Secretary of State John Kerry testified before the Senate Committee on Foreign Relations on President Obama's request for an authorization to use force against ISIL (or Daesh). Secretary Kerry's testimony is excerpted below and available at <http://www.state.gov/secretary/remarks/2015/03/238769.htm>.

* * * *

...I'm pleased to return here, and particularly so with—in the distinguished company of Defense Secretary Ash Carter and our Chairman of the Joint Chiefs of Staff, Marty Dempsey.

... We are very simply looking for ...the appropriate present-day authorization ... statement by the United States Congress about the authority with which we should be able to go after, degrade, and destroy, as the President has said, a group known as ISIL or Daesh.

Now, Mr. Chairman, in our democracy, there are many views about the challenges and the opportunities that we face, and that's appropriate. That's who we are. But I hope we believe that there is an overwhelming consensus that Daesh has to be stopped. Our nation is strongest, always has been, when we act together. There's a great tradition in this country of foreign policy having a special place, that politics ends at the water's edge, and that we will act on behalf of our nation without regard to party and ideology. We simply cannot allow this collection of murderers and thugs to achieve in their group their ambition, which includes, by the way, most likely the death or submission of all those who oppose it, the seizure of land, the theft of resources, the incitement of terrorism across the globe, the killing and attacking of people simply for what they believe or for who they are.

And the joint resolution that is proposed by the President provides the means for America and its representatives to speak with a single powerful voice at this pivotal hour. When I came here last time, I mentioned that ... ISIL's momentum has been diminished, Mr. Chairman. It's still picking up supporters in places. Obviously, we've all observed that. But in the places where we have focused and where we are asking you to focus at this moment in time, it is clear that even while savage attacks continue, there is the beginning of a process to cut off their supply lines, to take out their leaders, to cut off their finances, to reduce the foreign fighters, to counter the messaging that has brought some of those fighters to this effort. But to ensure its defeat, we have to persist until we prevail in the broad-based campaign along multiple lines of effort that have been laid out over the course of the last months.

The President already has statutory authority to act against ISIL, but a clear and formal expression of this Congress's backing at this moment in time would dispel doubt that might exist anywhere that Americans are united in this effort. Approval of this resolution would encourage our friends and our partners in the Middle East, it would further energize the members and prospective members of the global coalition that we have assembled to oppose Daesh, and it would constitute a richly deserved vote of confidence in the men and women of our armed forces who are on the front lines prosecuting this effort on our behalf.

Your unity would also send an unmistakable message to the leaders of Daesh. They have to understand they can't divide us. Don't let them. They cannot intimidate us. And they have no hope of defeating us. The resolution that we have proposed would give the President a clear mandate to prosecute the armed component of this conflict against Daesh and associated persons or forces, which we believe is carefully delineated and defined. And while the proposal contains certain limitations that are appropriate in light of the nature of this mission, it provides the flexibility that the President needs to direct a successful military campaign. And that's why the Administration did propose a limitation on the use of "enduring offensive ground combat operations." I might add that was after the committee – then-committee chair Senator Menendez and the committee moved forward with its language and we came up here and testified and responded, basically, to the dynamics that were presented to us within the committee and the Congress itself.

So the proposal also includes no geographic limitation, not because there are plans to take it anywhere, but because... The point of the no geographic limitation is not that there are any plans or any contemplation. I think the President has been so clear on this. But what a mistake it would be to send a message to Daesh that there are safe havens, that there is somehow just a two-country limitation, so they go off and put their base, and then we go through months and months of deliberation again. We can't afford that. So that's why there's no limitation.

And Mr. Chairman, we know that there are groups in the world, affiliated terrorist groups, who aspire to harm the United States, our allies, our partners. Daesh is, however, very distinctive in that, because it holds territory and it will continue—if not stopped—to seize more, because it has financial resources, because of the debilitating impact of its activities in the broader Middle East, because of its pretensions to worldwide leadership, and because it has already been culpable in the violent deaths of Americans and others.

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b. *Legal Framework for Counterterrorism Efforts*

Stephen W. Preston, General Counsel at the Department of Defense, addressed the annual meeting of the American Society of International Law in Washington, DC, on April 10, 2015 on “The Legal Framework for the United States’ Use of Military Force Since 9/11.” Mr. Preston’s remarks are excerpted below and available at <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1931>.

* * * *

... Today, I will discuss how the U.S. Government has responded to this rapidly changing world and, specifically, how the legal framework for our military operations has developed since the attacks of 9/11.

President Obama has made clear from the beginning of his presidency that he is deeply committed to transparency in government because it strengthens our democracy and promotes accountability. Although a certain degree of secrecy is of course required to protect our country, the Administration has demonstrated its commitment to greater transparency in matters of national security and, specifically, in explaining the bases, under domestic and international law, for the United States’ use of military force abroad. We have seen this in the President’s own speeches, for example, at the National Archives in May 2009, at National Defense University in May 2013, and at West Point in May 2014.*

Among senior Administration lawyers, we saw this early on, in a speech by the State Department’s Legal Adviser at ASIL in March 2010—this same meeting, five years ago—and in later speeches by the Attorney General at Northwestern in March 2012, and by my predecessor as DoD General Counsel at Yale and at Oxford, both in 2012.** There was even a very modest contribution by the CIA General Counsel in remarks at Harvard Law School in April 2012. My remarks here today are the latest in the series—an update of sorts—addressing the legal authority for U.S. military operations as the mission has evolved over the past year or so.

This talk will proceed in four parts. First, I want to review the legal framework for the use of military force developed in the aftermath of the 9/11 attacks. Second, I will explain the legal basis for current military operations against the so-called Islamic State of Iraq and the Levant, or ISIL. Third, I will discuss the end of the U.S. combat mission in Afghanistan and its impact on the legal basis for the continuing use of military force under the 2001 AUMF. Fourth,

* Editor’s note: See *Digest 2009* at 709-13; *Digest 2013* at 540-46; *Digest 2014* at 88.

** Editor’s note: See *Digest 2010* at 715-19; *Digest 2012* at 575-84, 590-92.

and finally, I will look ahead to the legal framework for counterterrorism operations in the future.

Let us begin with a bit of history. It is only by seeing where we have been over the past decade and a half that we can understand where we are today.

Return to the first days after the attacks on September 11, 2001, for it is in that time that our government began to articulate the legal framework that we still rely on today. As many of you know, it was only days after the 9/11 attacks that Congress passed, and the President signed, an authorization for the use of military force, or AUMF, authorizing the President to take action to protect the United States against those who had attacked us. Even though it was only days later, we already knew that the attacks were the work of al-Qa'ida, a terrorist organization operating out of Afghanistan, led by a man named Usama bin Laden.

The authorization that was enacted into law—which came to be known as the 2001 AUMF—was not a traditional declaration of war against a state. We had been attacked, instead, by a terrorist organization. Yes, the Taliban had allowed bin Laden and his organization to operate with impunity within Afghanistan. But it was not Afghanistan that had launched the attack. It was bin Laden and his terrorist organization.

The authorization for the use of military force that Congress passed aimed to give the President all the statutory authority he needed to fight back against bin Laden, his organization, and those who supported him, including the Taliban. At the same time, the 2001 AUMF was not without limits. It 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

With this statutory authorization, the United States commenced military operations against al-Qa'ida and the Taliban in Afghanistan on October 7, 2001, notifying the UN Security Council consistent with Article 51 of the UN Charter that the United States was taking action in the exercise of its right of self-defense in response to the 9/11 attacks.

Although the 2001 AUMF was not unlimited, enacted as it was just a short time after the attacks, it was necessarily drafted in broad terms. Shortly after President Obama came into office, his Administration filed a memorandum in Guantanamo habeas litigation offering the new President's interpretation of his statutory authority to detain enemy forces as an aspect of his authority to use force under the 2001 AUMF. That memorandum explained that the statute authorized the detention of “persons who were part of, or substantially supported, Taliban or al Qaida 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.” Moreover, it stated that “[p]rinciples derived from law-of-war rules governing international armed conflicts . . . must inform the interpretation of the detention authority Congress has authorized” under the AUMF.

This interpretation of the 2001 AUMF was adopted by the D.C. Circuit and, in 2011, it was expressly endorsed by Congress in the context of detention. The National Defense Authorization Act for Fiscal Year 2012 reaffirmed the authority to detain “[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.” It also reaffirmed that dispositions of such individuals are made “under the law of war.”

Thus, a decade after the conflict began, all three branches of the government weighed in to affirm the ongoing relevance of the 2001 AUMF and its application not only to those groups that perpetrated the 9/11 attacks or provided them safe haven, but also to certain others who were associated with them.

My predecessor, Jeh Johnson, later elaborated on the concept of associated forces. In a speech at Yale Law School in February 2012, he explained that the concept of associated forces is not open-ended. He pointed out that, consistent with international law principles, an associated force must be both (1) an organized, armed group that has entered the fight alongside al-Qa'ida, and (2) a co-belligerent with al-Qa'ida in hostilities against the United States or its coalition partners. This means that not every group that commits terrorist acts is an associated force. Nor is a group an associated force simply because it aligns with al-Qa'ida. Rather, a group must have also entered al-Qa'ida's fight against the United States or its coalition partners.

More recently, during a public hearing before the Senate Foreign Relations Committee in May 2014, I discussed at some length the Executive branch's interpretation of the 2001 AUMF and its application by the Department of Defense in armed conflict. *** In my testimony, I described in detail the groups and individuals against which the U.S. military was taking direct action (that is, capture or lethal operations) under the authority of the 2001 AUMF, including associated forces. Those groups and individuals are: al-Qa'ida, the Taliban and certain other terrorist or insurgent groups in Afghanistan; al-Qa'ida in the Arabian Peninsula (AQAP) in Yemen; and individuals who are part of al-Qa'ida in Somalia and Libya. In addition, over the past year, we have conducted military operations under the 2001 AUMF against the Nusrah Front and, specifically, those members of al-Qa'ida referred to as the Khorasan Group in Syria. We have also resumed such operations against the group we fought in Iraq when it was known as al-Qa'ida in Iraq, which is now known as ISIL.

The concept of associated forces under the 2001 AUMF does not provide the President with unlimited flexibility to define the scope of his statutory authority. Our government monitors the threats posed to the United States and maintains the capacity to target (or stop targeting) groups covered by the statute as necessary and appropriate. But identifying a new group as an associated force is not done lightly. The determination that a particular group is an associated force is made at the most senior levels of the U.S. Government, following reviews by senior government lawyers and informed by departments and agencies with relevant expertise and institutional roles, including all-source intelligence from the U.S. intelligence community. In addition, military operations against these groups are regularly briefed to Congress. There are no other groups—other than those publicly identified, as I have just described—against which the U.S. military is currently taking direct action under the authority of the 2001 AUMF.

That brings me to my second topic: the legal authority applicable to today's fight against ISIL. The military operations conducted by the United States against ISIL in Iraq and Syria are consistent with both domestic and international law.

First, a word about this group we call ISIL, referred to variously as ISIS, the Islamic State or Daesh (its acronym in Arabic). In 2003, a terrorist group founded by Abu Mu'sab al-Zarqawi—whose ties to bin Laden dated from al-Zarqawi's time in Afghanistan and Pakistan before 9/11—conducted a series of sensational terrorist attacks in Iraq. These attacks prompted bin Laden to ask al-Zarqawi to merge his group with al-Qa'ida. In 2004, al-Zarqawi publicly pledged his group's allegiance to bin Laden, and bin Laden publicly endorsed al-Zarqawi as al-

*** Editor's note: See *Digest 2014* at 722-24.

Qa'ida's leader in Iraq. For years afterwards, al-Zarqawi's group, often referred to as al-Qa'ida in Iraq, or AQI for short, conducted numerous deadly terrorist attacks against U.S. and coalition forces, as well as Iraqi civilians, using suicide bombers, car bombs and executions. In response to these attacks, U.S. forces engaged in combat—at times, near daily combat—with the group from 2004 until U.S. and coalition forces left Iraq in 2011. Even since the departure of U.S. forces from Iraq, the group has continued to plot attacks against U.S. persons and interests in Iraq and the region—including the brutal murder of kidnapped American citizens in Syria and threats to U.S. military personnel in Iraq.

The 2001 AUMF has authorized the use of force against the group now called ISIL since at least 2004, when bin Laden and al-Zarqawi brought their groups together. The recent split between ISIL and current al-Qa'ida leadership does not remove ISIL from coverage under the 2001 AUMF, because ISIL continues to wage the conflict against the United States that it entered into when, in 2004, it joined bin Laden's al-Qa'ida organization in its conflict against the United States. As AQI, ISIL had a direct relationship with bin Laden himself and waged that conflict in allegiance to him while he was alive. ISIL now claims that it, not al-Qa'ida's current leadership, is the true executor of bin Laden's legacy. There are rifts between ISIL and parts of the network bin Laden assembled, but some members and factions of al-Qa'ida-aligned groups have publicly declared allegiance to ISIL. At the same time, ISIL continues to denounce the United States as its enemy and to target U.S. citizens and interests.

In these circumstances, the President is not divested of the previously available authority under the 2001 AUMF to continue protecting the country from ISIL—a group that has been subject to that AUMF for close to a decade—simply because of disagreements between the group and al-Qa'ida's current leadership. A contrary interpretation of the statute would allow the enemy—rather than the President and Congress—to control the scope of the AUMF by splintering into rival factions while continuing to prosecute the same conflict against the United States.

Some initially greeted with skepticism the President's reliance on the 2001 AUMF for authority to renew military operations against ISIL last year. To be sure, we would be having a different conversation if ISIL had emerged out of nowhere a year ago, having no history with bin Laden and no more connection to current al-Qa'ida leadership than it has today, or if the group once known as AQI had, for example, renounced terrorist violence against the United States at some point along the way. But ISIL did not spring fully formed from the head of Zeus a year ago, and the group certainly has never laid down its arms in its conflict against the United States.

The name may have changed, but the group we call ISIL today has been an enemy of the United States within the scope of the 2001 AUMF continuously since at least 2004. A power struggle may have broken out within bin Laden's jihadist movement, but this same enemy of the United States continues to plot and carry out violent attacks against us to this day. Viewed in this light, reliance on the AUMF for counter-ISIL operations is hardly an expansion of authority. After all, how many new terrorist groups have, by virtue of this reading of the statute, been determined to be among the groups against which military force may be used? The answer is zero.

The President's authority to fight ISIL is further reinforced by the 2002 authorization for the use of military force against Iraq (referred to as the 2002 AUMF). That AUMF authorized the use of force to, among other things, “defend the national security of the United States against the continuing threat posed by Iraq.” Although the threat posed by Saddam Hussein's regime in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals,

has always been understood to authorize the use of force for the related purposes of helping to establish a stable, democratic Iraq and addressing terrorist threats emanating from Iraq. After Saddam Hussein's regime fell in 2003, the United States, with its coalition partners, continued to take military action in Iraq under the 2002 AUMF to further these purposes, including action against AQI, which then, as now, posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq. Accordingly, the 2002 AUMF authorizes military operations against ISIL in Iraq and, to the extent necessary to achieve these purposes, in Syria.

Beyond the domestic legal authorities, our military operations against ISIL have a firm foundation in international law, as well. The U.S. Government remains deeply committed to abiding by our obligations under the applicable international law governing the resort to force and the conduct of hostilities. In Iraq, of course, the United States is operating against ISIL at the request and with the consent of the Government of Iraq, which has sought U.S. and coalition support in its defense of the country against ISIL. In Syria, the United States is using force against ISIL in the collective self-defense of Iraq and U.S. national self-defense, and it has notified the UN Security Council that it is taking these actions in Syria consistent with Article 51 of the UN Charter. Under international law, states may defend themselves, in accordance with the inherent right of individual and collective self-defense, when they face armed attacks or the imminent threat of armed attacks and the use of force is necessary because the government of the state where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.

The inherent right of self-defense is not restricted to threats posed by states, and over the past two centuries states have repeatedly invoked the right of self-defense in response to attacks by non-state actors. Iraq has been clear, including in letters it has submitted to the UN Security Council, that it is facing a serious threat of continuing armed attacks from ISIL coming out of safe havens in Syria, and it has asked the United States to lead international efforts to strike ISIL sites and strongholds in Syria in order to end the continuing armed attacks on Iraq, to protect Iraqi citizens and ultimately enable Iraqi forces to regain control of Iraqi borders. ISIL is a threat not only to Iraq and our partners in the region, but also to the United States. Finally, the Syrian government has shown that it cannot and will not confront these terrorist groups effectively itself.

Let's turn now to my third topic: the end of the U.S. combat mission in Afghanistan and its impact on the legal basis for the continuing use of military force under the 2001 AUMF.

At the outset, I pause to observe, as Clemenceau put it, "It is far easier to make war than to make peace." That remains as true today as it was a hundred years ago. Indeed, in an armed conflict between a state and a terrorist organization like al Qaeda or ISIL, it is highly unlikely that there will ever be an agreement to end the conflict. Unlike at the close of the World Wars, there will not be any instruments of surrender or peace treaties.

The situation is further complicated by the fact that the U.S. Constitution says nothing directly about how wars are to be ended. The closest it comes is the Treaty Clause, which gives the President and the Senate the power, together, to join treaties—which were, at the time the Constitution was written, the main way that wars were brought to an end. But, again, for a variety of reasons, the current conflict is unlikely to end in that way.

How, then, are we to know when the armed conflict has come to an end? The Supreme Court has not directly addressed this question, but it has offered important guidance. In *Hamdi v. Rumsfeld*, the plurality interpreted the 2001 AUMF as informed by the international law of war. Citing Article 118 of the Third Geneva Convention, it explained, "[i]t is a clearly established

principle of the law of war that detention may last no longer than active hostilities.” It concluded, “[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who engaged in an armed conflict against the United States.” Consistent with the Court’s approach, the Obama Administration has interpreted the AUMF as informed by these international law principles, and this interpretation has been embraced by the federal courts. Hence, where the armed conflict remains ongoing and active hostilities have not ceased, it is clear that congressional authorization to detain and use military force under the 2001 AUMF continues.

Now what does this mean for U.S. military operations in Afghanistan after 2014? Although our presence in that country has been reduced and our mission there is more limited, the fact is that active hostilities continue. As a matter of international law, the United States remains in a state of armed conflict against the Taliban, al-Qa’ida and associated forces, and the 2001 AUMF continues to stand as statutory authority to use military force.

At the end of last year, the President made clear that “our combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion.” As a part of this transition, we have drawn down our forces to roughly 10,000—the fewest U.S. forces in Afghanistan in more than a decade. The U.S. military now has two missions in Afghanistan. First, the United States is participating in the NATO non-combat mission of training, advising and assisting the Afghan National Security Forces. Second, the United States continues to engage in counterterrorism activity in Afghanistan to target the remnants of al-Qa’ida and prevent an al-Qa’ida resurgence or external plotting against the homeland or U.S. targets abroad. With respect to the Taliban, U.S. forces will take appropriate measures against Taliban members who directly threaten U.S. and coalition forces in Afghanistan, or provide direct support to al-Qa’ida. The use of force by the U.S. military in Afghanistan is now limited to circumstances in which using force is necessary to execute those two missions or to protect our personnel.

At the same time, our military operations in Afghanistan remain substantial. Indeed, the President recently announced that U.S. force levels in Afghanistan will draw down more slowly than originally planned because Afghanistan remains a dangerous place. It is sometimes said that the enemy gets a vote. Taliban members continue to actively and directly threaten U.S. and coalition forces in Afghanistan, provide direct support to al-Qa’ida, and pose a strategic threat to the Afghan National Security Forces. In response to these threats, U.S. forces are taking necessary and appropriate measures to keep the United States and U.S. forces safe and assist the Afghans. In short, the enemy has not relented, and significant armed violence continues.

The United States’ armed conflict against al-Qa’ida and associated forces in Afghanistan and elsewhere also continues. As my predecessor explained at the Oxford Union in 2012, there will come a time when “so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.” Unfortunately, that day has not yet come. To be sure, progress has been made in disrupting and degrading al-Qa’ida, particularly its core, senior leadership in the tribal areas along the Afghanistan-Pakistan border. But al-Qa’ida and its militant adherents—including AQAP, that most virulent strain of al-Qa’ida in Yemen—still pose a real and profound threat to U.S. national security—one that we cannot and will not ignore.

Because the Taliban continues to threaten U.S. and coalition forces in Afghanistan, and because al-Qa’ida and associated forces continue to target U.S. persons and interests actively, the

United States will use military force against them as necessary. Active hostilities will continue in Afghanistan (and elsewhere) at least through 2015 and perhaps beyond. There is no doubt that we remain in a state of armed conflict against the Taliban, al-Qa'ida and associated forces as a matter of international law. And the 2001 AUMF continues to provide the President with domestic legal authority to defend against these ongoing threats.

Finally, we have come to my fourth topic: the future of the legal framework governing the United States' use of military force. I have described for you how we arrived where we are over the course of nearly fourteen years. The 2001 AUMF continues to provide authority for our ongoing military operations against al-Qa'ida, ISIL and others, even though the conditions of the fight have changed since that authorization was first enacted.

In his 2013 NDU speech, the President anticipated "engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate." While, today, the Administration's immediate focus is to work with Congress on a bipartisan, ISIL-specific AUMF, the President's position on the 2001 statute has not changed. ... Our democracy is at its best when we openly debate matters of national security, and our nation is strongest when the President and Congress are in agreement on the employment of military force in its defense. The President has made clear that he stands ready to work with Congress to refine the 2001 AUMF after enactment of an ISIL-specific AUMF.

In February of this year, President Obama submitted to Congress draft legislation authorizing use of "the Armed Forces of the United States as the President determines to be necessary and appropriate against ISIL or associated persons or forces." This raises the question: if the President already has the authority needed to take action against ISIL, why is he seeking a new authorization?

Most obviously and importantly, as the President has said, the world needs to know we are united behind the effort against ISIL, and the men and women of our military deserve our clear and unified support. Enacting the President's proposed AUMF will show our fighting forces, the American people, our foreign partners and the enemy that the President and Congress are united in their resolve to degrade and defeat ISIL.

But the value of having a new authorization expressly directed against ISIL and associated forces of ISIL extends beyond its expression of the political branches' unified support for our counter-ISIL efforts. The 2001 and 2002 AUMFs authorize the current military operations against ISIL, but they were enacted more than a decade ago. The last 14 years have taught us that the threats we face tomorrow will not be the same as the threats we faced yesterday or face today. This confrontation with ISIL will not be over quickly, and now is an appropriate time for the President, Congress, and the American people to define the scope of the conflict and make sure we have the appropriate authorities in place for the counter-ISIL fight.

To that end, the President has made clear that as part of the counter-ISIL mission he will not deploy U.S. forces to engage in long-term, large-scale ground combat operations like those our nation conducted in Iraq and Afghanistan. With its proposed AUMF, the Administration has sought to strike a balance, putting in place reasonable limitations that would, as the President said at NDU, "discipline our thinking, our definition, [and] our actions," while continuing to provide the authority and flexibility needed to accomplish the mission and preserve the Commander in Chief's authority to respond to unforeseen circumstances. And by working with Congress and the American people to come up with appropriate authorizing legislation for the fight against ISIL, we might also create a model to guide future efforts to refine the 2001 AUMF or otherwise authorize the use of force against some new threat we may not yet foresee.

A central question as we look ahead is what follow-on legal framework will provide the authorities necessary in order for our government to meet the terrorist threat to our country, but will not greatly exceed what is needed to meet that threat. Drawing again from the President's NDU speech, the answer is not legislation granting the Executive "unbound powers more suited for traditional armed conflicts between nations." Rather, the objective is a framework that will support "a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America." The challenge is to ensure that the authorities for U.S. counterterrorism operations are both adequate and appropriately tailored to the present and foreseeable threat.

Of course, in conducting military operations under the authority of existing AUMFs, a new, ISIL-specific AUMF, or a follow-on framework designed to replace the 2001 AUMF, we will remain committed to acting in accordance with our international obligations. As I have already described, our actions against ISIL in Iraq and Syria are justified as a matter of international law, and our military operations are being carried out in accordance with the law of armed conflict. This will continue to be the case under any new domestic authorizations.

* * * *

Transparency to the extent possible in matters of law and national security is sound policy and just plain good government. As noted earlier, it strengthens our democracy and promotes accountability. Moreover, from the perspective of a government lawyer, transparency, including clarity in articulating the legal bases for U.S. military operations, is essential to ensure the lawfulness of our government's actions and to explain the legal framework on which we rely to the American public and our partners abroad. Finally, I firmly believe transparency is important to help inoculate, against legal exposure or misguided recriminations, the fine men and women the government puts at risk in order to defend our country. We agency counsel all serve the same client, the United States of America, and each of us answers to the head of our respective agencies. But our highest calling, in my personal view, is to serve those who serve us.

* * * *

2. Actions in Syria

On September 30, 2015, Secretary of State John Kerry addressed the United Nations Security Council during a meeting on international peace and security and countering terrorism. Secretary Kerry's statement is excerpted below and available at <http://www.state.gov/secretary/remarks/2015/09/247639.htm>.

* * * *

Let me remind this council that coalition air operations are grounded in well-established military procedures, firmly based in international law, and the requests of neighboring states for

collective self-defense under Article 51 of the UN Charter. That foundation has not changed, and we will continue our mission with the full sanction of international law.

Pursuant to these procedures in Syria over the past year, the coalition has now conducted nearly 3,000 airstrikes against ISIL targets, and we are now in position with France, Australia, Canada, Turkey, and other coalition partners joining the campaign, to dramatically accelerate our efforts. This is what we will do. Over the coming weeks we will be continuing our flights out of Incirlik base in Turkey to apply constant pressure on strategic areas held by ISIL in northwest Syria.

We will also be sustaining our support to anti-ISIL fighters in northeast Syria. These efforts will put greater pressure on ISIL's operational areas, and we will ensure through precision airstrikes that ISIL leaders do not have any sanctuary anywhere on the ground in Syria.

* * * *

3. War Powers Resolution

On October 14, 2015, President Obama sent a letter to leaders in the U.S. Congress to report, consistent with the War Powers Resolution (Public Law 93–148), on the deployment of U.S. Armed Forces personnel to Cameroon. Daily Comp. Pres. Docs. 2015 DCPD No. 00724 (Oct. 14, 2015). The letter specified that approximately 90 U.S. Armed Forces personnel were being deployed to Cameroon initially, with the consent of the Government of Cameroon, in advance of the deployment of additional personnel to Cameroon “to conduct airborne intelligence, surveillance, and reconnaissance operations in the region.” The ultimate deployment was estimated to be about 300, to “remain in Cameroon until their support is no longer needed.” President Obama’s letter stated that he “directed the deployment of U.S. forces in furtherance of U.S. national security and foreign policy interests, and pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.”

4. Department of Defense 2015 Law of War Manual

On June 12, 2015, the U.S. Department of Defense Office of the General Counsel issued the 2015 Law of War Manual, pursuant to Department directives. The 2015 Law of War Manual is available at <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>. The 2015 Law of War Manual is the first Defense Department-wide version, in contrast to previous service-specific manuals. As stated in the section on the purpose of the manual:

The purpose of this manual is to provide information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations.

This manual represents the legal views of the Department of Defense. This manual does not, however, preclude the Department from subsequently changing its interpretation of the law. Although the preparation of this manual has benefited from the participation of lawyers from the Department of State

and the Department of Justice, this manual does not necessarily reflect the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole.

This manual is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

5. Bilateral Agreements and Arrangements

On May 21, 2015, President Obama announced his intent to designate Tunisia as a Major Non-NATO ally. On July 10, 2015, the designation process was complete and Tunisia became the 16th Major Non-NATO Ally (“MNNA”) of the United States. See State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/07/244811.htm>. As explained in the media note, MNNA status signals U.S. support for democracy in Tunisia and emphasizes U.S. friendship with the Tunisian Government and people. “MNNA status is a symbol of our close relationship and comes with tangible privileges including eligibility for training, loans of equipment for cooperative research and development, and Foreign Military Financing for commercial leasing of certain defense articles.”

Singapore and the United States signed an enhanced Defense Cooperation Agreement (“DCA”) in December 2015, an update to the 2005 U.S.-Singapore DCA and part of the bilateral Strategic Framework Agreement (“SFA”) between both sides.

6. International Humanitarian Law

a. Oslo Conference on Safe Schools

In response to an invitation from Norway to participate in the conference on Safe Schools in Oslo, May 28-29, 2015, representatives of the United States, Australia, Japan, the United Kingdom, the Republic of Korea, Canada, and France signed a joint statement to express their views on the work of the Oslo conference and the draft Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict (the “Lucens Guidelines”). The May 28, 2015 joint statement delivered to the Permanent Representative of Norway to the UN in Geneva is excerpted below.

* * * *

We share the strong desire to minimize the adverse effects of armed conflict on children, schools, and universities, and we strongly agree with the importance of maximizing the protections for civilians and civilian objects, such as schools and the students who attend them. We deplore the fact that armed conflict can expose students and teaching personnel to harm and

that attacks during armed conflict have resulted in the bombing, shelling, and burning of schools and universities and have entailed the killing, abduction, and arbitrary arrest of students, teachers, and academics.

We are aware that attacks on educational facilities, students, and teaching personnel can cause severe and long-lasting harm to individuals and societies and may, in many circumstances, constitute violations of international humanitarian law, including the unlawful targeting of civilians who are entitled to protection during armed conflict.

We reiterate that education is fundamental to development and contributes to the full enjoyment of human rights and fundamental freedoms.

We highlight the importance of United Nations Security Council resolutions 1998 (2011) and 2143 (2014), which urge parties to armed conflict to refrain from actions that impede children's access to education, and we continue to support the work of the United Nations Security Council on the promotion of the welfare of children in armed conflict.

We note that the Guidelines for protecting schools and universities from military use during armed conflict are not legally binding and do not affect existing rights, obligations, or protections under international law, but rather ... provide recommendations and ... contribute to good practice with a view to minimizing the harmful effects of armed conflict on civilians and civilian objects. However, we have concerns that the guidelines do not mirror the exact language and content of international humanitarian law, and that the full implications of this divergence are yet to be fully explored. We consider that the full implementation of international humanitarian law provides the best protection for civilians in situations of armed conflict.

We therefore take this opportunity to reaffirm our commitment, and invite all States to reaffirm their commitment, to international humanitarian law and to emphasize the importance, in all circumstances, of the full implementation of and compliance with international humanitarian law, and to the need to pursue accountability for violations thereof.

* * * *

b. Applicability of international law to conflicts in cyberspace

See Chapter 16 for a discussion of a new Executive Order issued by President Obama relating to persons engaging in malicious cyber-enabled activities.

c. Private military and security companies

On March 26, 2015, the U.S. delegation to the 28th session of the Human Rights Council provided its explanation of vote on the resolution entitled "Open-ended Intergovernmental Working Group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring, and oversight of the activities of private military and security companies." The U.S. explanation of vote is excerpted below and available at <https://geneva.usmission.gov/2015/03/26/eov-on-item-3-resolution-entitled-open-ended-intergovernmental-working-group-to-consider-the-possibility-of-elaborating-an-international-regulatory-framework-on-the-regulation-monitoring-a/>.

* * * *

The United States will abstain from this resolution, due to our concern about the length of the mandate extension and its related costs. While we appreciate that changes were made regarding the mandate during the negotiations, we are also concerned about the lack of a clear reference to paragraph 77 of the report of the second OEIGWG session, which this Council's previous resolution on this mandate, Resolution 22/33, referenced specifically. To reiterate, we see paragraph 77, including the issues defined in subparagraph (B), as providing the basis for our continued cooperation. We will continue to evaluate the OEIGWG against that metric.

The United States has consistently advocated bringing together home states, territorial states, contracting states, experts, and other stakeholders to make step-by-step progress on promoting and protecting human rights in the context of activities of PSCs and PMCs. But the United States continues to believe that what is needed now is not new international law but better implementation of the existing international law, as well as improvements in law, regulation, and policy at the national level. We hope that continued discussion in the OEIGWG can be a vehicle for facilitating that kind of enhancement of domestic standards.

* * * *

The International Code of Conduct Association ("ICOCA"), a multi-stakeholder association comprised of governments, including the United States, civil society organizations, and private security companies, was established to ensure effective implementation of the International Code of Conduct for Private Security Service Providers (2010). See *Digest 2010* at 740-42. ICOCA continued to make progress in 2015 on developing a mechanism for certifying and monitoring private security companies. See ICOCA website, <http://icoca.ch/en>. At the annual General Assembly meeting on October 8, 2015, the Government Members of ICOCA voted unanimously to elect a representative from the United States of America to serve a three-year term on the ICOCA Board of Directors, replacing another U.S. representative. See Minutes of the Board Meetings, October 2015, available at <http://icoca.ch/en/resources#category-tid-534>.

d. *International Conference of the Red Cross and Red Crescent*

The 32nd quadrennial International Conference of the Red Cross and Red Crescent convened in Geneva in December 2015. The United States joined in the consensus adoption of a number of relevant resolutions on international humanitarian law ("IHL") during the International Conference. Resolutions and reports from the International Conference are available at <http://rcrcconference.org/international-conference/documents/>. Resolution 2 would have created a new "meeting of States" on IHL. Due to opposition from some countries at the International Conference, it was not created. Instead, the resolution recommends "continuation of an inclusive, State-driven intergovernmental process based on the principle of consensus after the 32nd

International Conference and in line with the guiding principles enumerated in operative paragraph 1 to find agreement on features and functions of a potential forum of States.” Doc. 32IC/15/19.2 (2015). Resolution 1 commends the pursuit of further in-depth work... with the goal of producing one or more concrete and implementable outcomes in any relevant or appropriate form of a non-legally binding nature with the aim of strengthening IHL protections and ensuring that IHL remains practical and relevant to protecting persons deprived of their liberty in relation to armed conflict, in particular, in relation to [non-international armed conflict or] NIAC.” Doc. 32IC/15/R1 (2015). The International Conference also adopted its first resolution pertaining to preventing and responding to sexual and gender-based violence. Doc. 32IC/15/R3.

B. CONVENTIONAL WEAPONS

1. Anti-Personnel Landmines

On November 4, 2015, U.S. Permanent Representative to the Conference on Disarmament Robert Wood delivered the U.S. explanation of vote on a draft resolution under consideration by the UN General Assembly’s First Committee on implementation of the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Landmines. Ambassador Wood’s statement is excerpted below and available at <http://usun.state.gov/remarks/6956>.

* * * *

... As many of you are aware, last year the United States announced a number of important changes to U.S. anti-personnel landmine, APL, policy.

On June 27, 2014 the United States delegation at the Third Review Conference of the Ottawa Convention in Maputo, Mozambique, announced that the United States will not produce or otherwise acquire any anti-personnel munitions that are not compliant with the Ottawa Convention, including replacing such munitions as they expire in the coming years.

On September 23, 2014 the United States further announced that we are aligning our APL policy outside the Korean Peninsula with the key requirements of the Ottawa Convention. This means that the United States will: Not use APL outside the Korean Peninsula; Not assist, encourage, or induce anyone outside the Korean Peninsula to engage in activity prohibited by the Ottawa Convention; and Undertake to destroy APL stockpiles not required for the defense of the Republic of Korea

These measures represent important further steps to advance the humanitarian aims of the Ottawa Convention and to bring U.S. practice in closer alignment with the international humanitarian movement embodied in the Ottawa Convention.

Even as we take the steps announced last year, the unique circumstances on the Korean Peninsula preclude us from changing our landmine policy there at this time. As such, we are not presently in a position to comply fully with and seek accession to the Ottawa Convention, and must continue to abstain on this resolution. However, we will continue our diligent efforts to

pursue material and operational solutions that would be compliant with and ultimately allow us to accede to the Ottawa Convention while ensuring our ability to respond to contingencies on the Korean Peninsula and meet our alliance commitments to the Republic of Korea.

More broadly, the United States is the world's single largest financial supporter of humanitarian mine action, providing more than \$2.5 billion in aid in over 90 countries for conventional weapons destruction programs since 1993. The United States will continue to support this important work and remains committed to a continuing partnership with Ottawa States Parties and non-governmental organizations in addressing the humanitarian impact of anti-personnel landmines.

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2. Convention on Cluster Munitions

On November 4, 2015, Ambassador Wood delivered the explanation of vote on behalf of the United States at the UN General Assembly First Committee discussion of Draft Resolution L.49/Rev.1, "Implementation of the Convention on Cluster Munitions." Ambassador Wood's statement is excerpted below and available at <http://usun.state.gov/remarks/6955>.

* * * *

Mr. Chairman, my delegation has abstained on draft resolution L.49/Rev.1, "Implementation of the Convention on Cluster Munitions." The United States is not a party to this convention and as such is not bound by its provisions. We consider this resolution applicable only to those States Parties to this Convention, in particular those paragraphs calling for the Convention's full and effective implementation.

It strongly remains the U.S. view that when used properly in accordance with international humanitarian law, cluster munitions with a low unexploded ordnance, UXO, rate provide key advantages against certain types of legitimate military targets and can produce less collateral damage than high explosive, unitary weapons.

Although cluster munitions remain an integral part of U.S. force capabilities, the United States is committed to reducing the potential for unintended harm to civilians and civilian infrastructure caused by either the misuse of cluster munitions or the use of cluster munitions that generate a large amount of UXO. Under the Department of Defense's 2008 Cluster Munitions Policy, by the end of 2018 DOD will no longer employ cluster munitions with a UXO rate greater than one percent. In addition, by U.S. law, the United States does not transfer cluster munitions to other countries except those that meet the 1% UXO rate.

We note the references to "the principles of humanity and the dictates of public conscience," which flow from the Martens Clause. While the United States believes that "the principles of humanity and the dictates of public conscience" can provide a relevant and important paradigm for discussing the moral or ethical issues related to warfare, the Martens Clause is not a rule of international law that prohibits any particular weapon, including cluster munitions.

In general, the lawfulness of the use of a type of weapon under international law does not depend on an absence of authorization, but instead depends upon whether the weapon is prohibited. The United States does not accept by this or any other standard that the Convention on Cluster Munitions represents an emerging norm or reflects customary international law that would prohibit the use of cluster munitions in armed conflict.

* * * *

C. DETAINEES

1. President's Statement on National Defense Authorization Act for 2016

On October 22, 2015, President Obama sent a message to the House of Representatives, returning without approval the National Defense Authorization Act for Fiscal Year 2016. Daily Comp. Pres. Docs. 2015 DCPD No. 00750 (Oct. 22, 2015). Among the reasons identified in his message for vetoing the bill is that it would impede the closure of the detention facility at Guantanamo Bay. As his message explains:

I have repeatedly called upon the Congress to work with my Administration to close the detention facility at Guantanamo Bay, Cuba, and explained why it is imperative that we do so. As I have noted, the continued operation of this facility weakens our national security by draining resources, damaging our relationships with key allies and partners, and emboldening violent extremists. Yet in addition to failing to remove unwarranted restrictions on the transfer of detainees, this bill seeks to impose more onerous ones. The executive branch must have the flexibility, with regard to those detainees who remain at Guantanamo, to determine when and where to prosecute them, based on the facts and circumstances of each case and our national security interests, and when and where to transfer them consistent with our national security and our humane treatment policy. Rather than taking steps to bring this chapter of our history to a close, as I have repeatedly called upon the Congress to do, this bill aims to extend it.

On November 25, 2015, President Obama signed the amended version of the National Defense Authorization Act for Fiscal Year 2016. Daily Comp. Pres. Docs. 2015 DCPD No. 00843 pp. 1-2 (Nov. 25, 2015). President Obama's signing statement explains that he signed the legislation because it provided acceptable levels of funding for national defense, but goes on to say that the executive branch deems some of its provisions relating to Guantanamo to be contrary to the national interest and potentially unconstitutional:

I am, however, deeply disappointed that the Congress has again failed to take productive action toward closing the detention facility at Guantanamo. Maintaining this site, year after year, is not consistent with our interests as a Nation and undermines our standing in the world. As I have said before, the

continued operation of this facility weakens our national security by draining resources, damaging our relationships with key allies and partners, and emboldening violent extremists. It is imperative that we take responsible steps to reduce the population at this facility to the greatest extent possible and close the facility. The population once held at Guantanamo has now been reduced by over 85 percent. Over the past 24 months alone, we have transferred 57 detainees, and our efforts to transfer additional detainees continue. It is long past time for the Congress to lift the restrictions it has imposed and to work with my Administration to responsibly and safely close the facility, bringing this chapter of our history to a close.

The restrictions contained in this bill concerning the detention facility at Guantanamo are, as I have said in the past, unwarranted and counterproductive. Rather than taking steps to close the facility, this bill aims to extend its operation. Section 1032 renews the bar against using appropriated funds to construct or modify any facility in the United States, its territories, or possessions to house any Guantanamo detainee in the custody or under the control of the Department of Defense unless authorized by the Congress. Section 1031 also renews the bar against using appropriated funds to transfer Guantanamo detainees into the United States for any purpose. Sections 1033 and 1034 impose additional restrictions on foreign transfers of detainees—in some cases purporting to bar such transfers entirely. As I have said repeatedly, the executive branch must have the flexibility, with regard to the detainees who remain at Guantanamo, to determine when and where to prosecute them, based on the facts and circumstances of each case and our national security interests, and when and where to transfer them consistent with our national security and our humane treatment policy.

Under certain circumstances, the provisions in this bill concerning detainee transfers would violate constitutional separation of powers principles. Additionally, section 1033 could in some circumstances interfere with the ability to transfer a detainee who has been granted a writ of habeas corpus. In the event that the restrictions on the transfer of detainees in sections 1031, 1033, and 1034 operate in a manner that violates these constitutional principles, my Administration will implement them in a manner that avoids the constitutional conflict.

2. U.S. Response to Inter-American Commission Report on Guantanamo

On March 30, 2015, the United States submitted its response to the Inter-American Commission on Human Rights (“IACHR”) regarding the IACHR’s Draft Report on the Closure of Guantanamo (OEA/Ser.L/V/II. Doc. 30 January 2015). Excerpts follow (with footnotes omitted) from the U.S. submission, which is available in full at <http://www.state.gov/s/l/c8183.htm>. The IACHR final report, “Towards the Closure of Guantanamo” was released June 3, 2015. AS/Ser.L/V/II. Doc. 20/153 June 2015.

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II. Relevant International Legal Framework

All U.S. military detention operations conducted at Guantanamo Bay are carried out in accordance with the law of armed conflict, also known as the “law of war” or international humanitarian law (IHL), including Common Article 3 of the Geneva Conventions of 1949, and all other applicable international and domestic laws.

The detainees who remain at the Guantanamo Bay detention facility continue to be detained lawfully, both as a matter of international law and under U.S. domestic law. As a matter of international law, the United States is engaged not in a “war on terrorism,” as characterized in the draft report, but in an ongoing armed conflict with al-Qaida, the Taliban, and associated forces. As part of this conflict, the United States has captured and detained enemy belligerents, and is permitted under the law of war to hold them until the end of hostilities. Further, as a matter of domestic law, this detention is authorized by the 2001 Authorization for Use of Military Force (AUMF) (U.S. Public Law 107-40), as informed by the laws of war. We object to the finding that U.S. detention operations at Guantanamo constitute arbitrary detention in violation of applicable international law. In both international and non-international armed conflicts, a State may detain enemy belligerents consistent with the law of armed conflict until the end of hostilities, and such detention is not arbitrary.

During situations of armed conflict, the law of war is the *lex specialis* and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims. The law of war and international human rights law contain many provisions that complement one another and are in many respects mutually reinforcing. Further, despite the general presumption that specific law of war rules govern the entire process of planning and executing military operations in armed conflict, certain provisions of human rights treaties may apply in armed conflicts. For example, the obligations to prevent torture and cruel, inhuman, or degrading treatment or punishment in the Convention Against Torture (CAT) remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of war. As our response in Section IV further demonstrates, the United States is fully committed to ensuring that individuals it detains in any armed conflict are treated humanely in all circumstances, consistent with applicable U.S. treaty obligations, U.S. domestic law, and U.S. policy.

The United States notes that many of the sources referred to by the Inter-American Commission do not give rise to binding legal obligations on the United States or are not within the Commission’s mandate to apply with respect to the United States. The United States has undertaken a political commitment to uphold the American Declaration of the Rights and Duties of Man (“American Declaration”), a non-binding instrument that does not itself create legal rights or impose legal obligations on signatory states.¹⁵ Article 20 of the Statute of the Inter-

¹⁵ Because the American Declaration is non-binding, the United States interprets any assertions regarding alleged violations of the American Declaration as allegations that the United States has not lived up to its political commitment to uphold the Declaration. Furthermore, as the IACHR Statute makes clear, the powers of the Commission to issue recommendations as set forth in Article 20 to States not party to the American Convention are strictly advisory. Article 18 of the IACHR Statute sets forth enumerated powers of the Commission with respect to Member States of the OAS including preparing “such studies or reports as it considers advisable for the performance

American Commission on Human Rights (“IACHR Statute”) sets forth the powers of the Commission that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights (“American Convention”), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. Further, the United States reiterates its understanding that the Commission lacks the authority to issue precautionary measures to a non-State Party to the American Convention. Accordingly, we continue to have concerns about the jurisdictional competence of the Commission with respect to the United States and the law of war.

Moreover, the Commission has cited jurisprudence of the Inter-American Court of Human Rights (“Inter-American Court”) interpreting the American Convention. The United States has not accepted the jurisdiction of the Inter-American Court, nor, as previously noted, is it party to the American Convention. Accordingly, the jurisprudence of the Inter-American Court interpreting the Convention does not govern U.S. commitments under the American Declaration. Likewise, advisory opinions of the Inter-American Court interpreting other international agreements, such as the International Covenant on Civil and Political Rights (ICCPR), are not relevant.

III. Overview of United States’ Efforts and Accomplishments Regarding Guantanamo Closure

The United States continues to work toward the goal of closing the detention facility at Guantanamo Bay, a process that started under the Bush Administration, and is working assiduously to reduce the detainee population at Guantanamo and to close the facility in a responsible manner that protects national security. President Obama has repeatedly reaffirmed this commitment, including in his State of the Union Address in January 2015; he has stated that closing the detention facility at Guantanamo is a national security imperative and that its continued operation weakens our national security by draining resources, damaging our relationships with key allies and partners, and emboldening violent extremists.

On January 22, 2009, President Obama signed Executive Order (E.O.) 13492, which ordered the closure of the detention facility at Guantanamo Bay. Pursuant to that order, the Department of Justice coordinated a special Guantanamo Review Task Force, which was established to review comprehensively information in the possession of the U.S. Government about the detainees in order to determine the appropriate disposition—transfer, prosecution, or other lawful disposition—for each of the 240 detainees subject to the review.

It is important to note that a decision to designate a detainee for transfer does not reflect a decision that the detainee poses no threat, nor does it equate to a judgment that the U.S. Government lacks legal authority to hold the detainee. Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country. The United States continues to have legal authority to hold Guantanamo detainees in law of war detention until the end of hostilities, consistent with

of its duties,” making “recommendations to the governments of the states on the adoption of progressive measures in favor of human rights,” and conducting “on-site observations in a state, with the consent or at the invitation of the government in question.”

U.S. law and applicable international law, but has elected, as a policy matter, to ensure that it holds them no longer than necessary to mitigate the threat posed.

Subsequently, after working through numerous, complex issues associated with building a comprehensive process, the Periodic Review Board (PRB) process commenced in October 2013. The PRB consists of senior national security officials from the Departments of Defense, Homeland Security, Justice, and State, as well as from the Office of the Chairman of the Joint Chiefs of Staff and the Office of the Director of National Intelligence. The PRB process is a discretionary, administrative, interagency process that is reviewing the status of detainees at Guantanamo Bay to determine whether continued detention remains necessary to protect against a continuing significant threat to the security of the United States. In this way, the United States will ensure that any continued detention is carefully evaluated and justified. The PRB process thus makes an important contribution toward the Administration's goal of closing the Guantanamo Bay detention facility by ensuring a principled and sustainable process for reviewing the current circumstances and intelligence, and identifying whether additional detainees may be designated for transfer.

The PRB has conducted fourteen full hearings and three six-month file reviews. Eight of the full hearings have resulted in a final determination that law of war detention is no longer necessary, and one hearing is still pending a final determination.

Since 2002, more than 640 detainees have departed Guantanamo Bay to more than 40 countries, including OAS Member States. The United States is grateful to these governments for their support for U.S. efforts to close the Guantanamo Bay detention facility. All told, more than 80 percent of those at one time held at the Guantanamo Bay facility have been repatriated or resettled, including all detainees subject to final court orders directing their release. Of the 242 detainees at Guantanamo at the beginning of the Obama Administration, 116 have been transferred out of the facility. In 2014, 28 detainees were transferred from the facility, more than in any year since 2009. As of March 27, 2015, 122 detainees remain at the Guantanamo Bay detention facility, the lowest number since the initial weeks after the facility was opened. Of these, 56 are eligible for transfer, 10 are being prosecuted or have been convicted, with 2 currently awaiting sentencing, and the remaining 56 will be reviewed by the PRB.

IV. Responses to Particular Issues Raised

A. Conditions of Detention

1. Prohibition on Torture and Cruel, Inhuman, or Degrading Treatment or Punishment

It is the clear position of the United States that torture and cruel treatment are categorically prohibited under domestic and international law, including human rights law and the law of armed conflict. The United States has taken important steps to ensure adherence to its legal obligations, establishing laws and procedures to strengthen the safeguards against torture and cruel treatment. For example, E.O. 13491, issued by President Obama during his first days in office, directs that, consistent with the Convention Against Torture and Common Article 3 of the 1949 Geneva Conventions, as well as U.S. law, any individual detained in armed conflict by the United States or within a facility owned, operated, or controlled by the United States, in all circumstances, must be treated humanely and must not be tortured or subjected to cruel, inhuman, or degrading treatment or punishment. The Executive Order also directs that no individual in U.S. custody in any armed conflict "shall . . . be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3." The manual explicitly prohibits threats, coercion, and physical abuse. Interrogations undertaken in compliance with the Army Field Manual are

consistent with U.S. domestic and international legal obligations. E.O. 13491 also revoked all previous executive directives that were inconsistent with the Order, provided that no officer, employee, or agent of the U.S. Government could rely on any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001, and January 20, 2009, and created a Special Task Force on Interrogations and Transfer Policies, which helped strengthen U.S. policies so that individuals transferred to other countries would not be subjected to torture.

The United States does not permit its personnel to engage in acts of torture or cruel, inhuman, or degrading treatment or punishment of any person in its custody either within or outside U.S. territory. As the United States recently reaffirmed in its presentation before the U.N. Committee Against Torture in November 2014, torture and cruel, inhuman, or degrading treatment or punishment are prohibited at all times in all places.

The Commission's draft report references the release of the declassified Executive Summary, Findings, and Conclusions of the Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program ("SSCI Report"). The SSCI Report contains a review of a program that included interrogation methods used on terrorism suspects in secret facilities at locations outside of both the United States and Guantanamo Bay. Harsh interrogation techniques highlighted in that Report are not representative of how the United States deals with the threat of terrorism today, and are not consistent with our values. In E.O. 13491, President Obama prohibited the use of those techniques and ended the detention and interrogation program described in the SSCI Report. President Obama also determined that the Executive Summary, Findings, and Conclusions of the SSCI Report should be declassified, with appropriate redactions necessary to protect national security, because public scrutiny, debate, and transparency will help to inform the public's understanding of the program to ensure that the United States never resorts to these kinds of interrogation techniques again.

2. Accountability

The Department of Defense, the Central Intelligence Agency (CIA), the Department of Justice, and others have conducted numerous independent, rigorous investigations into detainee treatment, detention policy, and conditions of confinement since the September 11 attacks. Reports have been issued by, among others, the Inspectors General of the Army, Navy, and CIA; Major General Ryder, the General Officer appointed by the Commander, U.S. Southern Command, for the purpose of investigating conditions of detention; an independent panel led by former Secretary of Defense James Schlesinger; the Senate Armed Services Committee; and the Senate Select Committee on Intelligence. For the sake of transparency and accountability, many of these reports were released to the public, to the extent consistent with national security and other applicable U.S. law and policy. These investigations led to hundreds of recommendations on ways to improve detention and interrogation operations, and the Department of Defense and the CIA have instituted processes to address these recommendations.

The U.S. military is, and has always been, required to investigate every credible allegation of abuse by U.S. forces in order to determine the facts, including identifying those responsible for any violation of law, policy, or procedures. The Department of Defense has multiple accountability mechanisms in place to ensure that personnel adhere to law and policy associated with military operations and detention.

The Department of Justice conducted preliminary reviews and criminal investigations into the treatment of individuals alleged to have been mistreated while in U.S. Government

custody subsequent to the September 2001 terrorist attacks, brought criminal prosecutions in several cases, and obtained the conviction of a CIA contractor and a Department of Defense contractor for abusing detainees in their custody. Further, in August 2009, the Department of Justice commenced a preliminary review of the treatment of 101 persons alleged to have been mistreated while in U.S. Government custody subsequent to the September 11 attacks. That review, led by Assistant United States Attorney John Durham, who is a career federal prosecutor, generated two criminal investigations. The Department of Justice ultimately declined those cases for prosecution consistent with the Principles of Federal Prosecution, which require that each case be evaluated for a clear violation of a federal criminal statute with provable facts that reflect evidence of guilt beyond a reasonable doubt and a reasonable probability of conviction.

With respect to accountability for legal advice, the conduct of two senior Department of Justice officials in giving legal advice that justified the use of certain “enhanced interrogation techniques” following the September 11 attacks was reviewed by an Associate Deputy Attorney General, a longtime career Department of Justice official. In a 69-page January 5, 2010 memorandum subsequently released publicly with limited redactions, he found that they had narrowly construed the torture statute, often failed to expose countervailing arguments, and overstated the certainty of their conclusions. He concluded that although they had exercised poor judgment, the evidence did not establish that they had engaged in professional misconduct.

3. Camp 7 Conditions

All U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo Bay, 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. Camp 7 is a climate-controlled, single-cell facility currently used to house a small group of special detainees at Guantanamo captured during operations in the war against al-Qaida, the Taliban, and associated forces. The transfer of these detainees to Guantanamo Bay was announced in 2006. Individuals in this group are accused of plotting the September 11 attacks on the United States, the attack on the USS COLE, and various other attacks that have taken the lives of innocent civilians around the world. Facilities at Camp 7 or at any of the other camps are routinely maintained for habitability, which would include repairing or replacing equipment, plumbing, or structures in the interest of humane treatment consistent with applicable treatment standards.

The Department of Defense has been working closely with the International Committee of the Red Cross to facilitate increased opportunities for high-value 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 confinement for detainees in its custody. The Department of Defense has concluded that increasing family contact for the high-value detainees can be done in a manner that is consistent with both humanitarian and security interests.

4. Role of Health Professionals

The Joint Medical Group at Guantanamo is committed to providing appropriate and comprehensive medical care to all detainees. The healthcare provided to the detainees being held at the Guantanamo Bay detention facility is comparable to that which our own service personnel receive while serving at Joint Task Force-Guantanamo. Detainees receive timely, compassionate, quality healthcare and have regular access to primary care and specialty physicians.

U.S. practice is consistent with principle No. 2 of the non-binding Principles of Medical Ethics relevant to the Role of Health Personnel in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Department of Defense physicians and health care personnel charged with providing care to detainees take their responsibility for the health of detainees very seriously. DoD Instruction 2310.08E, “Medical Program Support for Detainee Operations,” June 6, 2006, states: “Health care personnel charged with the medical care of detainees have a duty to protect detainees’ physical and mental health and provide appropriate treatment for disease. To the extent practicable, treatment of detainees should be guided by professional judgments and standards similar to those applied to personnel of the U.S. Armed Forces.”

Military physicians, psychologists, and other healthcare personnel are held to the highest standards of ethical care and at no time have been released from their ethical obligations. Department of Defense policy authorizes healthcare personnel qualified in behavioral sciences to provide consultative services to support authorized law enforcement or intelligence activities, including observation and advice on the interrogation of detainees when the interrogations are fully in accordance with applicable law and interrogation policy. These behavioral science consultants are not involved in the medical treatment of detainees and do not access medical records.

It is the policy of the United States to support the preservation of life by appropriate clinical means, in a humane manner, and in accordance with all applicable laws. To that end, the Department of Defense has established clinically appropriate procedures to address the medical care and treatment of individual detainees experiencing the adverse health effects of clinically significant weight loss, including those individuals who are engaged in hunger strikes. Involuntary feeding is used only as a last resort, if necessary to address significant health issues caused by malnutrition and/or dehydration. These procedures are administered in accordance with all applicable domestic and international laws pertaining to humane treatment.

5. Religious and Cultural Accommodations

Detainees at Guantanamo have the opportunity to pray five times each day. Prayer times are posted for the detainees, and arrows are painted in the living areas—in each cell and in communal areas—so that the detainees know the direction of Mecca. Once prayer call sounds, detainees receive 20 minutes of uninterrupted time to practice their faith. The guard force strives to ensure detainees are not interrupted during the 20 minutes following the prayer call, even if detainees are not involved in religious activity. The majority of detainees are in communal living accommodations, where they are able to pray communally. Even detainees who are in single cell living accommodations conduct prayer together.

Joint Task Force Guantanamo schedules detainee medical appointments, interviews, classes, legal visits, and other activities mindful of the prayer call schedule. Every detainee at Guantanamo is issued a personal copy of the Quran in the language of his choice. Strict measures are in place throughout the facility to ensure that the Quran is handled appropriately by U.S. personnel. The Joint Task Force recognizes Islamic holy periods like Ramadan by modifying meal schedules in observance of religious requirements. Special accommodations are made to adhere to Islamic dietary needs. Department of Defense personnel deployed to Guantanamo receive cultural training to ensure they understand Islamic practices.

6. Requests by the Commission to Visit the Guantanamo Bay Detention Facility

The United States is committed to being as open and transparent to the international community as possible. We have invited the Commission to visit the Guantanamo Bay detention

facility and view the detention operations there. However, because of relevant security procedures in effect at the detention facility, we are unable to accommodate the Commission's request to meet with detainees held there. The United States continues to recognize the special role of the International Committee of the Red Cross (ICRC) under the Geneva Conventions of 1949 and grants it access to all detainees held at Guantanamo Bay. We value our relationship with the ICRC and address any concerns it may raise at all levels of the chain of command.

B. Access to Justice

1. Habeas Corpus

All Guantanamo Bay 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. Except in rare instances required by compelling security interests, all of the evidence relied upon by the government in habeas proceedings to justify detention is disclosed to the 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 cases have been denied or dismissed continue to have access to counsel pursuant to the same terms applicable during pendency of proceedings.

With regard to the effectiveness of the habeas remedy afforded to Guantanamo detainees, the United States notes that the evidentiary issues and other procedural concerns raised in the draft report are matters within the expertise and purview of our independent federal judiciary, as the U.S. Supreme Court ruled in *Boumediene v. Bush*, 553 U.S. 723, 796 (2008). Many of the detainees at Guantanamo today have challenged their detention in U.S. federal courts. All of the detainees at Guantanamo who have prevailed in habeas proceedings under orders that are no longer subject to appeal have been either repatriated or resettled. To date, 32 detainees have been ordered released, and they were transferred from Guantanamo pursuant to U.S. federal court orders.

2. Military Commissions

The U.S. Government remains of the view that in our efforts to protect our national security, military commissions and federal courts can—depending on the circumstances of the specific prosecution—each provide tools that are both effective and legitimate. A statutory ban currently prohibits the use of funds to transfer Guantanamo detainees to the United States, however, even for prosecution in federal court.

All current military commission proceedings at Guantanamo incorporate fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 and other applicable law, and are consistent with those in Additional Protocol II to the 1949 Geneva Conventions, as well.

These include: (1) innocence is presumed and the prosecution must prove guilt beyond a reasonable doubt; (2) there is a prohibition on the admission of any statement obtained by the use of torture or by cruel, inhuman, or degrading treatment in military commission proceedings, except against a person accused of torture or such treatment as evidence that the statement was made; (3) the accused has latitude in selecting defense counsel; (4) in capital cases, the accused is provided counsel “learned in applicable law relating to capital cases”; and (5) the accused has the right to pre-trial discovery.

The 2009 Military Commissions Act also provides for the right to appeal final judgments rendered by a military commission to the U.S. Court of Military Commissions Review, and

subsequently to the U.S. Court of Appeals for the District of Columbia Circuit and then to the U.S. Supreme Court, both of which are federal civilian courts comprised of life-tenured judges. Further, the United States is committed to ensuring the transparency of military commission proceedings. To that end, proceedings are now transmitted via video feed to locations at Guantanamo Bay and in the United States, so that the press and the public can view them, with a 40-second delay to protect against the disclosure of classified information. Court transcripts, filings, and other materials are also available to the public online via the Office of Military Commissions website, www.mc.mil.

C. Transfer Issues

1. Yemeni Detainees

Seventy-five of the remaining 122 detainees at Guantanamo are Yemeni nationals, 18 of whom are designated for transfer subject to appropriate security measures. An additional 30 Yemeni nationals are designated for “conditional detention,” which means they are not approved for repatriation to Yemen at this time, but may be transferred to third countries if an appropriate resettlement option becomes available, or repatriated to Yemen in the future if security conditions improve.

The current situation in Yemen precludes us from repatriating Yemeni detainees at this time. Accordingly, we are vigorously engaging with partners and allies around the world for assistance in resettling these detainees. The U.S. Government, through intensive diplomatic efforts across the world, has found and continues to identify countries willing to resettle Yemeni detainees, including recent transfers of four individuals to Oman, three to Kazakhstan, three to Georgia, and one each to Slovakia and Estonia.

2. Non-refoulement

As a matter of fundamental policy and practice, the United States does not transfer any individual to a foreign country if it is more likely than not that the person would be tortured. The United States’ firm and long-standing commitment to this policy is demonstrated in many ways, such as in section 1242 of the Foreign Affairs Reform and Restructuring Act where it is explicitly stated, and in E.O. 13491, which required the formation of a special U.S. Government task force to study and evaluate the practices of transferring individuals to other nations in order to ensure consistency with all applicable laws and U.S. policies pertaining to treatment. The United States considers the totality of relevant factors relating to the individual to be transferred and the proposed recipient government in question. Such factors include, but are not limited to:

- the individual’s allegations of prior or potential mistreatment by the receiving government;
- the receiving country’s human rights record;
- whether post-transfer detention is contemplated;
- the specific factors suggesting that the individual in question is at risk of being tortured by officials in that country;
- whether similarly situated individuals have been tortured by the country under consideration;
- and, where applicable, any diplomatic assurances of humane treatment from the receiving country (including an assessment of their credibility).
- Humane treatment assurances are necessarily tailored to the specific context of a particular transfer. With respect to law of war detainee transfers, it is U.S. practice to obtain

access for post-transfer monitoring where post-transfer detention by the receiving state is anticipated. Specifically, the United States seeks consistent, private access to the individual who has been transferred and thereafter detained, with minimal advance notice to the detaining government. If the United States determines, after taking into account all relevant information, including any assurances received and the reliability of such assurances, that it is more likely than not that a person would be tortured if transferred to a foreign country, the United States would not approve the transfer of the person to that country.

* * * *

3. Transfers

The number of detainees remaining at Guantanamo Bay declined further in 2015 as part of ongoing U.S. government efforts to close the facility. On January 14, 2015, the Defense Department announced the transfer of Guantanamo detainee Akhmed Abdul Qadir to Estonia. See January 14, 2015 Release No: NR-016-15, available at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=17109>. In accordance with President Obama's January 22, 2009 executive order, Qadir was unanimously approved for transfer by the six departments and agencies making up the Guantanamo Review Task Force. Also on January 14, the Defense Department announced the transfers of Al Khadr Abdallah Muhammad Al Yafi, Fadel Hussein Saleh Hentif, Abd Al-Rahman Abdullah Au Shabati, and Mohammed Ahmed Salam from the detention facility at Guantanamo Bay to Oman. See Release No: NR-015-15, available at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=17110>. These four detainees were approved for transfer by the Guantanamo Review Task Force. After the transfers announced on January 14, 2015, 122 detainees remained at Guantanamo Bay.

On June 13, 2015, the Department of Defense announced the transfer to Oman of six Guantanamo detainees, approved for transfer by the Guantanamo Review Task Force. See June 13, 2015 Release No: 235-15, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/605565/detainee-transfer-announced>.

On September 17, 2015, the Department of Defense announced the repatriation of Younis Abdurrahman Chekkouri from the detention facility at Guantanamo Bay to the Government of Morocco. See September 17, 2015 Release No: NR-361-15, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/617549/detainee-transfer-announced>. Chekkouri was approved for transfer by the Guantanamo Review Task Force. The Department of Defense announced the transfer of Abdul Shalabi from the detention facility at Guantanamo Bay to the government of the Kingdom of Saudi Arabia on September 22. See September 22, 2015 Release No: NR-370-15, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/618219/detainee-transfer-announced>. Shalabi was recommended for transfer by the Periodic Review Board established by E.O. 13567.

The Department announced the transfer of Ahmed Ould Abdel Aziz from the detention facility at Guantanamo Bay to the Government of Mauritania on October 29.

See October 29, 2015 Release No: NR-412-15. On October 30, 2015, the Department of Defense announced the repatriation of Shaker Aamer to the Government of the United Kingdom. See October 30, 2015 Release No: NR-415-15, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/626666/detainee-transfer-announced>. Both transfers announced in October were pursuant to approval by the Guantanamo Review Task Force. For discussion of litigation involving Aamer, see section 3.a(2), *infra*.

On November 15, 2015, the Department of Defense announced the transfer of five detainees at Guantanamo to the Government of the United Arab Emirates. See November 15, 2015 Release No: NR-438-15, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/628980/detainee-transfers-announced>. Four of the five detainees were approved for transfer after a comprehensive review by the Guantanamo Review Task Force. The other was recommended for transfer by the Periodic Review Board, established by E.O. 13567. As of November 15, 2015, 107 detainees remained at Guantanamo Bay.

4. U.S. court decisions and proceedings

a. Detainees at Guantanamo: Habeas Litigation

(1) Al-Warafi v. Obama and other petitions asserting cessation of active hostilities

On April 17, 2015, the United States filed its opposition to Al-Warafi's motion to grant his petition for habeas corpus. As discussed in *Digest 2013* at 609-11, the U.S. Court of Appeals for the D.C. Circuit had previously affirmed the district court's denial of Al-Warafi's earlier petition for habeas relief, which was premised on his assertion that he was entitled to recognition as "medical personnel" under the First Geneva Convention. Al-Warafi's latest motion claims that his detention has become unlawful because the armed conflict against the Taliban in Afghanistan allegedly concluded at the end of 2014. The U.S. brief in opposition asserts that active hostilities remain ongoing and clarifies that public statements by President Obama that the U.S. combat mission in Afghanistan was coming to an end do not constitute the requisite determination by the U.S. government that active hostilities had ceased pursuant to the law of armed conflict, including the Third Geneva Convention and U.S. court precedent. The brief identifies numerous examples of attacks by the Taliban in 2015 precipitating hostile actions by U.S. and coalition forces remaining in Afghanistan in support of its assertion that hostilities are ongoing. The brief emphasizes that this determination is a matter for the political branches, and the judiciary must give the political branches "wide deference" on questions concerning the cessation of hostilities. The brief cites congressional and executive branch determinations and statements confirming that active hostilities are ongoing in Afghanistan post-2014, including Mr. Preston's ASIL remarks, excerpted *supra*. The public version of the U.S. brief filed in the district court in opposition to Al-

Warafi's 2015 petition is available at <http://www.state.gov/s/l/c8183.htm>. The court denied the petition on July 30, 2015. *Al Warafi v. Obama*, No. 09-CV-2368 (D.D.C.).

On May 8, 2015, the United States filed a similar brief in support of its motion to dismiss the petition for habeas by Fayez Mohammed Ahmed Al Kandari, who also claimed he was being unlawfully detained because the war in Afghanistan allegedly had ended. The U.S. brief in *Al Kandari* is also available at <http://www.state.gov/s/l/c8183.htm>. On July 24, 2015, the United States filed its reply brief in support of its motion to dismiss. The reply brief is also available at <http://www.state.gov/s/l/c8183.htm>. On August 31, 2015, the district court issued its opinion denying the petition. *Al Kandari v. United States*, No. 15-CV-329 (D.D.C.). On September 8, 2015, the Periodic Review Board concluded its review of Al-Kandari's case, recommending his transfer. ****

On September 4, 2015, the United States filed its brief in response to the petition of Moath Hamza Ahmed Al-Alwi and in support of its motion to dismiss that petition. Al-Alwi, who had previously been determined to be part of al-Qa'ida or Taliban forces by the U.S. Court of Appeals for the District of Columbia, also claimed his detention became unlawful after the U.S. combat mission in Afghanistan allegedly ended at the close of 2014. The U.S. brief makes the same arguments as the briefs in *Al-Warafi* and *Al Kandari*: (1) that law of war detention remains lawful until the end of active hostilities and active hostilities against al-Qa'ida and Taliban forces have not ceased; and (2) the determination of when active hostilities have ceased is reserved for the political, not judicial, branches of government. The brief also responds to Al-Alwi's additional assertions that his detention violates the Convention Against Torture and Additional Protocol I to the Geneva Conventions. The public version of the U.S. brief in *Al-Alwi* is available at <http://www.state.gov/s/l/c8183.htm>. The U.S. reply brief, filed on November 24, 2015, is also available at <http://www.state.gov/s/l/c8183.htm>.

(2) Aamer v. Obama

On July 2, 2015, the United States filed its opposition to the motion brought by petitioner Shaker Aamer to compel examination by a mixed medical commission. The introduction to the U.S. brief, below, summarizes the background of the case and the U.S. arguments against the extraordinary remedy sought by the petitioner. The full text of the brief is available at <http://www.state.gov/s/l/c8183.htm>. On October 30, 2015, the Department of Defense announced Aamer's repatriation to the United Kingdom. Aamer was approved for transfer by the Guantanamo Review Task Force. See Defense Department news release, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/626666/detainee-transfer-announced>.

**** Editor's note: The Department of Defense announced Al Kadari's repatriation to Kuwait on January 8, 2016. See Defense Department news release, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/641982/detainee-transfer-announced>.

* * * *

Petitioner Shaker Aamer moves the Court for the extraordinary remedy of a permanent injunction compelling the Executive to establish a Mixed Medical Commission pursuant to one of the military regulations that implements provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (“Third Geneva Convention” or “GC III”), and also to appoint his hired medical expert, Dr. Emily Keram, to that Commission. . . . Such an order would necessarily require the Executive to establish such a commission, craft procedures for it, and develop criteria applicable to this non-international armed conflict against al-Qaida, Taliban, and associated forces from principles laid down in the Model Agreement annexed to the Third Geneva Convention for determining the types of disabilities and sicknesses that warrant repatriation. Each of these steps implicates the United States’ interpretation and application of the Third Geneva Convention and the implementing military regulations. Petitioner seeks this relief even though neither the relevant provisions of that military regulation nor of the Third Geneva Convention apply to him.

The Court should deny Petitioner’s motion for two reasons. First, the Court does not have or should not exercise jurisdiction to consider his claim for relief. Pursuant to 28 U.S.C. § 2241(e)(2), the Court lacks jurisdiction to hear any claim that does not sound in habeas. Here, Petitioner’s claim for relief does not sound in habeas, and therefore is barred, because he seeks affirmative injunctive relief that will not lead directly to his release or otherwise affect the duration or form of his detention. Petitioner claims that the Court has authority to order this extraordinary relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a), but the All Writs Act does not confer or enlarge the Court’s jurisdiction. Moreover, even if Petitioner’s claim could be said to sound in habeas, the Court should refrain from exercising its jurisdiction over this claim as a matter of equity—which it may do pursuant to statutory and common law—because an order requiring the Executive to take an action pursuant to certain provisions of a military regulation implementing its treaty obligations would be contrary to the Executive’s considered interpretation about the scope and applicability of those provisions, which in turn would be inconsistent with the great deference the Court should give the Executive on these matters. It would also place an extraordinary burden on the Executive by, among other things, requiring the Executive to launch a difficult and unprecedented policy process to establish the procedures for a Mixed Medical Commission and the contours of the standards it would apply in this non-international armed conflict.

Second, although framed as a request for a preliminary injunction, Petitioner actually seeks permanent injunctive relief requiring the establishment of a Mixed Medical Commission to decide his case (because he does not seek to preserve the status quo pending further litigation or relief that is “preliminary”), but he has not made the showing required to warrant such an extraordinary remedy. As an initial matter, Petitioner fails to demonstrate that he is entitled to the establishment of, and examination by, a Mixed Medical Commission. Petitioner claims that he should be accorded the privileges of an enemy prisoner of war—which can include access to a Mixed Medical Commission—because, pursuant to Army Regulation 190-8, he qualifies as an “other detainee,” a placeholder status for individuals “who have not been classified as an [enemy prisoner of war, or EPW], [retained personnel, or RP], or [civilian internee, or CI], [and who] shall be treated as EPWs until a legal status is ascertained by a competent authority.” Army Reg.

190-8, Appendix B, Section II-Terms. But Petitioner's legal status has been determined. In 2002, the Executive determined that al-Qaida, Taliban, and associated forces did not qualify for prisoner of war status under the Third Geneva Convention. In 2004, a Combatant Status Review Tribunal ("CSRT") determined that Petitioner is an "enemy combatant," which means that the Executive determined that he was in fact an individual who was part of or supporting al-Qaida, Taliban, or associated forces, forces that the President previously determined did not qualify for prisoner of war status. Accordingly, because Petitioner was detained as part of those forces, his status has already been determined, and he does not qualify for protections afforded an EPW, either permanently or as a placeholder under the regulation, and he therefore has no basis to seek permanent injunctive relief on those grounds.

Petitioner is also not entitled to such wide-ranging, permanent injunctive relief because he cannot show that the equities tip in his favor. The injunctive relief sought by Petitioner would be improper because it would impose substantial hardships on the Executive and, on the facts presented here, would be wholly unprecedented. For similar reasons, the public interest also tips in favor of Respondents. In contrast, Petitioner's claim that an injunction would remedy his purported irreparable injury is speculative because at best, as he concedes, an order establishing a Mixed Medical Commission would only provide him an opportunity to seek release, not actual release. Moreover, in prior briefing, Respondents submitted a declaration of the senior medical officer at Guantanamo responsible for Petitioner's care demonstrating that his medical condition is far different than Dr. Keram claims. Thus, on balance, Petitioner is not entitled to the relief he seeks.

* * * *

(3) *Al-Hawsawi v. Obama*

On November 16, 2015, the United States filed its brief in the U.S. Court of Appeals for the D.C. Circuit in *Al-Hawsawi v. Obama*, No. 15-5267. Al-Hawsawi filed a habeas petition in the district court, seeking an order for production of unredacted copies of all of his medical records, the appointment of an independent physician to report on his health, and a preliminary injunction halting military commission proceedings pending the district court's resolution of his petition. The district court dismissed the petition, ruling that Al-Hawsawi's claims are discovery requests over which the court lacks subject-matter jurisdiction. The U.S. brief in support of affirming the dismissal is excerpted below (with footnote omitted) and available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The district court properly dismissed Al-Hawsawi's action for lack of subject-matter jurisdiction. The Military Commissions Act and this Court's precedents expressly restrict the jurisdiction of the federal courts to claims that properly sound in habeas. Al-Hawsawi's claims are not cognizable in habeas, for resolving his claims would not require a court to address the lawfulness of his detention or any aspect of his confinement, and granting the relief he seeks would not necessarily affect his detention. Because Al-Hawsawi's claims fall beyond the outer limits of the

writ, they are barred by 28 U.S.C. § 2241(e)(2).

A. Al-Hawsawi's Claims Are Not Cognizable in Habeas and Are Therefore Barred by 28 U.S.C. § 2241(e)(2)

Through Section 7 of the Military Commissions Act of 2006, 28 U.S.C. § 2241(e), Congress exercised its constitutional prerogative to withdraw from federal courts jurisdiction over all conditions-of-confinement claims brought against the United States by detainees at Guantanamo Bay. One subsection barred federal courts from hearing any “application for a writ of habeas corpus filed by or on behalf of” a detainee. 28 U.S.C. § 2241(e)(1). The other barred federal courts from hearing all actions “relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of” a detainee. *Id.* § 2241(e)(2).

The Supreme Court in *Boumediene v. Bush*, 553 U.S. 723 (2008), invalidated § 2241(e)(1) with respect to Guantanamo detainees such as Al-Hawsawi, holding that withdrawing jurisdiction over detainee habeas petitions violated the Suspension Clause. But *Boumediene*'s limited holding does not extend to § 2241(e)(2), which this Court has upheld as a valid exercise of congressional power. *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012); *Kiyemba v. Obama*, 561 F.3d 509, 512 n.1 (D.C. Cir. 2009). Because § 2241(e)(2) remains in full force, a detainee who does not allege a “proper claim for habeas relief” may not invoke the jurisdiction of the federal courts. *Kiyemba*, 561 F.3d at 513. If a claim does not sound in habeas, it constitutes “an action other than habeas corpus barred by section 2241(e)(2).” *Aamer v. Obama*, 742 F.3d 1023, 1030 (D.C. Cir. 2014). Section 2241(e)(2) bars Al-Hawsawi's claims.

1. The habeas petitioner's “essential claim is that his custody in some way violates the law.” *Aamer*, 742 F.3d at 1036. The writ of habeas corpus is an “instrument to obtain release from such confinement.” *Preiser v. Rodriguez*, 411 U.S. 475, 486 (1973). At its core, the writ allows a petitioner to challenge the fact, place, or duration of his confinement. *Ibid.* This Court has held that the writ also allows a petitioner to challenge certain conditions of his confinement. *Aamer*, 742 F.3d at 1038.

The writ does not encompass any claim that a petitioner might raise, however. As this Court has explained, “petitioners invoking habeas jurisdiction must assert claims that sound in habeas.” *Aamer*, 742 F.3d at 1033. The purpose of the writ is “to remedy,” *id.* at 1036, confinement that is “more burdensome than the law allows,” *id.* at 1038 (quoting *Miller v. Overholser*, 206 F.2d 415, 420 (D.C. Cir. 1953)). To qualify as a conditions-of-confinement claim sounding in habeas, a claim must present the “substantive inquiry” of whether “the conditions in which the petitioner is currently being held violate the law.” *Id.* at 1035; see also *Muhammad v. Close*, 540 U.S. 749, 754- 55 (2004) (per curiam) (evaluating whether a complaint sought “a judgment at odds with his conviction” or some other aspect of the prisoner's confinement cognizable in habeas). Only then does that claim test “the form of detention” in a manner cognizable under the writ. *Aamer*, 742 F.3d at 1033 (quoting *Hudson v. Hardy*, 424 F.2d 854, 855 n.3 (D.C. Cir. 1970)).

In *Aamer*, for instance, this Court considered three identical requests for a preliminary injunction banning the government from implementing its policy of administering enteral feeding when medically necessary to preserve a detainee's life and health. *Id.* at 1026-27. This Court reasoned that such claims ought to be cognizable in habeas because, like challenges to the place of confinement, the claims rested on the contention that “some aspect” of the petitioners' detention “deprived” the petitioners “of a right to which” they were “entitled while in custody.” *Id.* at 1036. Those claims directly presented the issue of whether the conditions of the *Aamer*

petitioners' confinement were lawful. And resolving those claims in the *Aamer* petitioners' favor would have necessarily eliminated the allegedly unlawful conditions.

Aamer does not suggest that habeas jurisdiction extends to claims that do not require a court to pass upon whether "the conditions in which the petitioner is currently being held violate the law." 742 F.3d at 1035. As this Court has recognized, claims where "success on the merits" would not necessarily "impact * * * the duration of custody" or some other aspect of a petitioner's detention "may not even lie within the bounds of habeas, much less at its core." *Davis v. United States Sentencing Comm'n*, 716 F.3d 660, 665 (D.C. Cir. 2013). To the contrary, a claim that does not "as such raise any implication about the validity" of a petitioner's detention or "necessarily" "affect" some cognizable aspect of the petitioner's confinement does not present a claim "on which habeas relief could [be] granted on any recognized theory" of the writ's scope. *Muhammad*, 540 U.S. at 754-55; see *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (explaining that a claim which does not "necessarily demonstrate the invalidity of confinement or its duration" need not be brought in habeas form); *Skinner v. Switzer*, 562 U.S. 521, 533-34 (2011) (emphasizing that the Court has not recognized that habeas is even "available * * * where the relief sought would 'neither terminat[e] custody, accelerat[e] the future date of release from custody, nor reduc[e] the level of custody'" (quoting *Wilkinson*, 544 U.S. at 86 (Scalia, J., concurring))).

2. Neither of Al-Hawsawi's claims "raise[s] any implication about the validity" of the fact, place, duration, or conditions of his confinement. *Muhammad*, 540 U.S. at 754-55; see *Davis*, 716 F.3d at 665. Al-Hawsawi contends that he has not received complete records of his medical history, although the government is providing his medical records on a rolling basis. D... He also contends that he must receive a report on his health from an independent physician (and identifies his preferred doctor), although the government has provided and is continuing to provide him with medical care. ...

Such claims do not sound in habeas. The "substantive inquiry" that governs whether Al-Hawsawi should prevail on these claims does not require a court to decide whether the government's medical care is constitutionally adequate. See *Aamer*, 742 F.3d at 1035. Indeed, a court that reaches the merits of Al-Hawsawi's arguments would decide his claims without reference to his confinement at all. At most, a court would have to determine whether Al-Hawsawi had some free-standing right to obtain his medical records in some different way, or to obtain the appointment of a doctor to produce a report about Al-Hawsawi's health. But such claims are not habeas claims, and at no point in the inquiry would the legality of any aspect of his confinement enter play.

The relief that Al-Hawsawi seeks further underscores that his claims do not sound in habeas, as the relief does not seek changes to his conditions of confinement. Far from directly challenging a condition of his confinement, he seeks access to records and appointment of an expert. As the district court correctly recognized, Al-Hawsawi's claims are demands for discovery in the guise of a habeas action. Because discovery requests do not sound in habeas, they are barred by 28 U.S.C. § 2241(e)(2). The district court properly dismissed Al-Hawsawi's action for lack of subject-matter jurisdiction.

* * * *

C. Even If Al-Hawsawi's Claims Are Not Barred by 28 U.S.C. § 2241(e)(2), the District Court's Ruling Should Be Affirmed

Even if the district court decided the jurisdictional question incorrectly, its judgment of dismissal without prejudice should be affirmed on prudential grounds. Al-Hawsawi has not exhausted his remedies before the military commission. And comity counsels against interfering with ongoing commission proceedings. These prudential considerations suggest that the district court's judgment should be affirmed whether Al-Hawsawi's claims sound in habeas or not.

1. "[F]or prudential reasons," the Supreme Court requires defendants to "exhaust[] * * * alternative remedies" before invoking the writ. *Boumediene v. Bush*, 553 U.S. 723, 793 (2008); see *Clinton v. Goldsmith*, 526 U.S. 529, 537 n.11 (1999) (applying that rule in the context of military tribunals); *Noyd v. Bond*, 395 U.S. 683, 693-99 (1969) (same). The "reach of the law's writs" is informed by "[p]ractical considerations and exigent circumstances." *Boumediene*, 553 U.S. at 793. When neither pragmatism nor exigency demands judicial intervention, using habeas to superintend pending military proceedings would generate "wholly needless" friction between military tribunals and Article III courts. See *Gusik v. Schilder*, 340 U.S. 128, 132 (1950). Al-Hawsawi himself acknowledges that "courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted." ...

Prudential considerations are especially important here. Congress and the President, acting together, established the military commission system to "disciplin[e] * * * enemies" charged with "violat[ing] the law of war." *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) (per curiam); see 10 U.S.C. § 948a et seq. Al-Hawsawi's prosecution by military commission reflects the considered judgment of the political branches about how the grave crimes with which he is charged should be tried. The deference that the courts generally owe such a judgment, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), underscores the peril of hasty intervention in the commission process.

Exercising jurisdiction now over Al-Hawsawi's claims risks transforming the federal courts into a venue for interlocutory review of any decision that a military commission might issue. Al-Hawsawi's own claims prove the point: To the extent he has invoked the right to counsel at all, the right he asserts relates not to pending habeas proceedings but to his military commission. ... This would create uncertainty about the orderly progression of military commission proceedings that could not be confined to this case. Such proceedings could be impaired any time a detainee can convert an objection to any military commission order into a complaint about some aspect of his confinement, no matter the strength on the merits of that imaginative claim. This Court should decline Al-Hawsawi's invitation to interfere with the military commission process.

2. The breadth of alternative remedies available to Al-Hawsawi also counsels against preempting ongoing military commission proceedings by way of habeas corpus. *Cf. In re Al-Nashiri*, 791 F.3d 71, 79 (D.C. Cir. 2015) (observing that this Court remains "mindful" of Congress's choices in crafting the Military Commissions Act when deciding whether to grant relief). As we have explained, the military commission has jurisdiction to hear and to remedy any concerns that the governmental policies at issue affect the integrity of Al-Hawsawi's trial. And Al-Hawsawi may challenge the military commission's rulings in appellate courts.

That conclusion does not change even if this Court credits Al-Hawsawi's belated attempt to convert his district court filing into a conditions-of-confinement challenge. Again, Congress has given Al-Hawsawi ample opportunities to raise such arguments after his military trial concludes. And the military commission offers him multiple avenues of relief if, as he now suggests, his medical condition prevents him from contributing to his defense. For example, Al-Hawsawi retains the right to request a continuance in his military case at any time, which the

military judge may grant upon a showing of “reasonable cause.” 10 U.S.C. § 949e. And the judge in Al-Hawsawi’s military commission prosecution has entertained a continuance on the ground that a panel of independent medical experts should assess the fitness for trial of one of Al-Hawsawi’s co-defendants. In sum, the military commission process is more than capable of addressing Al-Hawsawi’s recharacterized claims.

* * * *

b. Former Detainees

Al Janko v. Gates

As discussed in *Digest 2014* at 771-74, the U.S. Court of Appeals for the D.C. Circuit upheld the district court’s dismissal of a complaint for civil damages brought by a former detainee due to its lack of jurisdiction under the Military Commissions Act (“MCA”), 28 U.S.C. § 2241(e)(2). *Al Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014). On February 4, 2015, the United States filed its brief in the U.S. Supreme Court in opposition to the petition for certiorari. Excerpts follow from the U.S. brief, with footnotes omitted.

* * * *

The court of appeals correctly held that [Section 2241\(e\)\(2\)](#) forecloses petitioner’s money-damages action. Petitioner’s arguments to the contrary (Pet. 9-22) lack merit, and he does not contend that any other circuit has reached a different conclusion on either his statutory or his constitutional arguments. The only other circuits that have addressed the constitutionality of [Section 2241\(e\)\(2\)](#) have reached the same conclusion as the decision below, and this Court recently denied review of those decisions. See [Ameur v. Gates, No. 14-6711, 2015 WL 232012 \(Jan. 20, 2015\)](#); [Hamad v. Gates, 134 S. Ct. 2866 \(2014\)](#) (No. 13-9200). Further review is therefore unwarranted.

1. Petitioner contends (Pet. 17-22) that because he was granted habeas relief, [Section 2241\(e\)\(2\)](#) does not bar his money-damages action against federal officials. That argument rests on a misinterpretation of [Section 2241\(e\)\(2\)](#).

a. With exceptions not relevant here, [Section 2241\(e\)\(2\)](#) prohibits a court from exercising jurisdiction over a non-habeas action “relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.” [28 U.S.C. 2241\(e\)\(2\)](#). The court of appeals correctly held that the phrase “determined by the United States to have been properly detained as an enemy combatant” refers exclusively to an Executive Branch determination, not to a judicial ruling in a habeas proceeding.

Taken in isolation, the phrase “United States” is “susceptible of multiple meanings.” Pet. App. 10a. For that reason, in construing “United States” in various federal statutes, courts have examined the relevant statutory context to determine whether the term refers to the United States as a sovereign, the components of the Executive Branch alone, or some other concept. ...For a number of reasons, the statutory context of [Section 2241\(e\)\(2\)](#) indicates that the phrase

“determined by the United States to have been properly detained as an enemy combatant” refers exclusively to the Executive Branch. ...

First, the text of [Section 2241\(e\)\(2\)](#) makes clear that “United States,” which appears three times in that provision, means the Executive Branch. The phrase immediately preceding “determined by the United States to have been properly detained as an enemy combatant” limits Section 2241(e)(2)’s application to an alien who “is or was detained by the United States.” As the court of appeals concluded, the use of “United States” in that phrase clearly refers exclusively to the Executive Branch; Congress and the Judiciary do not detain enemy combatants. See Pet. App. 11a-12a. And because it would be discordant to interpret the term “United States” in two different ways within the same sentence, it follows that the phrase “determined by the United States” also refers exclusively to the Executive Branch. ...

In addition, [Section 2241\(e\)\(2\)](#) applies either to an alien “determined by the United States to have been properly detained as an enemy combatant” *or* to an alien who “is awaiting such determination.” That disjunctive structure strongly indicates that a single entity makes the relevant “determination.” If petitioner were correct that both the Executive Branch and the Judicial Branch can make the relevant “determination” (see Pet. 22), an alien could both have been determined to be an enemy combatant (by the Executive Branch) *and* simultaneously be awaiting “such determination” (by the Judicial Branch). That would not be consistent with a statute that treats those two circumstances as alternatives.

Second, neighboring [Subsection \(e\)\(1\) of Section 2241](#), which was enacted at the same time as the current version of Subsection (e)(2), unequivocally uses the term “United States” to mean the Executive Branch. See Military Commissions Act of 2006 (MCA), [Pub. L. No. 109-366, § 7\(a\), 120 Stat. 2635](#). In language that parallels Subsection (e)(2), Subsection (e)(1) withdraws jurisdiction over habeas actions filed by any alien “detained by the United States” who has been “determined by the United States to have been properly detained as an enemy combatant” or “is awaiting such determination.” The phrase “determined by the United States” in that provision must refer exclusively to the Executive Branch’s determination. As the court of appeals explained, “[i]n a statute depriving federal courts of jurisdiction to decide the lawfulness of *executive* detention, the phrase ‘determined by the United States’ must refer to an executive-branch determination.” Pet. App. 14a; see *id.* at 18a n.7 (“The statute cannot be fairly read to include within the meaning of ‘determined by the United States’ a judicial decision which, in the same statutory section, the Congress attempted to preclude.”). The identical phrase “determined by the United States” in Subsection (e)(2) should be construed the same way. ...

Third, the statutory history of [Section 2241\(e\)\(2\)](#) indicates that Congress intended an Executive Branch determination of an alien’s status alone to trigger the jurisdictional bar. The version of [Section 2241\(e\)\(2\)](#) that preceded the current version barred a non-habeas “action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who *** has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with [statutory-review] procedures *** to have been properly detained as an enemy combatant.” DTA § 1005(e)(1), 119 Stat. 2742 ([28 U.S.C. 2241\(e\)\(2\)\(B\)](#) (Supp. V 2005)). As the court of appeals explained, that provision recognized that the detaining entity (the Department of Defense) was different from the entity determining the propriety of the detention (the D.C. Circuit). See Pet. App. 15a-16a. But when Congress amended the statute in 2006, it “abandoned the independent, judicial propriety-of-detention determination in favor of a non-judicial determination made by the same entity that detains the alien (the United States).” *Id.* at 16a. See MCA § 7(a), 120 Stat.

2635. That change signaled Congress’s intent that the statutory bar be triggered by the determination of the detaining authority, rather than by the determination of the reviewing court. That inference is confirmed by the legislative record.

b. Petitioner does not meaningfully address the statutory context that the court of appeals found to support the respondents’ interpretation of [Section 2241\(e\)\(2\)](#), and he does not address the statutory history of [Section 2241\(e\)\(2\)](#) at all. ...

Petitioner also contends ... that his interpretation is compelled by the constitutional-avoidance canon. But courts are obligated to “ ‘construe *** statute[s] to avoid [constitutional] problems’ ” only “if it is ‘fairly possible’ to do so.” [Boumediene v. Bush](#), 553 U.S. 723, 787 (2008) (quoting [Immigration & Naturalization Serv. v. St. Cyr](#), 533 U.S. 289, 299-300 (2001)) (second set of brackets in original). Here, as the court of appeals held, “only one construction of section 2241(e)(2) is ‘fairly possible.’ ” Pet. App. 22a n.9 (quoting [United States v. Jin Fuey Moy](#), 241 U.S. 394, 401 (1916)). And in any event, no serious constitutional question is raised by applying the statute to aliens previously detained as enemy combatants who have been granted habeas relief. ...

2. The court of appeals correctly held that applying [Section 2241\(e\)\(2\)](#) to bar petitioner’s damages action is constitutional, even assuming that petitioner is entitled to the constitutional protections that he invokes. That holding is consistent with the conclusions reached by both of the other courts of appeals to have addressed the constitutionality of [Section 2241\(e\)\(2\)](#). See [Ameur v. Gates](#), 759 F.3d 317, 325-327 (4th Cir. 2014), cert. denied, No. 14-6711, 2015 WL 232012 (Jan. 20, 2015); [Hamad v. Gates](#), 732 F.3d 990, 1003-1004 (9th Cir. 2013), cert. denied, 134 S. Ct. 2866 (2014).

a. Petitioner argues (Pet. 10-14) that application of [Section 2241\(e\)\(2\)](#) to bar his constitutional money-damages claim violates Article III of the Constitution. Petitioner appears to contend that the Constitution requires courts to hear all money-damages claims for alleged constitutional violations or, in the alternative, that only courts—not Congress—may preclude such claims. Those arguments lack merit.

i. As the court of appeals recognized in a prior decision upon which it relied below, Pet. App. 22a-23a, and as the Fourth Circuit and the Ninth Circuit each held in rejecting the same challenge to [Section 2241\(e\)\(2\)](#), money-damages remedies for violations of constitutional rights “are not constitutionally required” and may be barred by Congress. [Al-Zahrani v. Rodriguez](#), 669 F.3d 315, 319 (D.C. Cir. 2012); see [Ameur](#), 759 F.3d at 326; [Hamad](#), 732 F.3d at 1003. That conclusion is consistent with the decisions of other courts of appeals holding, in the context of other statutes, that it is “certain[]” that the Constitution does not “mandate[] a tort damages remedy for every claimed constitutional violation.” [Harris v. Garner](#), 190 F.3d 1279, 1288 (11th Cir.), vacated, 197 F.3d 1059 (11th Cir. 1999) (en banc), reinstated in relevant part, 216 F.3d 970, 972 (11th Cir. 2000) (en banc), cert. denied, 532 U.S. 1065 (2001); see, e.g., [Zehner v. Trigg](#), 133 F.3d 459, 461-462 (7th Cir. 1997).

As the D.C. Circuit has explained, this “Court has made this eminently clear in its jurisprudence finding certain of such claims barred by common-law or statutory immunities, and applying its ‘special factors’ analysis” to preclude implied causes of action under the Constitution. [Al-Zahrani](#), 669 F.3d at 319-320. For example, in [Wilkie v. Robbins](#), 551 U.S. 537 (2007), this Court explained that under [Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics](#), 403 U.S. 388 (1971), an implied damages remedy for alleged constitutional violations “is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified.” [Wilkie](#),

[551 U.S. at 550](#). That principle refutes petitioner’s view that individuals are constitutionally entitled to a money-damages remedy for any constitutional violation.

Moreover, even if a common-law damages remedy might be warranted in this context in the absence of congressional action, petitioner cites no decision in which this Court has held or suggested that an express congressional bar on money-damages claims, such as [Section 2241\(e\)\(2\)](#), is unconstitutional. Indeed, under this Court’s *Bivens* jurisprudence, courts may not recognize a common-law *Bivens* remedy where Congress’s creation of an alternative remedy—even one that does not provide complete relief—demonstrates implicitly that Congress “expected the Judiciary to stay its *Bivens* hand.” [Wilkie, 551 U.S. at 550, 554](#); see [Schweiker v. Chilicky, 487 U.S. 412, 421, 425 \(1988\)](#); [Bush v. Lucas, 462 U.S. 367, 388-389 \(1983\)](#) (emphasizing that “Congress [wa]s in a far better position than a court to evaluate the impact of a new species of [damages] litigation” there). It follows from that principle that Congress may preclude a damages remedy for constitutional violations when it does so expressly. Consistent with that understanding, this Court has emphasized that in the limited circumstances when it has recognized *Bivens* remedies in the past, it has done so only after concluding that, *inter alia*, there was “no explicit statutory prohibition against the relief sought.” [Schweiker, 487 U.S. at 421](#).

In addition, as the D.C. Circuit has explained, petitioner’s argument is inconsistent with this Court’s well-settled jurisprudence recognizing that constitutional damages claims may be barred by common-law and statutory immunities. See [Al-Zahrani, 669 F.3d at 319-320](#). “Even in circumstances in which a *Bivens* remedy is generally available,” this Court has held, “an action under *Bivens* will be defeated if the defendant is immune from suit.” [Hui v. Castaneda, 559 U.S. 799, 807 \(2010\)](#). In [Imbler v. Pachtman, 424 U.S. 409 \(1976\)](#), for example, this Court catalogued a wide array of immunities available in damages suits alleging violations of constitutional rights, including absolute immunity available to judges for “acts committed within their judicial jurisdiction.” [Id. at 418](#) (citation omitted); see [id. at 417-429](#). Similarly, in [Harlow v. Fitzgerald, 457 U.S. 800 \(1982\)](#), as well as numerous subsequent decisions, this Court held that qualified immunity shields a government official from civil liability if his conduct “does not violate clearly established statutory or constitutional rights.” [Id. at 818](#). And in [Hui](#), this Court recognized Congress’s conferral of total immunity on certain individuals from *Bivens* claims. [559 U.S. at 806-808](#). Given those well-established common-law and statutory bars on constitutional damages claims, [Section 2241\(e\)\(2\)](#)—which shields government officials from money-damages claims in connection with sensitive decisions relating to ongoing military operations—was well within Congress’s power to enact.

* * * *

3. Criminal Prosecutions and Other Proceedings

a. United States v. Hamidullin

On May 18, 2015, the United States filed a response to a motion to dismiss the indictment made by defendant Irek Ilgiz Hamidullin, a Russian national who had been detained by the United States since 2009 at the detention facility at Bagram in Afghanistan. In the course of its review of the cases of detainees held at Bagram in preparation for its closure, the U.S. Department of Justice concluded that there was sufficient evidence to prosecute Hamidullin in U.S. court. Hamidullin was transferred to

the United States and indicted for various offenses committed in connection with the November 29, 2009 attack on the Afghan Border Police (“ABP”) compound known as Camp Leyza, to which U.S. forces responded. In Hamidullin’s pre-trial motions, he claimed that, as a Taliban fighter, he was a lawful combatant entitled to immunity from domestic prosecution. The U.S. brief in response is excerpted below (with most footnotes omitted) and available in full at <http://www.state.gov/s/l/c8183.htm>. The brief argues that Hamidullin is not entitled to combatant privilege or immunity pursuant to the Geneva Convention Relative to the Treatment of Prisoners of War (“GPW”)

* * * *

In his Motion to Dismiss, Hamidullin claims immunity from federal criminal prosecution through a number of arguments all centering on his claim that he qualified as a “lawful combatant” under the *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, 1956 WL 54809 (U.S. Treaty 1956) (“GPW”), and related common law principles. In a similar vein, the defendant’s reliance on requirements of “unlawful” conduct in the charging statutes (*Defendant’s Motion to Dismiss*, at 6-9) boils down to the same exact argument—if this Court determines that he was a lawful enemy combatant, he cannot be prosecuted for violations of federal criminal law. All of these arguments fail. Hamidullin and his cohorts had no legitimate authority for their attack, and neither international nor U.S. law cloaks them with any kind of combatant privilege or immunity.

The United States’ response to the defendant’s arguments is divided into three sections. First, the continued conflict against the Taliban in Afghanistan is not an international armed conflict under Article 2 of the GPW, meaning that the combatant immunity provisions of the GPW do not apply to the Taliban. Moreover, even if that were not the case, Hamidullin’s bid for “lawful combatant” status would fail as members of the Taliban and Taliban-affiliated groups do not qualify for prisoner-of-war protections under Article 4 of the GPW. Second, the defendant’s claim for immunity under a public authority defense fails because Hamidullin’s attack was not authorized by a recognized government or military organization. Finally, the defendant’s argument that the criminal statutes have no application in this case is utterly wrong given the plain terms of the statutes and his failure to qualify for lawful combatant immunity.

A. The Defendant Is Not a Lawful Combatant Entitled to Immunity From Criminal Prosecution Under International Law.

Lawful combatant immunity is a doctrine reflected in the customary international law of war. It “forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.” *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002); *see also Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942). Belligerent acts committed by lawful combatants in an armed conflict generally “may be punished as crimes under a belligerent’s municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict.” *Lindh*, 212 F. Supp. 2d at 553.

The concept of lawful combatant immunity has a long history preceding GPW and is grounded in common law principles, early international conventions, statutes, and treatises. *See Instructions for the Government of the Armies of the United States in the Field*, Headquarters,

United States Army, Gen. Order No. 100 (Apr. 24, 1863), *reprinted in The Laws of Armed Conflicts* 3 (3d ed. 1988) (“So soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.”); Col. William Winthrop, *Military Law and Precedents*, at 791 (2d ed. 1920) (“[T]he status of war justifies no violence against a prisoner of war as such, and subject him to no penal consequence of the mere fact that he is an enemy.”); *Hague Convention Respecting the Laws and Customs of War on Land* (“Hague Convention”), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; Brussels Declaration of 1874, Article IX, July 27, 1874, *reprinted in The Laws of Armed Conflicts* 25 (3d ed. 1988); *Manual of Military Law* 240 (British War Office 1914).

As noted by one court, the combatant immunity doctrine is reflected in the provisions of the GPW. *See Lindh*, 212 F. Supp. 2d at 553. The United States is a party to the GPW and it therefore has the force of law in this case under the Supremacy Clause. *See* U.S. Const. art. VI, § 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land. . . .”). The GPW sets forth certain principles with respect to the prosecution of persons entitled to prisoner-of-war status under the GPW:

- Article 87: “Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.”
- Article 99: “No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.”

GPW, arts. 87 and 99. Taken together, these Articles “make clear that a [lawful] belligerent in a war cannot prosecute the soldiers of its foes for the soldiers’ lawful acts of war.” *Lindh*, 212 F. Supp. 2d at 553.

Although immunity based on lawful combatant status may be available as an affirmative defense to criminal prosecution in appropriate circumstances, this defense is not available to a defendant just because he believes that he has justly taken up arms in a conflict.⁴ *Lindh*, 212 F. Supp. 2d at 554. Rather, this defense is available only to a defendant who can establish that he is a “lawful combatant” against the United States under the requisite criteria established in international law that is binding upon the United States—that is, “*members of a regular or irregular armed force who fight on behalf of a state and comply with the requirements for lawful*

⁴ To the extent Hamidullin contends that the GPW, of its own force, provides a defense to the charges (as opposed to his reliance on a common law defense that incorporates the Geneva Convention standards for lawful participation in armed conflict), such a contention would lack merit. The GPW does not afford individual defendants judicially enforceable rights or legal defenses. *See Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) (concluding that the predecessor to the current GPW—the Third Geneva Convention of 1929—conferred rights on alien enemies that could be vindicated “only through protests and intervention of protecting powers,” not through the courts); *see also Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) (“background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts”); *Hamdi v. Rumsfeld*, 316 F. 3d 450, 468, (4th Cir. 2003) (“The Geneva Conventions evince no [] intent [to provide a private right of action]”), *vacated and remanded on unrelated grounds*, 542 U.S. 507 (2004); *Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774, 809 (D.C. Cir. 1984) (same).

combatants.” *Id.* at 554 (emphasis added); *see also Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942) (“Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”); *United States v. Khadr*, 717 F.Supp.2d 1215, 1222 (USCMCR 2007) (“Unlawful combatants . . . are not entitled to ‘combatant immunity’ nor any of the protections generally afforded lawful combatants who become POWs. Unlawful combatants remain civilians and may properly be captured, detained by opposing military forces, and treated as criminals under the domestic law of the capturing nation for any and all unlawful combat actions.”). Moreover, the burden of establishing the application of the combatant immunity defense is upon the defendant. *See Lindh*, 212 F. Supp. 2d at 553 (holding “it is Lindh who bears the burden of establishing the affirmative defense that he is entitled to lawful combatant immunity” by showing that “the Taliban satisfied the four criteria required for lawful combatant status outlined by the [Geneva Conventions].”).

Here, Hamidullin argues that he fought as a member of the Taliban and is entitled to combatant immunity. That protection is unavailable for, at least, two reasons. First, under GPW Article 2, the Taliban is not covered by the GPW immunity provisions because this does not involve an international armed conflict between any States or “High Contracting Parties.” Second, even if the defendant’s claimed affiliation with the Taliban permits the application of the GPW’s provisions related to international armed conflict, he could not satisfy the requisite criteria for “lawful combatant” status.

1. The Taliban is not protected by the GPW immunity provisions.

The provisions of the GPW that have been interpreted as reflecting the principles of combatant immunity do not apply to the Taliban in this case. Under GPW Article 2, the provisions of the Convention apply to “all cases of declared war or of any other *armed conflict 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 (emphasis added).

By November 2009, however, the Taliban had been removed from power in Afghanistan for eight years and was not the government for Afghanistan (the GPW “High Contracting Party”). At the time of Hamidullin’s attack, there was no international conflict between the United States and Afghanistan. Rather, the two powers, along with other States, were working together in a coalition directed at assisting the legitimate Afghan government to stop the Taliban’s unlawful attacks within the country’s borders. The International Committee of the Red Cross (ICRC), the non-governmental organization that has a special position under the GPW, came to the same conclusion in 2007:

This conflict [against the Taliban] is non-international, albeit with an international component in the form of a foreign military presence on one of the sides, because it is being waged with the consent and support of the respective domestic authorities and does not involve two opposed States. *The ongoing hostilities in Afghanistan are thus governed by the rules applicable to non-international armed conflicts found in both treaty-based and customary IHL.* The same body of rules would apply in similar circumstances where the level of violence has reached that of an armed conflict and where a non-State armed actor is party to an armed conflict (e.g. the situation in Somalia).

Id. at 725 (emphasis added); *see also ICRC, International Humanitarian Law and the*

Challenges of Contemporary Armed Conflicts, at 10 (2011) (“As the armed conflict does not oppose two or more states, i.e. as all the state actors are on the same side, the conflict must be classified as non-international, regardless of the international component, which can at times be significant. A current example is the situation in Afghanistan (even though that armed conflict was initially international in nature). The applicable legal framework is Common Article 3 and customary IHL.”); Maj. Jerrod Fussnecker, *The Effects of International Human Rights Law on the Legal Interoperability of Multinational Military Operations*, 2014-MAY Army Law. 7, at 12 (May 2014) (“Due to the fall of the Taliban government and the formation of ISAF, coalition members such as the United Kingdom and Canada began considering the ongoing military presence in Afghanistan to have transitioned from an IAC to a NIAC between the government of Afghanistan, with the assistance of the ISAF alliance, against the Taliban and Al Qaeda.”). Thus, as the conflict in Afghanistan no longer falls within GPW Article 2, the relevant provisions of that Convention reflecting the right to combatant immunity do not apply.

Any doubt on the non-applicability of the combatant’s privilege in these circumstances is further dispelled by the ICRC’s independent analysis. The ICRC has emphasized that “*only in international armed conflicts* does [International Humanitarian Law] provide combatant (and prisoner-of-war) status to members of the armed forces. The main feature of this status is that it gives combatants the right to directly participate in hostilities and grants them immunity from criminal prosecution for acts carried out in accordance with IHL, such as lawful attacks against military objectives.” ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 726 (2007) (emphasis in original). “Upon capture, civilians detained in non-international armed conflicts do not, as a matter of law, enjoy prisoner-of-war status and may be prosecuted by the detaining State under domestic law for any acts of violence committed during the conflict, including, of course, war crimes.” *Id.* at 728.

Hamidullin nevertheless relies upon the second paragraph of GPW Article 2 to support his claim to entitlement to its protections. *See Defendant’s Motion to Dismiss*, at 23. It provides that the “Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” GPW, art. 2, ¶ 2. That provision, however, addresses situations where an armed conflict may not exist between the High Contracting Parties because armed resistance was deemed futile by the occupied party. As one commentator explained:

[A]ccording to Jean Pictet, one of the main authors of the Geneva Conventions, the second paragraph of Article 2 “was intended to fill the gap left by paragraph 1.” Pictet continues to explain that “paragraph 2 was designed to protect the interests of protected persons in occupations achieved without hostilities when the government of the occupied country considered that armed resistance was useless.”

Catherine Bloom, *The Classification of Hezbollah in Both International and Non-International Armed Conflicts*, 14 Ann. Surv. Int’l & Comp. L. 61, 87 (Spring 2008) (citations omitted); *see also* Wolff Heintschel von Heinegg, *Factors in War to Peace Transitions*, 27 Harv. J.L. & Pub. Pol’y 843, 845 (Summer 2004) (“The *ratio legis* of the provision applying the law of armed conflict to an occupation, even if it meets no armed resistance, is obvious. According to Article 42, para. 1, of the 1907 Hague [Convention], ‘territory is considered occupied when it is actually placed under the authority of the hostile army.’ The civilian population, one of the groups of protected victims, comes under the authority of the enemy’s armed forces and thus is in need of continuing protection by the laws of armed conflict. Moreover, the presence of foreign forces on

a State's territory, which in case of occupation will presumably be against that State's will, is to be considered a continuous use of military force by one State against another State."). Here, the "occupying power" language of Article 2 has no application as the United States was never an Occupying Power in Afghanistan. Moreover, nothing in the "occupying power" language extends the protections of the GPW to non-state actors that are not Parties to the Convention, such as bands of marauders, merely because *they* control territory.

Finally, to support his claim that the conflict involving remnants and adherents of the former Taliban regime is international in character, the defendant relies upon GPW art. 4(A)(3). *Defendant's Motion to Dismiss*, at 27. That provision, which we discuss further, *infra*, provides that members of the military force of a deposed government do not lose entitlement to POW status. It neither transforms an insurgency made up of members of the deposed regime into an international armed conflict governed by GPW, nor does it extend the full ambit of the GPW's protections to the insurgents.

In sum, the provisions of the GPW related to combatant immunity do not cover Hamidullin's unlawful attack on November 29, 2009, which was in the context of a non-international armed conflict. As a result, he is not entitled to prisoner-of-war status and is therefore subject to prosecution under the domestic laws of the United States.

2. The defendant cannot satisfy the test for "lawful combatant" status.

For the foregoing reasons, the defendant is not entitled to POW status under the GPW, putting any claim for "lawful combatant" status out of his reach. *Supra* at 11-14. But even if the conflict was international in character, Hamidullin could not meet the test for claiming "lawful combatant" status under GPW Article 4.

Hamidullin is specifically claiming lawful combatant status as a "prisoner of war" under two provisions of GPW Article 4, which protects: members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces; and members of regular armed forces who profess allegiance a government or an authority not recognized by the Detaining Power. GPW, art. 4(A)(1) and (3). The GPW sets forth criteria that militia or volunteer corps belonging to a State that is a Party to the conflict must meet for its members to qualify for "prisoner of war" status:

- (1) the organization must be commanded by a person responsible for his subordinates;
- (2) the organization's members must have a fixed distinctive emblem or uniform recognizable at a distance;
- (3) the organization's members must carry arms openly; and
- (4) the organization's members must conduct their operations in accordance with the laws and customs of war.

Lindh, 212 F. Supp. 2d at 557 (citing GPW, art. 4(A)(2)).

These criteria have long been understood to be the defining characteristics of any lawful armed force and were well established in customary international law before being codified in the GPW in 1949. *See id.* at 557, n. 34; *Hague Convention Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (Hague Convention) ("The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of war."); *British Manual of Military Law* 240 (British War Office 1914) ("It is taken for granted that all members of the army as a matter of course will comply with the four conditions [required for lawful combatant

status]; should they, however, fail in this respect . . . they are liable to lose their special privileges of armed forces.”).

Hamidullin claims that these requirements, which are specifically enumerated in GPW Article 4(A)(2), do not apply in determining whether a combatant qualifies as a prisoner of war under GPW Article 4(A)(1) and (3) as they are not expressly mentioned under those sections. *Defendant’s Motion to Dismiss*, at 31. The *Lindh* court considered and rejected that very argument and held that these elements must be met for all the categories of combatants covered by the GPW. As it explained, the argument:

ignores long-established practice under the GPW and, if accepted, leads to an absurd result. First, the four criteria have long been understood under customary international law to be the defining characteristics of any lawful armed force. *See supra* n. 33. Thus, all armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity. Were this not so, the anomalous result that would follow is that members of an armed force that met none of the criteria could still claim lawful combatant immunity merely on the basis that the organization calls itself a “regular armed force.” It would indeed be absurd for members of a so-called “regular armed force” to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war. Simply put, the label “regular armed force” cannot be used to mask unlawful combatant status.

Lindh, 212 F. Supp. 2d at 557, n. 35; *see also United States v. Arnaout*, 236 F. Supp. 2d 916, 918 (N.D.Ill. 2003) (citing to *Lindh* in determining that “all armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity.”).

In *Lindh*, the court considered these criteria, as well as the manner in which the President determined “that the Taliban militia [in 2002] were unlawful combatants pursuant to the GPW and general principles of international law, and therefore, they were not entitled to POW status under the Geneva Conventions.” *Lindh*, 212 F. Supp. 2d at 555. Although holding that it was not bound by the President’s determination, the *Lindh* court independently determined that the Executive Branch had acted well within its discretion in determining that the Taliban was not covered by GPW Article 4. *Id.* at 558 (holding that the President’s determination is controlling because (i) the determination is entitled to deference as a reasonable interpretation and application of the GPW; (ii) *Lindh* failed to carry his burden of demonstrating the contrary; and (iii) even absent deference, the Taliban falls far short when measured against the four GPW criteria for lawful combatant status).

The circumstances before this Court are miles beyond the situation addressed in *Lindh*. There, the Taliban could arguably be characterized as the *de facto* government of Afghanistan at the time of *Lindh*’s capture, but that has not been the case since December 2001. Hamidullin has not provided any reason to justify a different conclusion today, several years after the Taliban ceased to have any claim to be the government of Afghanistan. Suffice it to say, the Taliban’s situation in 2009 had certainly not improved since 2002, when the group failed to meet the four criteria for claiming lawful combatant status. *Cf.* A.A.G. Jay S. Bybee, *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, Opinions of the Office of Legal Counsel, at 3-5 (2002) (concluding that Taliban forces: did not have an organized command structure whereby members of the militia reported to a military commander who takes

responsibility for the actions of his subordinates, consisted of a loose array of individuals who had shifting loyalties among various Taliban and al Qaeda figures, wore no distinctive uniforms or insignia, did not follow the Geneva conventions and related principles, and made no attempt to distinguish between combatants and non-combatants).

In 2009, the Taliban still lacked a structured system of recruitment, training and command capable of creating a disciplined army that would respect and uphold the laws and customs of war as envisioned by the GPW. They also failed to wear a uniform or distinctive sign that could be recognized by enemy combatants so as to differentiate the enemy forces from the civilian population. Although it appears the Taliban forces sometimes satisfied the third criteria with respect to carrying arms openly, it failed to meet the fourth criteria with respect to observing the laws and customs of war. In the years leading up to and after 2009, the Taliban regularly targeted civilian populations in clear violation of the laws and customs of war. *Id.* at 5. The Taliban's blatant violations have continued into the present.

* * * *

For all of these reasons, Hamidullin could not satisfy the requirements for lawful combatant status under any of the provisions of GPW Article 4, even if the current conflict were an international armed conflict. He could not have combatant immunity in this case and his motion to dismiss the indictment should be rejected.

B. The Defendant Cannot Establish Common Law Immunity Under the Public Authority Defense.

Hamidullin claims that criminal prosecution is also foreclosed under common law combatant immunity law, as applied under the public authority defense. As explained below, the common law provides no greater cover for the defendant than the international law principles embodied in the GPW. His related claim for a public authority defense also fails where the defendant cannot point to any Taliban members with legitimate, actual authority to authorize the November 29, 2009, attack. Finally, the defendant can also find no protection under the related "obedience to military orders defense," where he cannot establish that he received an order to carry out the attack from a superior in a *bona fide* military organization.

1. Common law combatant immunity does not cover the defendant's band of marauders.

Relying on a patchwork of cases addressing different instances of combatant immunity, Hamidullin first argues that he is eligible for common law immunity as an enemy soldier. *Defendant's Motion to Dismiss*, at 12-16. The authorities he cites, however, are grounded in acts performed under national military authorities, occurring during a state of war and in accordance with the principles of civilized warfare. This authority provides no protection for those acting in concert with unlawful renegade bands operating outside lawful military actions, such as the defendant and his band of marauders.

The "common law" view is articulated by Colonel William Winthrop, who has been referred to as "the Blackstone of Military Law" by the Supreme Court. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006). In his classic treatise, Colonel Winthrop distinguished between the military forces of a sovereign state and "irregular armed bodies" or "guerillas." He observed: "[i]t is the general rule that the operations of war on land can legally be carried on only

through the recognized armies or soldiery of the State as duly enlisted or employed in its service.” Col. William Winthrop, *Military Law and Precedents*, at 782 (2d ed. 1920). In contrast:

Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished ...

...Where indeed the opposing belligerent is unwilling to accept a certain force of its enemy as entitled to the rights of regular troops, it is open to it to announce that it will not so recognize them.

Id. at 783; see also Francis Lieber, *Instructions for the Government of the Armies of the United States in the Field*, General Orders No. 100, Art. 82 (1863) (referred to as the “Lieber Code”) (“Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”).

These authorities illustrate the common law’s recognition that insurgents like Hamidullin who are not engaging in hostilities on behalf of a belligerent nation are not entitled to combatant immunity or to be treated as POWs. Moreover, as explained in the previous section, the defendant does not qualify for common law immunity under the laws of war because the Taliban does not fulfill the requirements required for lawful combatants. These very principles were refined and codified in the 20th Century efforts to codify the international law of war that resulted in the Hague Convention and the GPW. For the reasons explained in the previous section, the defendant does not qualify for immunity under those laws.

* * * *

3. The defendant also cannot establish the obedience to military orders defense.

In the context of an armed conflict, Hamidullin’s defense also finds voice in the obedience to military orders defense. This defense provides that:

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior’s order is one which a man of ordinary sense and understanding would, under the circumstances, known to be unlawful, or if the order in question is actually known to the accused to be unlawful. *United States v. Yunis*, 924 F.2d 1086, 1097 (D.C. Cir. 1991) (citations omitted). But, as with the public authority defense, this defense must be grounded in obedience to orders from a superior vested with actual authority by virtue of his position in a *bona fide* military organization. *Id.* at 1097-98. As adopted by *Yunis*, the criteria for assessing the legality of such an organization tracks the criteria outlined at GPW Art. 4(A)(2). *Id.* at 1097 (approving jury instructions defining a “bona fide military organization” as one meeting the Hague Convention conditions, including that the group had a hierarchical command structure, conducted its operations in accordance with the

laws and customs of war, and its members had a uniform and carried arms openly). For the reasons explained above, Hamidullin is not entitled to this defense because he cannot establish that he received attack orders from a superior in a *bona fide* military organization that satisfies the relevant test. ...

The requirement for actual authorization from a *bona fide* military organization is not only supported by case law, but also by reason. Accepting either the public authority or obedience to military orders defense for rogue organizations, such as the Taliban, would shield marauding bands engaging in unlawful attacks from criminal responsibility. The defendant and his group were operating outside the authorization of any State and thus received no legitimate authorization for the November 29, 2009, attack. Both defenses have no application in this case.

C. The Federal Statutes Apply to the Criminal Conduct in this Case.

Hamidullin also challenges the application of the federal criminal statutes at the heart of the charges in Counts 1, 2 and 5-15. Those counts charge material support for terrorism, attempted murder, violent assault, and various weapons offenses, as well as conspiracy to commit some of those offenses. For those charges, the defendant makes the same general argument at the heart of his lawful combatant immunity claims—if this Court determines that he conducted himself as a lawful enemy combatant under the GPW and common law, he cannot be prosecuted for violations of federal criminal law. *Defendant’s Motion to Dismiss*, at 5-9. For the reasons explained in the previous sections, this argument fails where the defendant is not entitled to lawful combatant protections.

* * * *

Although the conspiracy to kill U.S. officers or employees count, *id.* §§ 1114, 1117, contains no explicit extraterritoriality provision, the nature of the offense—protecting U.S. personnel from harm when acting in their official capacity—implies an intent that it apply outside of the United States. The provision protects U.S. employees, and a significant number of those employees perform their duties outside U.S. territory. District courts in our Circuit have applied it so, as have courts in other circuits. *See, e.g., United States v. Benitez*, 741 F.2d 1312, 1317 (11th Cir.1984) (applying §§ 1114, 1117 extraterritorially); *United States v. Bin Laden*, 92 F.Supp.2d 189, 202 (S.D.N.Y.2000) (applying § 1114 extraterritorially). We join them and conclude that §§ 1114 and 1117 apply extraterritorially. *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011); *United States v. Siddiqui*, 699 F.3d 690, 700-01 (2d Cir. 2012) (rejecting contention that Section 1114, 111, and 924(c) did not apply extraterritorially to attacks on U.S. personnel in an “active theater of war” because “it would be “incongruous to conclude that statutes aimed at protecting United States officers and employees do not apply in areas of conflict where large numbers of officers and employees operate”).

* * * *

On July 13, 2015, the district court issued its decision, denying defendant’s motion to dismiss. *United States v. Hamidullin*, 114 F.Supp.3d 365 (E.D.Va. 2015). The conclusion of the district court’s opinion is excerpted below. Hamidullin was subsequently tried, convicted, and sentenced. He has appealed.

* * * *

Assuming the existence of a close affiliation, the central issue for the Court is whether the Taliban are lawful combatants entitled to prisoner of war treatment under the 1949 Geneva Convention, or a band of insurgent outlaws to be dealt with as criminals. ... [I]t is apparent from the evidence that the Haqqani Network falls beyond the outer perimeter of the armed entities described in Article 4, particularly when measured against the criteria of Article 4(A)(2).

In order to resolve the core issues, this Court need not determine whether the conflict in Afghanistan is international in nature as contemplated by Article 2 of the GPW. ... Surmounting this hurdle, the Court will turn to Article 4, which specifically addresses prisoners of war.

[Defendant's expert's] interpretation of Article 4 carves a wide swath of entitlement. His expansive interpretation would encompass a broad array of affiliates who would be treated as prisoners of war until hostilities cease. As long as they professed allegiance to an authority or power, they are essentially immune from criminal prosecution for violating the laws of the country in which they are operating. This interpretation could arguably include suicide bombers and other terrorist operatives claiming allegiance or working in association with armed groups.

... This Court, however, is of the opinion that the Haqqani Network and Taliban fit most compatibly within Article 4(A)(2). These groups are not members of militias or volunteer corps forming part of the armed forces of a party to the conflict. Furthermore, they are not members of a regular armed force as contemplated by Article 4(A)(3). Therefore, the Court will turn to the criteria for inclusion of combatants under Article 4(A)(2).

The expert testimony adduced by the government revealed that neither the Taliban nor the Haqqani Network fulfills the conditions of Article 4(A)(2). They do not have a clearly defined command structure nor a fixed distinctive sign recognizable at a distance. To the contrary, the Taliban's Rules and Regulations for Mujahidin counsel its fighters to adopt local clothing to conceal their identity. Although some Taliban and Haqqani fighters carry arms openly, they frequently utilize suicide bombers with concealed explosives. Lastly, neither entity conducts their operations in accordance with the laws and customs of war. Adams described a number of incidents in which the Taliban have killed large numbers of civilians. Adams testified that prisoners of war and captured police officers are summarily executed. He also testified that Afghans voting in national elections were subject to mutilation. Consequently, this Court finds that neither the Taliban nor Haqqani Network satisfies the criteria for prisoner of war status articulated in Article 4(A)(2), or any other provision of the GPW.

This Court is also unpersuaded that the Defendant was acting under the auspices of a government official with actual authority to attack U.S. troops or members of the International Security Assistance Force. Based upon the foregoing analysis, the Defendant's Motion to Dismiss the Indictment and Motion to Dismiss the Indictment Based on Due Process Concerns, Notice and Jurisdictional Defects will be denied.

* * * *

b. Military Commission

Information on cases being tried by military commissions is available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

Cross References

Terrorism, **Chapter 3.B.1.**

Abu Khatallah case, **Chapter 4.B.1.**

Meshal case regarding detention in counterterrorism context, **Chapter 5.A.1.**

Children and armed conflict, **Chapter 6.C.2.**

UN Committee Against Torture, **Chapter 6.H.**

Protecting human rights while countering terrorism, **Chapter 6.N.1.**

Countering violent extremism, **Chapter 6.N.2.**

Remotely piloted aircraft, **Chapter 6.N.3.**

ILC's work on protection of the environment in relation to armed conflict, **Chapter 7.D.2.**

International law in context of outer space activities, **Chapter 12.B.5.**

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

Sanctions relating to malicious activities in cyberspace, **Chapter 16.A.10.**

Arms Export Control Act and International Trafficking In Arms regulations, **Chapter 16.B.**

Protecting civilians during peacekeeping operations, **Chapter 17.A.12.**

Responsibility to protect, **Chapter 17.C.2.**

Arms Trade Treaty, **Chapter 19.E.**

CHAPTER 19

Arms Control, Disarmament, and Nonproliferation

A. GENERAL

On June 5, 2015, the State Department released the unclassified version of its report to Congress on Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments, submitted pursuant to Section 403 of the Arms Control and Disarmament Act, as amended, 22 U.S.C. § 2593a. The report contains four parts. Part I addresses U.S. compliance with arms control, nonproliferation, and disarmament agreements and commitments. Part II discusses compliance with treaties and agreements the United States concluded bilaterally with the Soviet Union or its successor states. Part III assesses compliance by other countries that are parties to multilateral agreements. And Part IV covers other countries' compliance with international commitments, such as the Missile Technology Control Regime ("MTCR"). The 2015 report primarily covers the period from January 1, 2014 through December 31, 2014. The report is available at <http://www.state.gov/t/avc/rls/rpt/2015/243224.htm>.

B. NUCLEAR NONPROLIFERATION

1. Overview

Frank A. Rose, Assistant Secretary of State for Arms Control, Verification and Compliance ("AVC") delivered remarks on behalf of the U.S. delegation to the 2015 UN General Assembly First Committee on October 12, 2015. Assistant Secretary Rose's remarks are excerpted below and available at <http://www.state.gov/t/avc/rls/2015/248112.htm>.

* * * *

At the outset of my remarks, let me assure you of my nation's commitment to seek the peace and security of a world without nuclear weapons. To achieve this long-term goal, the United States is

pursuing a full-spectrum, pragmatic approach. By steadily reducing the role and number of nuclear weapons in a way that advances strategic stability, we foster the conditions and opportunities for further progress.

Mr. Chairman, the numbers tell the real story: the United States has reduced its total stockpile of active and inactive nuclear warheads by 85% from its Cold War peak, from 31,255 nuclear weapons in 1967 to 4,717 as of September 30, 2014. More work needs to be done, but these results speak louder than any words—we have made significant progress.

This process and the wider regime established to prevent nuclear proliferation, have always underpinned our deep understanding of the humanitarian impact of nuclear weapons use. That is why we are committed to use every available avenue to pursue further progress on disarmament and arms control. And even as the steady implementation of the New START Treaty proceeds, the President has made clear his willingness to seek further reductions of up to one-third below those New START levels. But we have also made clear that progress in that direction requires a willing partner and a strategic environment conducive to further reductions.

In contrast to our full-spectrum approach, proposals such as a nuclear weapons ban or convention cannot succeed because they fail to recognize the need to develop the verification capabilities and build the security conditions for progress on disarmament. Instead, they risk creating a very unstable security environment, where misperceptions or miscalculations could escalate crises with unintended and unforeseen consequences, not excluding the possible use of a nuclear weapon. We must focus our efforts on realistic and achievable objectives that can make the world a safer place.

Disarmament must factor in humanitarian and security considerations

Mr. Chairman, we share the frustrations regarding the pace of disarmament, but it would be a mistake to allow this frustration to propel us toward the false choice that nuclear weapons are either a humanitarian or a security issue—they are both. Our pursuit of nuclear disarmament takes this into account.

Despite what some people think, nuclear deterrence and nuclear disarmament are actually complementary. Nuclear deterrence seeks to constrain threats as we work to reduce nuclear weapons and shore up efforts to prevent further proliferation. Both ultimately seek to prevent the use of nuclear weapons.

That is why President Obama made clear in Prague that even as we work toward the peace and security of a world without nuclear weapons, so long as such weapons exist, the United States will maintain a safe, secure, and effective arsenal to deter any adversary and guarantee the defense of our allies.

We declare our unwavering support to the NPT and its goals, including nuclear disarmament

Mr. Chairman, the Nuclear Non-Proliferation Treaty (NPT) continues to play a critical role in global security and provides the foundation for our efforts to achieve a world without nuclear weapons.

We are continuing to uphold the NPT's Article VI disarmament undertaking "to pursue negotiations in good faith on effective measures relating to... nuclear disarmament." But while we recognize that more needs to be done, we do not accept the notion that there is any "legal gap" in our fulfillment of these undertakings.

At the NPT Review Conference (RevCon) in May, our reason for not joining consensus had to do with the language concerning a Middle East WMD-free zone. While the United States supports this worthy goal, it cannot be imposed from outside the region or absent the consent of

the involved states. Like similar zones in other regions, it can only succeed if it reflects the accepted norm that such zones should be based on arrangements freely arrived at by the states of the region. Be assured that we will continue our work to identify opportunities for regional dialogue and encourage a way forward that takes into consideration the legitimate interests of all states in the region.

Post-NPT RevCon, more dialogue is needed

Mr. Chairman, the NPT RevCon experience confirmed our long-held belief that we need more genuine international dialogue and engagement on nuclear disarmament issues, including between the nuclear-weapon States and non-nuclear-weapon States.

As envisioned in the RevCon's draft final document, the United States is prepared to support an Open-Ended Working Group (OEWG) to identify and elaborate all effective measures that contribute to our shared nuclear disarmament goals. There are, naturally, a wide range of views on the purpose of such an OEWG; this reflects differences among states on how to take forward nuclear disarmament. We will not settle those differences at this First Committee. But we can improve the quality of debate through support for an OEWG resolution that encourages the widest possible participation. Let's not lose this opportunity for engagement.

Mr. Chairman, as a further contribution to this dialogue and cooperation, last December the United States and the Nuclear Threat Initiative (NTI) launched the International Partnership for Nuclear Disarmament Verification. This exciting new endeavor brings together twenty-seven states—nuclear and non-nuclear-weapon States alike—committed to exploring the tools and technologies needed to effectively verify future nuclear disarmament agreements. While ... this dialogue does NOT involve the sharing of any sensitive nuclear weapons-related information, we are convinced there is a role that non-nuclear-weapon States can play in this area.

We look forward to the 2nd plenary of the Partnership, to be held in Oslo, Norway this November. And on October 14, the United States and NTI will co-host a First Committee side-event to update states and civil society on Partnership progress and next steps.

Advancing our nuclear disarmament efforts through the P5 process

Mr. Chairman, when the final chapter of the age of nuclear weapons is written, history will record that the P5 process was among the earliest successful efforts to enhance the type of multilateral transparency, dialogue, confidence-building, and mutual understanding needed for future progress toward the verifiable elimination of nuclear weapons. Together, the P5 are pursuing intensified engagement that is essential in setting the foundation to advance nuclear disarmament. We look forward to discussing these and other issues at the P5 process side-event to be hosted by France on October 16.

* * * *

Conclusion

Finally, Mr. Chairman, up to now I have tried to focus on the positive. But I cannot end without pointing out that the accusations leveled by the Russian representative against my country last Friday are utterly baseless. U.S. missile defense is not directed against Russia's or China's strategic nuclear forces. Over many years, the United States has put very forward-leaning proposals on the table for cooperation with Russia on missile defense. However, Russia has refused all offers and instead has made absolutely unacceptable demands upon the United States and its allies as a precondition for any cooperation. Furthermore, the United States has always been, and remains, in full compliance with all of its NPT and INF Treaty obligations. We

have many times publicly and privately explained why this is the case and our Russian colleagues may feign misunderstanding but the facts couldn't be any clearer. In our political system, arms control treaty provisions are the law of the land. And the United States is a nation governed by the rule of law.

Russia's accusations are a classic attempt at misdirection, as it is Russia that is flagrantly violating key provisions of international law and undermining international security. Russia continues to violate the sovereignty and territorial integrity of Ukraine, a breach of the UN Charter. Russia is in violation of the INF Treaty, as it has tested a new ground-launched cruise missile that is explicitly prohibited by this treaty. And it is Russia that has failed to respond to President Obama's proposal to negotiate further reductions in our strategic and tactical nuclear forces. The United States remains committed to advancing toward a world without nuclear weapons and furthering international security, but we need a willing and sincere partner.

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2. Non-Proliferation Treaty ("NPT")

a. 2015 NPT Review Conference

The 2015 NPT Review Conference concluded without adoption of a final document due to lack of consensus. However, the United States delivered key statements on the importance of the NPT in preparation for and during the Review Conference. Prior to the 2015 NPT Review Conference, Assistant Secretary of State Thomas M. Countryman delivered remarks at the International Institute for Strategic Studies on accomplishments under the NPT and expectations for the 2015 Review Conference. Assistant Secretary Countryman's remarks are available at <http://www.state.gov/t/isn/rls/rm/2015/238762.htm> and excerpted below.

* * * *

...Yesterday marked the 45th anniversary of the entry into force of the Nuclear Nonproliferation Treaty so it is an appropriate time to consider what we have accomplished and how we can approach the Review Conference starting next month. We want to keep in mind the big picture throughout. This treaty in my opinion is the most successful multilateral treaty in the history of diplomacy. It has played a fundamental and irreplaceable role in promoting the security of every state that has become a party to the treaty. It is the common foundation for goals that we share in disarmament and nonproliferation and it lays the basis for the cooperation globally in the peaceful uses of nuclear energy. Upholding and strengthening the treaty is central to President Obama's Prague agenda and his commitment to seek the peace and security of a world without nuclear weapons. The treaty is not perfect, it is not immune to challenge, but it is irreplaceable and could not be replicated if we allow it to fall apart.

The NPT Treaty and Review Conference

So let's consider the significant accomplishments of the treaty. First it provides a framework for ending the nuclear arms race, for the vast reductions in global nuclear stockpiles

we have already achieved, particularly in the United States, and for reinforcing the strong taboo against use of nuclear weapons. It has succeeded in limiting the number of states that possess nuclear weapons. Projections in the 1960s before the treaty was negotiated were that by the turn of the century there would have been dozens of states possessing nuclear weapons. Instead that number has barely increased in the last 45 years. The treaty established durable, international legal obligations designed to prevent proliferation of weapons. It gives direction to safeguards and export control regimes that are needed to sustain the treaty, and it has promoted peaceful nuclear trade and assistance for energy and development throughout the world.

We are looking forward to a successful Review Conference or RevCon for short. We have been working with and will continue to work with all parties, and with particular focus on explaining our position better to Non-aligned states, in order to advance realistic and achievable objectives that reinforce and uphold the treaty. We seek a balanced review of all three pillars. As you know the three pillars are described as disarmament by the nuclear weapons states, nonproliferation and the commitment to avoid acquisition of nuclear weapons by other states, and the benefits of peaceful uses to all states. In the 2010 Review Conference, we agreed on an action plan by consensus. This was a breakthrough achievement. It was the most detailed, and substantive conclusion ever in the history of review processes. That action plan is valid today. It is a useful yardstick for implementing steps that strengthen the treaty. It is not, however, a deadline; it was not a time limited action plan. We need now at next month's conference to take stock of the action plan and update it. We developed a series of working papers on how to update the action plan, which we are now circulating in diplomatic channels. We want to reinforce all the parts that are relevant, which is most of it, and identify what can be advanced as a result of next month's Review Conference. And of course we are actively studying all the papers produced by friends around the world because they contain valuable ideas on how to advance the goals of disarmament and nonproliferation.

Now one hallmark of our preparation has been greater transparency about U.S. nuclear weapons, about their quantity, their alert status, and their role in our military doctrine. The report we gave last year to the Preparatory Committee was unprecedented in providing insight into our nuclear weapons program. No other state has ever provided so much information and we intend to surpass it next month in the Review Conference. Similarly, we have invited a group of senior, foreign government officials to visit our national nuclear laboratories in New Mexico to encourage a more open and transparent dialogue on U.S. policies.

Nonproliferation Pillar

To get to a success in New York next month does not require consensus on a final document but it is desirable and we will do all we can to achieve it. Success can also be measured by the degree of consensus on advancing all three pillars on nonproliferation, disarmament, and peaceful uses. Let me spend just a couple more minutes on our priorities in each of these pillars. On nonproliferation, we want to ensure that the international verification of obligations under the NPT remains effective and robust. That means it requires political, technical, and resource commitments from the world. We will continue to promote the IAEA Additional Protocol, which represents the highest standard for verification that states are meeting the NPT safeguards requirements. We have an active program through my bureau of the State Department to help states that seek assistance to implement their safeguard obligations. We need to give a strong statement of support to the International Atomic Energy Agency, which has the responsibility for implementing safeguards. Most recently, this includes implementing the advanced idea of the State-level concept about which we could talk more.

The International Atomic Energy Agency deserves the highest degree of independence, expertise, and resources in order to accomplish its crucial mission. We need to underscore that noncompliance by the treaty's members, that is by a state party, undermines the overall integrity of the NPT. We need to discuss how to hold accountable violators of their own obligations and we also want to develop a consensus about how to address states that may abuse Article 10 of the treaty which gives states the right to withdraw from the NPT. We've been part of a group that has built a very wide consensus on this topic.

Peaceful Uses Pillar

On peaceful uses of nuclear science, at the RevCon we will address and advance our record of promoting the availability and sharing of peaceful benefits of the atom. We will highlight nuclear trade and the considerable amount that we spend in assisting states to provide for safety and security in nuclear energy use. At the 2010 conference then-Secretary Clinton announced the Peaceful Uses Initiative, which was intended to expand the fund of money that the IAEA has to provide technical cooperation in developing countries. We have provided nearly \$200 million dollars to this and other technical cooperation programs since 2010, and I expect we will make a new commitment on this at the Review Conference.

We will detail the progress made through the Nuclear Security Summit process initiated by President Obama. As a result of this process the number of facilities and countries around the world that possess highly enriched uranium or plutonium has decreased markedly. Security of storage sites of fissile materials is much greater, and more countries are prepared to counter nuclear smuggling. We also of course will discuss nuclear safety. Since the 2010 action plan we've seen the tragedy of Fukushima, and we note our support for a more wide range of programs to advance nuclear safety—for example, the declaration of the diplomatic conference on the Convention of Nuclear Safety issued in Vienna last month. We will also use the Review Conference to seek support for new frameworks for peaceful nuclear cooperation such as an arrangement for a fuel bank facility in Kazakhstan that we hope to see finalized this year.

Disarmament Pillar

On the disarmament pillar, the U.S. commitment to achieve the peace and security of a world without nuclear weapons remains firm. We continue to actively pursue nuclear disarmament in keeping with the commitment that we made under Article 6 of the treaty. We work hard to put in place the building blocks for nuclear disarmament. This approach of discrete, practical steps has achieved major reductions in nuclear weapons and fissile material stocks over several decades and continues to do so. It is a practical approach. It is a verifiable approach, and we're prepared to explain it and defend it at the Review Conference. When I say discrete steps, it doesn't mean one thing at a time; it means we are pursuing many channels in order to lay the groundwork for future efforts in bilateral arms reduction with the Russian Federation and in multilateral arms reduction. This includes not only changes to the U.S. arsenal and U.S. policies, but also requires building confidence and transparency with other nuclear states, including by cooperating on our nonproliferation goals. Each step that we have taken over the years has helped to create the conditions and build momentum for subsequent steps.

Some states party to the treaty are dissatisfied with the recent pace of disarmament but the fact remains that since the last Review Conference the New START Treaty has entered into force, and it is being implemented in terms of its notifications and inspections on a faithful basis by both the Russian Federation and the United States. By the time we reach the levels set by the treaty for 2018, the U.S. deployed nuclear arsenal will be at its lowest level since before I was born and that was when Mr. Eisenhower was president. But we also have to show readiness to do

more. President Obama offered nearly two years ago to pursue further negotiated reductions with Russia with the goal of cutting our deployed nuclear weapons by another one third. That offer is still on the table. We are ready to engage with Russia on the full range of issues affecting strategic stability, but we're also realistic about how much can be achieved without a willing partner in the current difficult strategic environment. A new Russian security doctrine, which explicitly reprioritizes its nuclear forces, is obviously creating a new and direct challenge to bilateral disarmament efforts.

Nuclear Weapons Free Zone—Middle East

Let me speak to one special topic from the 2010 RevCon that I know is of interest around the world. At the 2010 Review Conference the United States, Russia, and the United Kingdom, as depositaries of the Nonproliferation Treaty, accepted a commitment that we would before the end of 2012 convene a conference to discuss the creation of a weapons of mass destruction-free zone in the Middle East. Well we are now in the 39th month of 2012 and we haven't yet succeeded in convening a conference. This is a very specific commitment we made and I think it requires explanation to the world of everything that we have done to try to make this possible. Here I would also note that despite differences with Russia on major issues, we have continued to cooperate well with the U.K., Russia and the UN on this particular point.

The commitment to convene a conference said explicitly that it should be attended by all states of the region, which is to include Israel. Israel, however, is not a member of the NPT and has no legal obligation to honor an invitation to the conference. Israel could, however, be persuaded and over the last three and a half years, through tireless efforts of Russia and the U.K. and the United Nations, and our facilitator Ambassador Laajava of Finland, but especially from the United States, we have reached a point where Israel accepts the value of holding such a conference which it sees as a venue for discussing not just creation of a WMD free zone in the Middle East, but a forum for discussing related security issues that must be addressed if a weapons free zone in the Middle East is to be successful. Over the past year and a half Ambassador Laajava and these three states, together with the UN, have convened five unofficial or informal meetings at which multiple Arab delegations and Israeli diplomats sat at the same table and discussed—for the first time in twenty years—regional security issues.

As a consequence, there is a better understanding by all sides of what are the obstacles and political conditions necessary for creation for such a zone are, and there is a better understanding of our Arab friends who have worked very hard on this issue and shown innovation and flexibility at times, a better understanding that this is not simply a technical exercise of taking the Africa Nuclear Weapon Free Zone Treaty and changing the names. It is a political process. It is a diplomatic process. It is a negotiation process, not just a technical drafting process. We remain hopeful even before the RevCon that additional contact between Israel and the Arabs on this issue will allow us to agree on an agenda and set a date for the convening of such a conference.

Conclusion

Let me just conclude by saying that we don't just focus on the NPT every five years. It is the constant job of my bureau within the State Department to focus on the assignments and specific obligations that the treaty has given not just to the U.S., not just to the five recognized nuclear weapons states, but to every state party to the treaty. It's a continual process of upholding and strengthening the treaty. It commands vigilance, and effort. It requires states to watch out for the kind of technical trade that they conduct with states such as North Korea and Iran. It means that we have to take greater responsibility to resolve conflicts that could become temptations for

proliferation. We have to seek consensus, we have to identify areas of agreement with states that have a different set of priorities than the United States. Of course progress elsewhere will contribute to success at this conference and in subsequent years, and here of course I am particularly hopeful that Iran will be able to take “yes” for an answer and sign a substantive agreement with the P5 + 1 that ends the possibility of Iranian pursuit of a nuclear weapon.

I am less hopeful but never totally pessimistic that we’ll make similar progress with North Korea within the months ahead and of course I hope to see a reduction of tensions in Asia, the one area of the world in which the number of nuclear weapons is increasing. So overall I am optimistic that we can build on the success of the 2010 Review Conference. We look forward to working with all parties who share our interest in achieving an objective, balanced and realistic text. It is essential not just for the security of the world but for the vision that all of us need to keep in our heads, the prospect of finally achieving a world without nuclear weapons. So thank you and I look forward to questions and ideas that you may want to give me.

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On March 5, 2015, Secretary Kerry released a press statement on the 45th anniversary of the NPT, which is excerpted below and available at <http://www.state.gov/secretary/remarks/2015/03/238174.htm>.

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All countries share responsibility to confront nuclear proliferation. All countries benefit if nuclear weapons do not spread to additional countries. All countries also profit when there is smart, continuous action in the direction of nuclear disarmament. And all countries gain from cooperation on the peaceful uses of nuclear energy.

That is why the Nuclear Non-Proliferation Treaty (NPT) has served the international community well for the past 45 years.

Simply put, it is the bedrock foundation for nuclear nonproliferation, disarmament, and the peaceful use of nuclear energy. They include the areas of human health, food and agriculture, water resource management, and the environment.

There are many reasons for the success of the NPT, which entered into force on March 5, 1970.

The international consensus against the spread of nuclear weapons, embodied in the spirit and text of the Treaty, is strong and continues to be upheld. Overwhelming numbers of states have refrained from pursuing nuclear weapons and accept International Atomic Energy Agency safeguards as the standard for verification and peaceful nuclear trade. Several states that abandoned nuclear weapons efforts might have come to a different conclusion in the absence of a robust and widely supported NPT.

Today, as we mark this anniversary, we especially celebrate that more states are party to the NPT than to any other arms control or nonproliferation agreement. But there is more work to do, and we must recommit ourselves to this task.

NPT Parties share a responsibility to reinforce the global nuclear nonproliferation regime, in particular to overcome the challenges posed by a few countries that have violated their

international nonproliferation obligations. This should be a concern of all states, as it is the future integrity of the nonproliferation regime that is at stake.

Our common security would be profoundly affected if additional countries crossed the nuclear threshold.

That is why President Obama and I have committed so much time and attention to seeking an agreement that will ensure Iran's nuclear program is peaceful, and that it will formally commit to it in perpetuity as a signatory to the NPT, and through a science-based, verifiable agreement with the P5+1 member nations and their partners.

We are also working with the international community to achieve the DPRK's complete, verifiable, and irreversible denuclearization, and its return to the NPT and IAEA safeguards.

The United States is fully committed to continuing to fulfill its own Treaty obligations, as well as to strengthening the global nuclear nonproliferation regime.

Under the New START Treaty, we are reducing our deployed nuclear weapons to levels not seen since the 1950s, and we are prepared to negotiate further reductions. Through bilateral agreements and through the IAEA, we also continue to advance peaceful nuclear cooperation with other NPT Parties. We also are proud of our record as the leading contributor of funds to assist such global development.

The Ninth Review Conference of the NPT will open in New York on April 27. The United States has been working diligently to implement the items in the Action Plan adopted at the 2010 Review Conference, and we seek to strengthen that Plan.

We look forward to working with all NPT Parties to achieve a constructive outcome of the conference.

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President Obama and Prime Minister Shinzo Abe of Japan issued a joint statement on the NPT in advance of the Review Conference. Daily Comp. Pres. Docs. 2015 DCPD No. 00307 (Apr. 28, 2015).

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1. Japan and the United States reaffirm our commitment to seek the peace and security of a world without nuclear weapons and to the Nuclear Non-Proliferation Treaty (NPT). We commit to work together for a successful Review Conference in New York that strengthens each of the Treaty's three pillars: nuclear disarmament, nuclear non-proliferation, and peaceful uses of nuclear energy. The NPT remains the cornerstone of the global non-proliferation regime and an essential foundation for the pursuit of nuclear disarmament. In this 70th year since the atomic bombings of Hiroshima and Nagasaki, we are reminded of the catastrophic humanitarian consequences of nuclear weapons use. Hiroshima and Nagasaki will be forever engraved in the world's memory. Concerns over the use of nuclear weapons underpin all work to reduce nuclear dangers and to work toward nuclear disarmament, to which all NPT parties are committed under Article VI of the Treaty. We affirm that it is in the interest of all States that the 70-year record of non-use should be extended

- forever and remain convinced that all States share the responsibility for achieving this goal.
2. We reaffirm our commitment to a step-by-step approach to nuclear disarmament, and recognize the progress made since the height of the Cold War. We recognize that further progress is needed. Immediate next steps should include further negotiated nuclear reductions between the United States and Russia, the immediate start of multilateral negotiations of a Fissile Material Cutoff Treaty, entry into force of the Comprehensive Nuclear-Test-Ban Treaty and the protocols to the existing nuclear weapon free zone treaties, and the continued reduction of all types of nuclear weapons, deployed and non-deployed, including through unilateral, bilateral, regional and multilateral measures. We further emphasize the importance of applying the principles of irreversibility, verifiability and transparency in the process of nuclear disarmament and non-proliferation. In this regard, the United States welcomes Japan's leadership in the Non-proliferation and Disarmament Initiative and Japan's role as the Co-Chair Country for the Conference on Facilitating the Entry into Force of the CTBT, and Japan welcomes the U.S. initiative to launch the International Partnership on Nuclear Disarmament Verification. We affirm our readiness to cooperate closely on this new initiative, which will facilitate further cooperation between the nuclear-weapon States and non-nuclear-weapon States with respect to nuclear disarmament efforts.
 3. We further note the positive role played by civil society, and hope that activities such as the UN Conference on Disarmament Issues and the Comprehensive Nuclear-Test-Ban Treaty's Group of Eminent Persons Meeting, both to be held in Hiroshima in August, and the Pugwash Conference to be held in Nagasaki in November, will strengthen momentum toward disarmament and non-proliferation.
 4. We unequivocally support access to nuclear technology and energy for peaceful purposes by states that comply with their non-proliferation obligations. We are especially pleased to announce that both the United States and Japan, which strongly support the role of the International Atomic Energy Agency (IAEA) in promoting the benefits of the peaceful uses of nuclear technology, have pledged to extend their financial support to the IAEA Peaceful Uses Initiative over the next five years. The U.S. pledge of \$50 million and Japan's pledge of \$25 million will ensure that applications of nuclear science and technology continue to advance medical care and health improvement including cancer treatment and Ebola diagnosis, food and water security, clean oceans and disease eradication in regions of the world most in need.
 5. The IAEA safeguards system is a fundamental element of that framework and plays a critical role in preventing and addressing challenges to the global non-proliferation regime, by verifying that states are not diverting peaceful nuclear energy programs to develop weapons, and by responding to cases of non-compliance. We call on all states that have not yet done so to adhere to a Comprehensive Safeguards Agreement and the Additional Protocol as the recognized IAEA safeguards standard, and renew our willingness to assist states to implement safeguards agreements. We support the evolution of IAEA safeguards at the State level, and emphasize the importance of maintaining the credibility, effectiveness and integrity of the IAEA safeguards system. To preserve the future integrity of the NPT, action is needed to discourage any state from withdrawing from the Treaty as a way to escape its responsibilities or

- to misuse the fruits of peaceful cooperation with other states, as well as to encourage States Parties to remain in the Treaty by demonstrating tangible progress in all three pillars of the Treaty.
6. We underscore the imperative of addressing challenges to the integrity of the NPT and the non-proliferation regime posed by cases of noncompliance. We welcome the EU/E3+3 deal with Iran and encourage completion of the work that remains to fully resolve the international community's concerns regarding the exclusively peaceful nature of Iran's nuclear program as well as to ensure that Iran does not acquire nuclear weapons. We also remain committed to a diplomatic process to achieve North Korea's complete, verifiable and irreversible denuclearization. We urge North Korea to take concrete steps to honor its commitments under the 2005 Joint Statement of the Six-Party Talks, fully comply with its obligations under the relevant UNSC Resolutions, refrain from further provocation including nuclear tests and ballistic missile launches, return to the NPT and IAEA safeguards, and come into full compliance with its nonproliferation obligations.
 7. We also underscore the importance of promoting stringent export control in Asia and globally. We are determined to continue to work together to conduct outreach activities for Asian countries with a view to further enhancing their export control capacity as well as to promoting recognition that rigorous export controls foster confidence of trade or investment partners, and create a favorable environment for further economic growth rather than impeding trade and investment.

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Secretary Kerry delivered the U.S. national statement to the Parties to the NPT at the opening of the Treaty's ninth Review Conference at the United Nations in New York on April 27, 2015. First, Secretary Kerry relayed a message from President Obama on the importance of the NPT. The President's message is excerpted below and available along with Secretary Kerry's remarks, also excerpted below, at <http://www.state.gov/secretary/remarks/2015/04/241175.htm>. Also on April 27, the United States released its updated national report to the NPT Review Conference describing U.S. efforts to implement certain actions of the 2010 NPT Review Conference Final Document. The U.S. national report is available at <https://www.state.gov/documents/organization/241363.pdf>.

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President's Message:

I send greetings to all gathered in New York at the 2015 Nuclear Non-Proliferation Treaty (NPT) Review Conference.

For over 45 years, the NPT has embodied our shared vision of a world without nuclear weapons. Thanks to collective international efforts and commitment, the NPT is now the cornerstone of the nuclear nonproliferation regime, and those that predicted at the time of the

Treaty's signing that dozens of countries would soon possess nuclear weapons have thankfully been proven wrong.

While the NPT has demonstrated its worth, we know we have more to do. As I said in Berlin in 2013, we may no longer live in fear of global annihilation, but so long as nuclear weapons exist, we are not truly safe. The United States remains committed to all three pillars of the NPT—disarmament, nonproliferation, and encouragement of peaceful uses of the atom—and we are prepared to go further in meeting our obligations under the Treaty. We continue to lead efforts to stop the spread of nuclear weapons and reduce the role and number of our own, and we are dedicated to global efforts preventing proliferation. There are no shortcuts in this endeavor, and each step must be carefully taken to ensure that the security of all is increased along the way.

We have not yet achieved the ultimate goals enshrined in the Treaty—on this, we all agree—but it is only by seeking common ground and reinforcing shared interests that we will succeed in realizing a world free of nuclear dangers. Over the next few weeks and beyond the time of this conference, let us come together in a spirit of partnership to stop the spread of nuclear weapons, advance the peaceful uses of nuclear energy, and continue our journey on the path to peace and security.

Secretary's Remarks:

So, ladies and gentlemen, I am pleased to stand here today representing a President and an Administration that is committed to the vision of a world without nuclear weapons and to taking the prudent actions that are necessary to one day make that possible.

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...The vast majority of the world has come to the conclusion—united around the belief that nuclear weapons should one day be eliminated—that as President Obama said in Prague, moral leadership is more powerful than any weapon. And today the race to nuclear arms that once sparked the fear of imminent Armageddon in billions of human beings and hearts, that has been supplanted in a wary but steady march in the direction of reason towards the promise of peace.

Can we really create a future in which nuclear weapons exist only within the pages of history books? The answer is yes. ...

So the answer is yes, but the journey will be a long one. And it will take patience, cooperation, and persistence to complete.

But have no doubt: Every step you take that gets closer to it or that works to get closer to it, in fact, makes our planet safer. And one day when we finally approach the finish line, when we have conditions that allow us to go from a hundred warheads to zero, we will already be living in a world that is transformed, and transformed for the better.

For the past 45 years, the guiding light on these issues has been the Nuclear Nonproliferation Treaty. It's a pretty straightforward arrangement, nothing complicated. Countries without nuclear weapons will not obtain them; countries with nuclear weapons will move towards disarmament; and all countries will have access to peaceful nuclear energy.

But it's critical to remember that each one of those components—nonproliferation, disarmament, and the peaceful use of the atom—is an essential ingredient to the full embodiment of the NPT. The NPT cannot stand unless all three of those pillars are sturdy enough to support it.

And for this treaty to remain upright we need to ensure its words have weight, that its rules are binding, and that its parties are compliant. And that means that the world has to remain united in rejecting the proliferation of nuclear weapons anywhere.

So today there is the potential for historic progress towards that end. The United States and our P5+1 partners have come together with Iran around a series of parameters that, if finalized and implemented, will close off all of Iran's possible pathways to the nuclear material required for a nuclear weapon, and give the international community the confidence that it needs to know that Iran's nuclear program is indeed exclusively peaceful.

I want you to know the hard work is far from over and some key issues remain unresolved. But we are, in fact, closer than ever to the good comprehensive deal that we have been seeking. And if we can get there, the entire world will be safer.

Now it's important to remember that the NPT has always been at the heart of these negotiations. From day one we have been focused on bringing Iran back into compliance with its obligations under the treaty. And if ultimately the talks are successful, it will once again prove the power of diplomacy over conflict and reinforce the rule of law.

Now we have said from the beginning that any deal with Iran will rely not on promises, not on words, but on proof. It will ... rely on verification, which is really at the center of the NPT and the entire IAEA process. Obviously verification is at the heart of the NPT, and one of the most important things that we can do to support our nonproliferation goals is to strengthen the IAEA safeguards in order to ensure that the agency has exactly what it needs in order to be able to verify safeguard agreements. That's why the United States is working to bring the Additional Protocol into force globally and to make it the standard, the global standard for safeguards compliance.

Verifying nations' compliance with the NPT is critical, but it's not good enough if we don't also hold parties accountable to their violations. And North Korea is the most glaring example. As we all know, the DPRK continues to ignore its obligations, to undermine the nuclear nonproliferation regime, and threaten international security and peace.

So we have to be crystal clear: North Korea must abandon all its nuclear weapons and existing nuclear programs, return to the IAEA safeguards, and come into full compliance with the duties that it accepted when it first became part of the NPT. The Obama Administration continues to work with its regional allies and partners to set the stage for credible, renewed negotiations, but the onus remains on the DPRK to show that it is actually serious about addressing global concerns. Until that happens, it will only become more isolated from the rest of the world.

My friends, nonproliferation must be non-negotiable. There is no room under the NPT for a country to negotiate its way into becoming a nuclear-armed state. But we are mindful that in return for a commitment to refrain from pursuing nuclear weapons, nations around the world expect the existing nuclear powers to in their turn steadily disarm and fulfill their part of the bargain.

The United States is unequivocally committed to doing just that. We have and we will continue to scale down our arsenal, and to continue to move, step by step, toward nuclear disarmament. And I would say to you that our progress is indisputable. As of September 2014, the number of nuclear weapons in our stockpile has fallen to 4,717, or 85 percent below the Cold War peak. And yes, still way too many. Over the last 20 years alone, we have dismantled 10,251 warheads, with another approximately 2,500 warheads retired and in the queue for elimination. Now, this is complex and costly work, but we are committed to reducing this backlog. And I am

pleased to announce today that President Obama has decided that the United States will seek to accelerate the dismantlement of retired nuclear warheads by 20 percent.

Our commitment to disarmament is clear in other areas as well. We have pledged not to pursue new nuclear warheads or support new military missions or military capabilities for the weapons that we do have, and we haven't tested a nuclear weapon in 23 years. We have clearly demonstrated our commitment to abide by the Comprehensive Nuclear Test Ban Treaty. We have reduced the role that nuclear weapons play in our national security strategy. And the primary purpose today is simply to deter nuclear threats from others. We have reduced the alert status of our nuclear arsenal, and we have taken every reasonable step to ensure its safety, security, and strict control.

But as someone who has spent three decades focused on these issues, I know as well as anyone that we have a long way to go. And I share President Obama's belief that the same countries that ushered in the era of nuclear arms have a special responsibility to guide the world beyond it.

Despite significant reductions, the United States and Russia still possess more than 90 percent of the world's nuclear weapons. The New START Treaty ... has put both the United States and Russia on track to reduce our nuclear stockpiles to the lowest levels since the era of Eisenhower and Khrushchev. Implementation is going well and it remains on track, and it will reduce our current stockpile of weapons significantly. But we know that we can cut back even further, and President Obama has made clear our willingness, readiness, now, to engage and negotiate further reductions of deployed strategic nuclear weapons by up to one-third below the level set by New START. Let me underscore: That offer remains on the table, and we urge the Russians to take us up on it.

On that note, I want to emphasize our deep concerns regarding Russia's clear violation of its obligations under the Intermediate-Range Nuclear Forces Treaty. We are urging Russia to return to compliance. For decades, that treaty has contributed to the peace and the security in Europe and Asia. And there is no reason—no reason—to create new dangers by undermining it now.

As we build for the future, there are further steps that we can take. It begins with agreement now to start to negotiate a Fissile Material Cutoff Treaty. It involves initiatives to prepare for future arms control agreements, as we have started to do with a new International Partnership on Nuclear Disarmament Verification. It also includes legal assurances against the use of nuclear weapons against states that meet their obligations, as allowed under the protocols in regional nuclear-weapons-free zone treaties. And I am pleased to tell you today that the United States submitted the Protocol to the Central Asia Nuclear-Weapon-Free Zone Treaty to the U.S. Senate for its advice and consent to ratification.

So let me briefly underscore one point here: In 1994, under the Budapest Memorandum, the United States, Russia and the United Kingdom extended similar assurances to Ukraine, Kazakhstan and Belarus as they sent back to Russia the Soviet-era nuclear weapons that remained on their territory. This was an incredible act of leadership for the nonproliferation regime, which is why Russia's current approach to the Budapest Memorandum—disregarding it—is extraordinary.

We also remain firmly committed to holding the proposed conference on a regional zone in the Middle East, free of all weapons of mass destruction. And this zone is a hugely ambitious goal and fraught with challenges, but ambitious goals are always the ones worth pursuing. We support the regional efforts underway to reach agreement on terms for a conference, and those

terms must be shared by all—there is no prospect for engagement or agreement absent the consent of the states involved. And this principle needs to be observed and respected if a process is really to start. And if that’s the case, I guarantee you the effort will have the full support of the United States.

The third pillar of the NPT is to expand the peaceful uses of the atom. Here, too, the United States is proud to play a strong and supportive role.

The United States is pleased that we are, by far and away, the largest donor to the IAEA. Since the last Review Conference, we have provided close to \$200 million to promote peaceful nuclear applications, and today I’m happy to announce another \$50 million contribution to the agency’s Peaceful Uses Initiative. These resources will further expand global access to the peaceful atom, putting it to use for sustainable economic development.

The fact is that nuclear energy can be an incredible resource, with a stunning range of applications.

Through the IAEA’s Peaceful Uses Initiative, we are promoting food security by improving the detection of animal diseases in Africa and expanding food safety measures in Latin America. We are advancing human health by advancing early detection capabilities for Ebola in Africa and strengthening the capacity to detect and treat cancer around the world. And we are protecting the future of our planet by tracing pollution in marine waters, documenting the impacts of climate change, and reducing our climate emissions.

What’s important here is that all of this work underscores the fact that our march towards peace is not only marked by the steps that we take to dismantle and to disarm. It’s also about the steps that we take to develop, the steps we take to innovate, the steps that we take to build a more peaceful world, where the atom is not used or thought about being used to level cities, but to lift whole communities. That’s our destination, and that’s where we believe this march will take us.

* * * *

Rose Gottemoeller, Under Secretary of State for Arms Control and International Security, delivered remarks at the conclusion of the 2015 Nuclear Nonproliferation Treaty Review Conference on May 22, 2015. Her remarks, explaining the grounds for the U.S. decision not to join consensus on the final document, are excerpted below and available at

<http://www.state.gov/t/us/2015/242778.htm>.

* * * *

The United States has a deep and long-standing interest in global nonproliferation efforts. President Obama remains committed to pursuing the peace and security of a world without nuclear weapons. We remain unwavering in our support for the Nuclear Non-Proliferation Treaty (NPT), and believe that this Review Conference (RevCon) has demonstrated the broad international support for the Treaty and the critical role it plays in global security. Though this conference concludes today, it is clear that the NPT remains the enduring cornerstone for the global nonproliferation regime and will continue to serve as the focus for our efforts to achieve a world without nuclear weapons.

As a result of our sustained leadership, engagement, and flexibility in New York, we have made real progress the past four weeks in advancing the discussion on global nonproliferation policy, disarmament, and peaceful uses. Much of this is reflected in the draft final document tabled by the President of the Conference.

Throughout this Conference, we reaffirmed the central role of the NPT in international security and the importance of compliance, developed ideas on enhancing the role of the International Atomic Energy Agency, universalizing the Additional Protocol, increasing transparency among nuclear weapons states, further promoting disarmament education, fostering international collaboration in developing nuclear disarmament verification capabilities, bolstering contributions to the Peaceful Uses Initiative and working to develop methods to handle withdrawal from the Treaty.

Moreover, we acknowledged the sincere and shared concern of the humanitarian impact of nuclear weapons. It is precisely our understanding of the consequences of nuclear weapons use that drives our efforts to reduce—and eventually eliminate—nuclear weapons, and to extend forever the nearly 70 year record of non-use of nuclear weapons. Lasting nuclear disarmament will only be achieved through a sustained, collaborative effort to create the conditions for a world without nuclear weapons.

Madame President,

We have made clear throughout the process that we will not accept the efforts by some to cynically manipulate the RevCon to try and leverage the negotiation to advance their narrow objectives at the expense of the treaty or of our shared long-standing principles. We know that this Treaty is more important than one idea or one person or one country. We also made clear that we were prepared to conclude this conference without a final consensus document rather than endorse a bad final document, just as we have said about other matters in the international arena.

We were prepared to endorse consensus on all the other parts of the draft Final Document addressing the three pillars of the Treaty—disarmament, nonproliferation and the peaceful uses of nuclear energy.

Unfortunately, the language related to the convening of a regional conference to discuss issues relevant to the establishment of a Middle East zone free of all weapons of mass destruction and their delivery systems is incompatible with our long-standing policies.

We have long supported regional nuclear weapons-free zones, as these zones, when properly crafted and fully implemented, can contribute to international peace, security and stability. We have also stressed that the initiative for the creation of such zones should emanate from the regions themselves, and under a process freely arrived at and with the full mutual consent of all the states in the region.

Secretary Kerry noted at the opening of the Review Conference that we were firmly committed to holding the proposed conference on a regional zone in the Middle East, free of all weapons of mass destruction, provided that the terms for the conference would be agreed to by all regional states. Secretary Kerry also warned that there would be no prospect for engagement or agreement absent the consent of all the states involved.

Unfortunately the proposed language for a final document did not allow for consensus discussions among the countries of the Middle East for an agreement on the agenda and the modalities of the conference and set an arbitrary deadline for holding the conference. We attempted to work with other delegations—in particular, Egypt and other Arab League states—to improve the text; but a number of these states, and in particular Egypt, were not willing to let go

of these unrealistic and unworkable conditions included in the draft text. In the end, the proposed final document outlined a process that would not build the foundation of trust necessary for holding a productive conference that could reflect the concerns of all regional states.

The United States is also disappointed that the failure to show flexibility leaves us with no clearly defined path to convene a conference on the Middle East free zone. All the productive efforts to date, including the historic face-to-face consultations on regional security issues that occurred in Glicion, do not need to be abandoned, however. If all the states in the region show the political will to resume the process of building such a zone through consensus, direct dialogue and a broad-based agenda, the United States stands ready to be their strongest supporter.

Madam President,

We regret that we were not able to support the draft consensus document tabled by the President of the conference. The blame for the inability of this conference to produce a forward-looking consensus document, however, lies squarely with those states that were unable to show any flexibility in pursuit of the convening of a Middle East conference that enshrined the principles of consensus and equality.

In closing, Madam President, we appreciate the efforts of the vast majority of States Parties at this Review Conference, and in particular, your work and that of the Secretariat. While we regret that this Review Conference will not produce a final consensus document, we leave New York satisfied that the NPT will continue to serve as a fundamental norm undergirding all of our efforts to achieve international peace and security for all.

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b. P5 Conference

On February 6, 2015, the Nuclear-Weapon States (the P5) issued a joint statement at the conclusion of their conference in London. The joint statement, excerpted below, is available as a State Department media note at <http://www.state.gov/r/pa/prs/ps/2015/02/237273.htm>.

* * * *

1. The Nuclear Non-Proliferation Treaty (NPT) Nuclear-Weapon States (NWS), or P5, met in London, 4-5 February 2015, for the sixth P5 Conference to review progress towards fulfilling the commitments made at the 2010 NPT Review Conference and to discuss the next steps for the P5 Process. In particular the P5 considered the implementation of the 2010 Action Plan adopted by consensus as a roadmap for long term action. The P5 also considered a wide array of issues related to and steps towards making progress on all three pillars of the NPT: disarmament, non-proliferation and the peaceful uses of nuclear energy. In addition, the P5 had constructive and productive discussions with a number of non-nuclear-weapon states and civil society representatives.
2. In reaffirming their commitment towards achieving a world without nuclear weapons in accordance with the goals of the NPT, the P5 reflected on the contribution that the P5 Process has made in developing the mutual confidence and transparency among the P5 that is

essential to make progress towards multilateral nuclear disarmament. At the start of the second cycle of the process, all of the P5 noted the value of having an established dialogue, with each P5 state having now hosted a conference at least once. They welcomed how each conference had built on the success of the last and the increasing amount of intersessional work on issues such as the Comprehensive Nuclear-Test-Ban Treaty, the achievement of P5 consensus on a common reporting framework and the Glossary of Key Nuclear Terms, which have all contributed towards the implementation of the 2010 Action Plan.

3. At their 2015 Conference the P5 restated their belief that the Nuclear Non-Proliferation Treaty remains the essential cornerstone for the nuclear non-proliferation regime and the foundation for the pursuit of nuclear disarmament, and is an essential contribution to international security and stability. They reviewed the NPT Preparatory Committee process over the course of this Review Cycle and considered the upcoming 2015 Review Conference, where the P5 intend to make a joint statement. The P5 looked forward to working with all States Parties to the NPT to ensure a positive outcome to the Review Conference that is balanced across the three mutually reinforcing pillars.
4. The P5 reaffirmed that a step-by-step approach to nuclear disarmament that promotes international stability, peace and undiminished and increased security for all remains the only realistic and practical route to achieving a world without nuclear weapons. To this end, the P5 discussed issues related to international security and strategic stability and their nuclear doctrines in order to enhance mutual understanding in these areas. This included updates on New START implementation and the verification experiences of both the Russian Federation and the United States in relation to the New START Treaty. It was noted that, since the entry into force of the NPT, the step-by-step approach has already dramatically reduced the number of nuclear weapons held by the NWS from their Cold War peak. The P5 all reaffirmed the importance of full compliance with existing, legally-binding arms control, nonproliferation, and disarmament agreements and obligations as an essential element of international peace and security.
5. The P5 stressed that addressing further prospects for nuclear disarmament would require taking into account all factors that could affect global strategic stability. In doing so they stressed the importance of engaging in frank and constructive dialogue to that end.
6. The P5 reiterated their shared understanding about the severe consequences of nuclear weapon use and underlined their resolve to prevent such an occurrence from happening. They also reaffirmed their commitment to existing security assurances regarding the use, or threat of use, of nuclear weapons, including, in accordance with UNSCR 984 (1995), their readiness to assist non-nuclear-weapon States Parties to the NPT that may become the victims of a nuclear attack (terrorist or otherwise).
7. The P5 discussed efforts to achieve entry into force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and recalled their commitment in the 2010 NPT Review Conference Final Document to promote and take concrete steps towards early entry into force of the CTBT and its universalization. They called upon all states to uphold national moratoria on conducting any nuclear explosion. It was noted that all members of the P5 have such a voluntary moratorium in place. P5 collaboration on improving and maintaining the International Monitoring System was reviewed. The P5 intend to release a joint statement on minimizing the impact of medical isotope production on the International Monitoring System. Further, particular note was made of the successful completion of the Integrated Field Exercise 2014 in Jordan, to which all members of the P5 contributed equipment, personnel and effort. The

P5 decided to continue regular technical meetings aimed at enhancing the verification regime and to hold a workshop on data quality objectives for radionuclide measurements for on-site inspections.

8. The P5 reiterated their full support for the United Nation's disarmament machinery, including the Conference on Disarmament (CD), and the Disarmament Commission. Whilst there was shared disappointment over the long-standing lack of consensus on a Programme of Work in the CD, the P5 welcomed the increased activity of the CD in its 2014 session and in particular informal substantive discussions held on all CD agenda items under the Schedule of Activities and the efforts of the Informal Working Group which sought to produce a Program of Work robust in substance and progressive over time in implementation. The P5 discussed efforts to find a way forward in the CD and reiterated their support for a comprehensive and balanced Program of Work which includes the immediate start of negotiations in the Conference on Disarmament on a non-discriminatory, multilateral and internationally and effectively verifiable treaty banning the production of fissile material for use in nuclear weapons or other nuclear explosive devices (Fissile Material Cut-off Treaty (FMCT)) on the basis of CD/1299 and the mandate contained therein. The P5 stressed in this regard the importance of the ongoing discussions of the Group of Governmental Experts established by United Nations General Assembly Resolution 67/53.
9. The P5 also decided that they should increasingly engage with the wider disarmament community. To this end, a number of non-nuclear-weapon states were invited, for the first time, to a briefing and discussion session as part of the P5 Conference. The P5 delivered a briefing on the Conference before discussing a number of NPT-related matters in greater depth and expressed their desire to continue such discussions when preparing for the important steps of the next review cycle, building on the increased engagement that has taken place in recent months with the NNWS. In addition to this an outreach event was organised in conjunction with Chatham House, providing civil society the opportunity to engage with the P5.
10. The P5 co-operative work featured heavily during the discussions and progress was made on the Glossary of Key Nuclear Terms. The P5 announced their intention to release the first edition for the Ninth Review Conference. The P5 intend to revise and update the Glossary as appropriate in due course.
11. The P5 received updates on a variety of bilateral and multilateral projects regarding disarmament verification, including from some P5 members.
12. The P5 reiterated the need to find peaceful and diplomatic solutions to challenges to the non-proliferation regime. The P5 welcome the ongoing diplomatic process between the Islamic Republic of Iran and the P5+1, and highlighted their continued commitment to negotiations on a comprehensive settlement that would guarantee the exclusively peaceful nature of Iran's programme. Regarding the interaction between the International Atomic Energy Agency (IAEA) and Iran, they noted the urgent need for full co-operation in order to resolve all outstanding issues, including those related to possible military dimensions. Additionally, the P5 stressed their resolve for a diplomatic resolution to the nuclear issue on the Korean Peninsula so as to achieve its complete, verifiable and irreversible denuclearization in accordance with the 19 September 2005 Joint Statement of the Six-Party Talks.
13. The P5 stressed the importance of maintaining and strengthening the IAEA's safeguards system. Discussions covered matters such as the universalisation of the Additional Protocol.

14. In discussing nuclear-weapon-free zones, the P5 welcomed the signing of the Protocol to the Treaty on the Central Asia Nuclear Weapon Free Zone in 2014 and its subsequent ratification by France and the UK, and noted the relevant efforts by others to bring about the Protocol's entry into force. The P5 also expressed hope that progress would be made on the signature of the Protocol to the South East Asian Nuclear Weapon Free Zone Treaty, and encouraged the parties to that Treaty to continue to engage constructively in order to find solutions to outstanding issues. Furthermore, the P5 reaffirmed their full support for the efforts of the facilitator and co-conveners in holding a conference on establishing a weapons of mass destruction free zone in the Middle East, and urged all states of the region to redouble their efforts to reach consensus on arrangements so that a conference could be convened.
15. The P5 continued their discussion on the issue of withdrawal from the NPT. Whilst noting that every State Party has the right to withdraw under the provisions of Article X.1, the P5 expressed the hope that the Review Conference would reach consensus on recommendations concerning potential abuse of the exercise of the right of withdrawal.
16. The P5 reviewed actions by each of the P5 to promote the peaceful uses of nuclear energy by States Parties to the NPT in conformity with Articles I, II, and III of the NPT, and reaffirmed their support for the programs of the IAEA in this area, including the Technical Cooperation Program.
17. The NWS looked forward to continuing their dialogue in order to make progress on NPT obligations. The P5 welcomed France's generous offer to host the next P5 Conference. They looked forward to a consensual, balanced outcome to the 2015 Review Conference, which would do much to enhance the P5's continuing efforts to strengthen the NPT.

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c. *Litigation Involving Alleged NPT Breach*

On February 3, 2015, the district court granted the U.S. motion to dismiss a case brought by the Republic of the Marshall Islands alleging that the United States has breached its obligations under Article VI of the NPT. *Republic of the Marshall Islands v. United States*, No. 4:14-cv-01885-JSW (N.D. Cal.) The court dismissed on the grounds that the plaintiff lacks standing and that the case presents a non-justiciable political question. For discussion of the case and excerpts from the U.S. brief in support of its motion to dismiss, see *Digest 2014* at 802-07. Excerpts follow from the court's opinion.

* * * *

Plaintiff here alleges two injuries to support its claim of standing. First, Plaintiff asserts that the conduct by Defendants "leaves Plaintiff Nation exposed to the dangers of existing nuclear arsenals and the real probability that additional States will develop nuclear arms." ... Such a generalized and speculative fear of the possibility of future use of nuclear weapons does not constitute a concrete harm unique to Plaintiff required to establish injury in fact. ...

Plaintiff also asserts injury in the deprivation of their benefit of the bargain encompassed by the terms of the Treaty. ... Plaintiff contends that, as a signatory nation, it has standing to enforce the Treaty's provisions. See [Jamaica v. United States](#), 770 F.Supp. 627, 630 n. 6 (M.D.Fla.1991) ("As a contracting party to the treaty, Jamaica has standing to assert its claim that the treaty has been violated."). Plaintiff contends that it has standing to sue for breach and its injury would be redressed by the United States adherence to its Treaty obligations. Plaintiff argues that the Treaty creates rights and duties and the breach of the duties is a violation of the individual rights of the signatories conferred by virtue of the Treaty's terms. See [Zivotofsky ex rel. Ari Z. v. Sec'y of State](#), 444 F.3d 614, 617 (D.C.Cir.2006) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.").

Even assuming that breaches of a contract confer standing on parties to the contract, and that international agreements should be considered contracts, Plaintiff fails to account for the fact that the Court cannot mandate specific performance as a remedy or grant redress for its alleged injury. See, e.g., [Canadian Lumber Trade Alliance v. United States](#), 30 C.I.T. 391, 418–420, 425 F.Supp.2d 1321 (Ct. Int'l Trade 2006). Even if the Court could mandate specific performance on the part of the Defendants, the relief Plaintiff seeks is not attainable. See, e.g., [Gonzales v. Gorsuch](#), 688 F.2d 1263, 1267 (9th Cir.1982) (holding that plaintiff lacked standing where the relief sought would not redress the injuries alleged). The Court finds that the requested relief—that the United States negotiate in good faith on effective measures relating to nuclear disarmament—is insufficient to establish standing because the Court is unable to fashion any meaningful decree. See *id.* (citing [Greater Tampa Chamber of Commerce v. Goldschmidt](#), 627 F.2d 258, 263–64 (D.C.Cir.1980) (invalidation of international executive agreement will not redress injury because act of foreign sovereign necessary for relief)). Here, the requested relief does not account for the participation of all of the nuclear and non-nuclear states that are parties to the Treaty but are not parties to this suit. The Treaty does not create, and the Court may not enforce, a bilateral obligation between the United States and the Marshall Islands. The injury Plaintiff claims cannot be redressed by compelling the specific performance by only one nation to the Treaty.

Furthermore, the Court finds that the claim for relief raises a fundamentally non-justiciable political question which is constitutionally committed to the political branches of government. Requiring the Court to delve into and then monitor United States policies and decisions with regard to its nuclear programs and arsenal is an untenable request far beyond the purview of the federal courts. Having no judicially manageable standards by which to adjudicate the United States' alleged breach of the international agreement, the Court finds the political question better suited to the vagaries of the political branches of government and diplomatic channels.

B. Political Question.

Even assuming that Plaintiff could establish standing to sue, the Court finds that the question presented raises a fundamentally non-justiciable political question. The political question inquiry "proceeds from the age-old observation of Chief Justice Marshall that '[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.'" [Alperin v. Vatican Bank](#), 410 F.3d 532, 544 (9th Cir.2005) (quoting [Marbury v. Madison](#), 1 Cranch 137, 5 U.S. 137, 170, 2 L.Ed. 60 (1803)). The non-justiciability of a political question is primarily a function of the separation of powers." [Baker v. Carr](#), 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The doctrine

“excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986).

The political question doctrine provides that a federal court having jurisdiction over a dispute should nevertheless decline to adjudicate it on the ground that the case raises questions which should properly be addressed by the political branches of government. See *Baker*, 369 U.S. at 210, 82 S.Ct. 691. The most appropriate case for applicability of the political question doctrine concerns the conduct of foreign affairs. *Id.* at 211, 82 S.Ct. 691. However, not every case involving foreign affairs or foreign relations raises a political question. In determining whether a particular matter raises political questions which the Court must decline to address, the Court must examine the following factors; “(1) a demonstrable constitutional commitment of the issue to a coordinate political department; (2) the lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of making a decision without first making a policy determination of the type clearly outside judicial discretion; (4) the court’s inability to resolve the issue without expressing lack of respect to the coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potential for embarrassment from multifarious pronouncements by various departments on one question.” *Zivkovich v. Vatican Bank*, 242 F.Supp.2d 659, 665 (N.D.Cal.2002) (citing *Baker*, 369 U.S. at 217, 82 S.Ct. 691). If any one of these factors is “‘inextricable from the case,’ the court should dismiss the case as non-justiciable because it involves a political question.” *Id.*

Here, the Court finds that Plaintiff’s claims relate to “the foreign affairs function, which rests with the exclusive province of the Executive Branch under Article II, section 2 of the United States Constitution.” *Earth Island Institute v. Christopher*, 6 F.3d 648, 652 (9th Cir.1993). Plaintiff seeks to have this Court interpret the Treaty to enforce an obligation for the Executive to initiate discussions with foreign nations. This request would violate “the separation of powers, and this court cannot enforce it.” *Id.* In *Earth Justice*, the Ninth Circuit addressed the request by plaintiff to enforce a statute that required the Secretary of State to initiate discussions with foreign countries over the protection of sea turtles. The court held that the question presented was not justiciable and rejected the contention that the “lawsuit merely asks the district court to review and interpret congressional legislation.” *Id.* at 653.¹ Similarly, here, the Court is not empowered by the Constitution to require the Executive to initiate discussions with foreign nations over the reduction in its nuclear armaments or programs. The authority to negotiate with foreign nations is expressly committed to the Executive, a coordinate political department. See *Zivkovich*, 242 F.Supp.2d at 665.

Further, the Court finds that it lacks any judicially discoverable and manageable standards for resolving the dispute raised by Plaintiff in this matter. Plaintiff requests that this Court issue an injunction directing the Executive to take “all steps necessary to comply with its obligations under Article VI of the Treaty within one year of the Judgment, including by calling for and convening negotiations for nuclear disarmament in all its aspects.” ... What constitutes good faith efforts to pursue negotiations on effective measures relating to cessation of the nuclear arms race are determinations for the political branches to make, using the panoply of resources and expertise it has accumulated in the area of international security as well as diplomatic and military affairs. Plaintiff’s request that such efforts be effectuated within one year is arbitrary and fails to take into consideration the activities and willingness of other nations which are also signatories to the Treaty. The Court finds that it lacks the standards necessary to fashion the type

of injunctive relief Plaintiff seeks. Accordingly, the Court finds it must dismiss this case as non-justiciable because it involves a political question. See *Zivkovich*, 242 F.Supp.2d at 665.

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3. Nuclear Safety

On February 9, 2015, a diplomatic conference convened in Vienna to consider a proposal by Switzerland to amend the Convention on Nuclear Safety. Remarks by Ambassador Eliot Kang on behalf of the U.S. delegation are excerpted below and available at <http://www.state.gov/t/isn/rls/rm/2015/237313.htm>. As mentioned by Ambassador Kang, the diplomatic conference developed the Vienna Declaration on Nuclear Safety, which includes principles for the implementation of the Convention to prevent accidents and mitigate radiological consequences. The Vienna Declaration on Nuclear Safety, which is available at https://www.iaea.org/sites/default/files/cns_viennadeclaration090215.pdf, was adopted by consensus at the diplomatic conference, and the amendment proposed by Switzerland was not adopted.

* * * *

We recognize and appreciate Switzerland's efforts to raise the profile of the important issue of nuclear safety. We would also like to thank the parties to the Convention for the active dialogue over the past several months. This Convention was founded on the principle that a multilateral, incentive-based approach provides the best way to ensure a high level of nuclear safety worldwide. It allows safety standards and guidance to be strengthened by taking into account emerging technologies and lessons learned. The process leading up to this conference has once again proven the wisdom of that approach.

The United States strongly supports the Convention and views it as an important instrument for international cooperation. Although safety remains a national responsibility, international cooperation through a process of robust peer review is indispensable for strengthening nuclear safety. Nuclear safety is an ongoing concern, and its continuous, timely improvement should be our shared objective.

The Fukushima accident was a wake-up call for all of us. In the United States, the U.S. Nuclear Regulatory Commission conducted an exhaustive review of our nuclear power plants and required significant safety enhancements in light of the lessons learned from Fukushima. Those enhancements are now well underway at U.S. plants, with most of the major work expected to be completed by the end of 2016.

At the same time, the international community has come together to strengthen safety standards through a variety of efforts. The parties to this Convention led some of the most important of those efforts. In particular, the changes to the Convention's guidance that we undertook at the 6th Review Meeting in April 2014, demonstrate our collective determination to reinforce nuclear safety. To make this incentive convention function as it should, parties report

on their implementation of obligations under the Convention with reference to contemporaneous guidance reflecting internationally formulated safety guidelines. Thanks to the work we have undertaken, the guidance that was updated and put into effect in April 2014 incorporates key lessons learned from the Fukushima accident. This ability to immediately update guidance and safety standards—without amending the Convention—makes the Convention a modern, relevant, and effective instrument to improve nuclear safety well into the future.

We are now here at this diplomatic conference to consider how to build on that work and continue moving the Convention forward. As many parties have expressed during the preparatory process, the best way to do that is to commit and dedicate ourselves to vigorous implementation of the Convention. The United States appreciates the work of the Chair in helping to put on paper the views of the parties as they have been expressed over the past several months. We believe the proposed Vienna Declaration is an excellent reflection of the consensus among the parties to the Convention and we are ready to support it. Achieving consensus at the Diplomatic Conference sends a crucial message to the international community and the public that we stand united on the importance of nuclear safety and are taking timely and responsive action to improve it.

Mr. President, we all live in an increasingly interdependent world. This certainly holds true for nuclear safety. The declaration before us represents a political commitment to reinvigorate the principles of the Convention itself, and by coming together as a community to endorse it, we will be sending a powerful message to the world. We are telling the world that we understand our responsibilities and are meeting them in a way that can inspire confidence in the future peaceful uses of nuclear energy and technology.

We hope that all parties to the Convention will join us in supporting the proposed consensus outcome and commit to follow the principles outlined in the Declaration.

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On January 15, 2015, Japan submitted to the IAEA its instrument of acceptance of the Convention on Supplementary Compensation for Nuclear Damage (“CSC”), an international instrument relating to liability and compensation for damage caused by a nuclear accident. The Convention requires at least five signatory States with a minimum of 400,000 units of installed nuclear capacity to deposit their instrument of ratification, acceptance or approval with the IAEA prior to entry into force. Japan’s joining the CSC triggered entry into force on April 15, 2015, three months after the deposit of Japan’s instrument of acceptance. In addition to Japan, Argentina, Morocco, Romania, the United Arab Emirates, and the United States have joined the CSC. See *Digest 2013* at 665 for a discussion of Japan’s declaration of its intention to accede.

4. Regional Arrangements

a. Nuclear-Weapon-Free Zone in Central Asia

On April 27, 2015, the President transmitted to the U.S. Senate, for its advice and consent to ratification, the Protocol to the Treaty on a Nuclear-Weapon-Free Zone in

Central Asia, signed at New York on May 6, 2014. Daily Comp. Pres. Docs. 2015 Doc No. 00304, p. 1 (Apr. 27, 2015). See *Digest 2014* at 811-12 for background on the Protocol.

b. Nuclear Fuel Bank in Kazakhstan

On June 11, 2015, the IAEA approved an agreement to establish a nuclear fuel bank of low enriched uranium (“LEU”) in Kazakhstan. See June 12, 2015 State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/06/243778.htm>. The fuel bank is to be operated by Kazakhstan, but the LEU will be owned by the IAEA and made available to IAEA member states for peaceful use in case LEU cannot be obtained commercially. The United States has expressed support for the creation of an international fuel bank to further a new framework for civil nuclear cooperation under which States can access peaceful nuclear power without increasing the risks of proliferation. As explained in the June 12 media note:

The LEU bank will also support our nuclear nonproliferation policies by reducing incentives for the spread of sensitive technologies to new countries. This undertaking further demonstrates Kazakhstan’s leadership in nonproliferation and nuclear security.

On August 27, 2015, Assistant Secretary Countryman delivered remarks at the signing ceremony in Astana, Kazakhstan of the IAEA Fuel Bank Agreement. His remarks are excerpted below and available at <http://www.state.gov/t/isn/rls/rm/2015/246375.htm>.

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Today, it is especially appropriate to recognize the Republic of Kazakhstan. When the IAEA Board of Governors selected Kazakhstan as the site of the Fuel Bank, it was a decision that was not just technically logical but also symbolically and politically important.

Kazakhstan has been a leader in nonproliferation and nuclear security dating back to President Nazarbayev’s historic decision in 1991 to close the Semipalatinsk Test Site, send all of the nuclear weapons in Kazakhstan back to Russia, and sign the Treaty on the Non-Proliferation of Nuclear Weapons as a non-nuclear weapons state.

It continues to be a valuable participant in the Nuclear Security Summit process. Recently, it took the important decision to host the new headquarters of the International Science and Technology Center here in Astana.

The United States remains committed to the agenda President Obama laid out in Prague in April 2009—that is, taking practical steps to achieving the goal of lasting peace and security in a world without nuclear weapons.

The IAEA LEU Fuel Bank is one such step. It is a mechanism that supports the growth of safe and secure nuclear power in ways that prevent proliferation and promote global security.

It will provide states with additional confidence in their ability to obtain nuclear fuel in an assured and predictable manner.

This Fuel Bank joins other initiatives such as the American Assured Fuel Supply, the U.K. Nuclear Fuel Assurance Mechanism, and the physical reserve of low enriched uranium maintained by the Russian Federation in Angarsk to provide additional assurance of supply to states—beyond the reliability of the commercial market.

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c. *ISTC in Kazakhstan*

On December 9, 2015, the United States, the European Union, Georgia, Japan, the Kingdom of Norway, the Kyrgyz Republic, the Republic of Armenia, the Republic of Kazakhstan, the Republic of Korea, and the Republic of Tajikistan signed the Agreement Continuing the International Science and Technology Center (“ISTC”). See December 9, 2015 State Department press release, available at <http://www.state.gov/t/isn/rls/prsrl/250496.htm>.

The ISTC was established in Moscow, Russia by a 1992 agreement that was provisionally applied in accordance with a 1993 protocol. After the Russian Federation decided to withdraw from the agreement establishing the ISTC, Kazakhstan offered to host the ISTC. The new headquarters will be at Nazarbayev University in Astana. The ISTC aims to direct scientists and engineers in states with technologies, expertise, and related materials applicable to WMD to engage in research and development activities for peaceful purposes and thereby minimize their incentives to engage in activities that could result in the proliferation of WMD or related materials. The agreement continuing the ISTC in Kazakhstan will enter into force once all signatories have deposited their instruments of ratification, acceptance, or approval.

d. *Middle East Weapon-Free Zone*

Ambassador Robert Wood, U.S. Permanent Representative to the Conference on Disarmament, delivered the U.S. explanation of vote on November 2, 2015 at the meeting of the First Committee at the 70th UN General Assembly on the draft resolution entitled, “The Risk of Nuclear Proliferation in the Middle East.” The U.S. explanation of vote follows and is also available at <http://usun.state.gov/remarks/6954>.

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Mr. Chairman, my delegation will vote “no” on draft resolution L.2, “The risk of nuclear proliferation in the Middle East.” As we have reported to this Committee many times before, our vote is based on the fact that such unbalanced resolutions will not advance a Middle East free of weapons of mass destruction and their delivery systems. Progress toward a regional zone agreement will require the engagement and constructive participation of all concerned states. Singling out one state for criticism—while ignoring the substantial security concerns and compliance challenges that remain in the region—will simply not advance this goal.

Be assured that the United States continues to strongly support universal adherence to the NPT and the goal of a Middle East zone free of weapons of mass destruction and their delivery systems. We have been clear that this worthy goal is enormously complex and achievable once essential conditions are in place.

Notwithstanding these challenges, we remain committed to supporting efforts to convene a conference on the establishment of a WMD-free zone in the Middle East. Getting there requires that the regional states agree on acceptable arrangements. Politically motivated resolutions will only move the regional states farther apart and undermine the trust and confidence necessary for resuming dialogue. We continue to believe that the only way to make meaningful progress is through face-to-face dialogue between the regional parties. The United States stands ready to actively support such discussions, but the impetus must come from the region itself. We encourage all the regional states, including the sponsors of this resolution, to call for renewed regional dialogue, so that real progress can be made toward a Middle East free of weapons of mass destruction.

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On November 11, 2015, Under Secretary Gottemoeller delivered remarks at a security colloquium in Amman, Jordan on principles for a WMD-Free Zone in the Middle East. Her remarks are excerpted below and available at <http://www.state.gov/t/us/2015/249440.htm>.

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... [O]ne of the most important and long-standing security challenges for this region is the establishment of a Weapons of Mass Destruction (WMD) Free Zone. We are now at a crossroad on this particular issue and we have two paths. The first is to assume that the region is incapable—because of politics and distrust—of creating a zone. The second is to accept that this region can and must create this zone.

Regions across the globe have managed to overcome disputes and differences to create nuclear weapon “free zones” and there is no doubt that such zones, when properly crafted, can play an important role in contributing to international peace, security, and stability.

The United States has long supported the goal of a Middle East free of all weapons of mass destruction (WMD) and their delivery systems, and we have worked actively over the past five years to fulfill a commitment we made at the 2010 Nuclear Non-Proliferation Treaty (NPT) Review Conference to convene a conference on the establishment of a Middle East WMD Free Zone.

Of course, we are also adamant that any conference related to a zone and the zone itself must emanate from the region and be based on arrangements freely arrived at by the regional states themselves.

While there is no one-size fits all approach to this and the region itself must do the heavy lifting, outside parties can help with the process.

To this end, the United States collaborated closely with the two other NPT depositaries (the United Kingdom and Russian Federation), along with the United Nations to facilitate direct regional dialogue aimed at reaching consensus on the agenda and modalities for the proposed conference. I want to commend the role of the Government of Finland, and in particular Ambassador Laajava as the conference facilitator for his tireless work.

These efforts culminated in five rounds of multilateral consultations held in Glion and Geneva, Switzerland, which we believe yielded important progress in several areas.

First, and most importantly, for the first time since the 1990s, Israel and Arab states held face-to-face meetings to substantively discuss regional arms control and non-proliferation issues. These meetings, while informal, made tangible progress in narrowing the gap among the regional states.

Through the consultative process, Arab states contributed ideas and commentary on conference modalities, and Israel's position evolved significantly. Despite early concerns regarding participation in an NPT-originated process to which it was not a party, Israel attended the consultations at a senior level, and eventually expressed its readiness to attend the proposed conference once regional states reached consensus on an agenda and other arrangements. Israel made clear, and we agree, that such a forum is urgently needed in order for regional states to address common security challenges. Unfortunately, the NPT Review Conference this spring did not produce consensus recommendations on how to advance the issue over the next five-year review cycle, leaving no clear path ahead toward convening the proposed conference or furthering the goal of a zone.

As I said, we are at a crossroads now and this region can choose collectively to make this goal a reality.

The various parties will disagree on the reasons for this lack of consensus, but rather than waste energy assigning blame, now is a time to look forward. Recriminations over the outcome of the Review Conference will not advance this issue; we need to think hard about the tough decisions that will be needed to move this process forward, building on the achievements made during the Glion and Geneva consultations.

From the start, we have approached this effort fully cognizant of the enormous complexity of making such a zone a reality. On a technical level, the creation of a zone that extends to all categories of weapons of mass destruction—nuclear, chemical, biological, as well as their delivery systems—has never been attempted elsewhere in the world and presents a unique set of verification challenges. Much work has been done by various organizations to advance this technical topic, and that work should continue.

Politically and strategically, the Middle East poses a number of factors not present in other regions of the world that have created nuclear weapon free zones, including the non-recognition of Israel by the majority of regional states, the regional tendency to resort to international pressure rather than direct engagement, and a host of complex security and compliance issues.

Conceptually, the parties view the role of arms control and regional security in very different ways. Arab states consider a zone treaty to be a predicate for better relations and

improved security among states in the region. For Israel, it's the reverse, with confidence building and security as the necessary precursor for achievement of a regional zone. It will be necessary to find ways to bridge this divide for any process the parties may consider.

Despite these challenges, again, progress is possible if all parties work in a mutually fair and collaborative manner.

First and foremost, a successful zone can only happen through direct, face-to-face dialogue among the regional states themselves.

Every other nuclear-free zone in the world has been created through direct dialogue among regional states. Unfortunately, the approach in the Middle East has been exactly the opposite: avoiding direct regional dialogue and asking P 5 states—more precisely, the United States, the United Kingdom and Russia, with support from the UN—simply to impose a Zone. Direct dialogue among states is even more important in the Middle East, due to the serious lack of trust in the region, which is deeply seated and reflected in the stark difference of views regarding how to advance regional arms control.

We have privately and publically encouraged the regional parties to resume direct discussions, so that the gap between the regional states can be bridged and the proposed conference convened.

We are willing to support discussions in various formats, but believe that progress may be more achievable in a smaller format, which would allow for deeper discussions of the issues.

Other approaches, including actions aimed at coercing or isolating regional parties through international fora like the UN or in technical agencies like the IAEA, will not advance a WMD-free zone in the region and will continue to prove counterproductive. As such, the United States will continue to strongly reject such efforts.

Finally, the U.S. position is unwavering—we support a Middle East WMD Free Zone, but we are firm in our belief that the impetus for further progress such efforts must come from the countries here in the region.

All regional parties must now show the political will to resume the process of building a zone through consensus, direct dialogue, and a broad-based agenda.

No one should be under the illusion that this process will be easy. This is an enormously complex, long-term goal, which will require that essential conditions be in place, including a comprehensive and durable peace in the region, and compliance by all regional states with their arms control and non-proliferation obligations.

It can seem daunting, but as Secretary Kerry emphasized, the idea of a WMD-free zone in the Middle East is “a hugely ambitious goal and fraught with challenges, but ambitious goals are always the ones worth pursuing.”

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5. Nuclear Security

a. Nuclear security treaties

On June 4, 2015, Secretary Kerry issued a press statement to announce that the United States Congress had passed, and President Obama had signed, implementing legislation for several nuclear security treaties. Secretary Kerry's press statement follows and is available at <http://www.state.gov/secretary/remarks/2015/06/243196.htm>.

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This week, President Obama signed into law implementing legislation for treaties that represent legal cornerstones of the global nuclear security architecture, the strengthening of which is a key goal of the Nuclear Security Summits. This legislation will also enhance protections against threats from nuclear, biological, and chemical weapons.

...The Department of State is now preparing the instruments of ratification of these important treaties for the President's signature.

I want to personally thank the U.S. Congress, particularly the House and Senate Judiciary Committees, for their efforts on this critically important legislation. It is a laudable example of the good we can accomplish when two branches of government and two parties come together to strengthen our nation's security. It is also yet another indication that the United States is committed on a bipartisan basis to eliminating the greatest threat to global security: nuclear terrorism.

The [Convention on the Physical Protection of Nuclear Material] amendment establishes new international norms for the physical protection of nuclear materials and facilities, including protection from sabotage. It also provides for expanded cooperation among state parties and defines new criminal offenses that must be made punishable by state parties under their domestic law. Once our national ratification actions are completed, the United States will work with other countries to secure the 16 additional ratifications that are needed in order for the amendment to enter into force with the goal of achieving this by the end of the year.

The [International Convention for the Suppression of Acts of Nuclear Terrorism] provides a specific legal basis for international cooperation in the investigation, prosecution, and extradition of those who commit terrorist acts involving radioactive material or a nuclear device, or any device that may emit radiation or disperse radioactive material.

The [two Protocols to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation] establish the first international treaty framework for criminalizing certain terrorist acts, including using a ship or fixed platform in a terrorist activity, transporting weapons of mass destruction or their delivery systems and related materials, and transporting terrorist fugitives.

U.S. ratification of these treaties will honor U.S. pledges made at the 2010 Nuclear Security Summit and at the Proliferation Security Initiative 10th Anniversary Meeting in 2013. We call on all countries who share our commitment to preventing nuclear terrorism to join and fully implement these treaties.

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On September 30, 2015, the United States deposited its instrument of ratification for the International Convention for the Suppression of Acts of Nuclear Terrorism ("Nuclear Terrorism Convention" or "ICSANT") at the UN in New York. See September 30, 2015 State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/09/247636.htm>. The United States became the 100th State Party to the Treaty. As described in the September 30 media note, the

Nuclear Terrorism Convention provides “a legal basis for international cooperation in the investigation, prosecution, and extradition of those who commit offenses involving radioactive material or a nuclear device, or any device that may emit radiation or disperse radioactive material.” The Nuclear Terrorism Convention was adopted on April 13, 2005 and the U.S. Senate gave its advice and consent to ratification in 2008. See *Digest 2008* at 94-95. But the United States could not deposit its instrument of ratification until the passage of implementing legislation in 2015, discussed above. The Convention entered into force for the United States on October 30, 2015.

On July 31, 2015, the United States deposited its instrument of ratification to the Amendment to the Convention on the Physical Protection of Nuclear Material, adopted at Vienna July 8, 2005. The Amendment had not yet entered into force at the end of 2015, as the threshold number of ratifications had not yet been met.*

On August 28, 2015, the United States deposited its instrument of ratification to the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted at London, October 14, 2005. The Protocol entered into force for the United States on November 26, 2015.

Also on August 28, 2015, the United States deposited its instrument of ratification to the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, adopted at London on October 14, 2005. The Protocol entered into force for the United States on November 26, 2015.

b. *Threat of nuclear terrorism*

On September 18, 2015, Under Secretary Gottemoeller gave a speech on the threat of nuclear terrorism at The Citadel’s Intelligence and Security Conference. Her remarks are excerpted below and available at <http://www.state.gov/t/us/2015/247083.htm>.

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During the Cold War, efforts to maintain strategic stability and deterrence helped to prevent the use of nuclear weapons. Today, the threats we face do not lend themselves to the classic understandings of nuclear deterrence. As President Reagan’s former Secretary of State George Shultz has said, “If...the people who are [perpetrating] suicide attacks...get a nuclear weapon, they are almost by definition not deterrable.”

In a multipolar and asymmetric world, the constraints that held back nuclear conflagration for so long are straining at the seams.

There are two primary pathways by which terrorist groups could acquire a nuclear weapon: by directly acquiring a nuclear weapon itself from a nuclear weapons state’s arsenal, or by acquiring enough nuclear materials to construct an improvised nuclear device.

* Editor’s note: That threshold for entry into force was reached in 2016.

The successful detonation by a terrorist group of even a crude and improvised nuclear device in a major city could result in the deaths of thousands and have significant, if not unfathomable, economic and political global consequences.

Recognizing this threat, President Obama has made preventing nuclear terrorism one of the United States' top foreign policy priorities, labeling it in his 2009 Prague speech "the single most important threat" to U.S. national security. This President and this Administration have backed up that assessment with the most concerted diplomatic effort to address nuclear security threats worldwide ever undertaken within the international community.

The fundamental task at hand is to prevent terrorists from accessing nuclear weapons or the fissile material that goes into a nuclear weapon. Without the material, which a terrorist organization cannot produce on its own, the threat is eliminated.

A cornerstone of this effort has been the Nuclear Security Summit process. The Summits are head-of-state-level events, attended by over 50 countries and international organizations. World leaders convene to discuss the risks of nuclear terrorism and commit to addressing those risks. To date there have been three Nuclear Security Summits, the first held in Washington in 2010, the second in Seoul in 2012, and the third in The Hague in 2014. The President will host the fourth Summit in Washington early in 2016.

As an expert who has worked on these issues for my whole career, I'll admit that fissile material control and risk reduction is a little "in the weeds" for heads of state. Fortunately, that has not been a problem at all. The leaders involved in the Nuclear Security Summits have really done their homework and are finding critical and creative solutions to this global problem. They have also committed their countries to pragmatic tasks to advance nuclear security.

The Summit process is advancing the twin goals of enhancing the international nuclear security architecture, and strengthening efforts to better secure vulnerable nuclear materials. Participants make nuclear security commitments at the Summits in the form of a Work Plan, Communiqués, national statements, and joint statements. Participants also share the results of their efforts at the Summits in their national progress reports. If you are interested, you can find them all on the State Department website.

These efforts are bearing fruit. The number of countries and facilities with Highly-Enriched Uranium (HEU) and Plutonium—the key materials in nuclear weapons—is decreasing and the quantities of these materials have been substantially reduced. Security practices and procedures at nuclear sites and in transit are improving and countries across the globe are better prepared to counter nuclear smuggling. In short, nuclear security measures are stronger worldwide.

While the 2016 Summit is expected to be the last in its current format, we look forward to working with Summit participants and all states on continued nuclear security efforts. International organizations such as the International Atomic Energy Agency (IAEA), the UN, the Global Partnership Against the Spread of Weapons and Materials of Mass Destruction, the Global Initiative to Combat Nuclear Terrorism, and INTERPOL will continue to facilitate this cooperation.

When it comes to nuclear terrorism, we are safer now than we were five years ago, but more remains to be done. The United States will continue to work with international partners to ensure that dangerous nuclear materials are accounted for and secured worldwide. Unending vigilance is required if we are to ensure that terrorist groups who may seek to acquire these materials are never able to do so.

Working toward this end, the United States puts its money where its mouth is. We are the largest national contributor to the IAEA's Nuclear Security Fund, providing more than \$70 million since 2010. These funds support cost-free experts, mission and technical visits to Member States, the development of nuclear security guidance and best practices, and the Incident and Trafficking Database.

The State Department's Counter Nuclear Smuggling Program (CNSP) is also working with key international partners to strengthen capacity to investigate nuclear smuggling networks, secure materials in illegal circulation, and prosecute the criminals who are involved. Countries such as Georgia and Moldova are to be commended for their recent arrests of criminals attempting to traffic HEU; significant progress has been made in this area. Unfortunately, continued seizures of weapon-usable nuclear materials indicate that these materials are still available on the black market.

In fact, in many countries, it is not illegal to possess or traffic dangerous radioactive or nuclear materials. In some countries where it is illegal, their existing criminal code does not allow for the adequate prosecution or sentencing of the criminals convicted of doing so. To help fill these gaps, CNSP helps countries amend their criminal code to incorporate the necessary provisions and allow for sentences that serve as both punishment and deterrent to these crimes. CNSP also conducts workshops and exercises with the police, prosecutors, and judges who handle these unique cases in order to ensure they are able to hold these criminals accountable.

A key piece of any criminal prosecution is ensuring that evidence is properly handled, analyzed, and presented in court. It's not different for nuclear and fissile materials, but this kind of evidence presents a unique challenge to law enforcement and technical experts—the challenge being that such material is radioactive. CNSP works with countries to build their analytical capabilities to meet courtroom requirements for the law and of course, for nuclear safety. This type of analysis belongs to a field known as nuclear forensics, and the United States is at the forefront of its study.

Similar to traditional forensic science, nuclear forensics aims to link materials, people, places, and events. Forensics can be aided when we are able to identify known characteristics and features of nuclear materials or devices. The United States has even developed nuclear forensic capabilities to identify where seized nuclear or other radioactive materials or a radiological dispersal device—also known as a dirty bomb—may have originated or who may be responsible. Such capabilities incentivize countries to make sure any material they have is locked down and secure. They would never want to be associated with a terrorist nuclear incident.

Multilaterally, the United States continues to Co-Chair with Russia the Global Initiative to Combat Nuclear Terrorism (GICNT), which is a voluntary partnership of 86 countries and five official observers committed to strengthening global capacity to prevent, detect, and respond to nuclear terrorism. Despite the terrible crisis that Russia created in Ukraine, our continued working relationship with Russia on the GICNT demonstrates our mutual concern over the threat of nuclear terrorism.

Over the past two years, the GICNT has held 15 multilateral activities, including workshops, tabletop exercises, and other practical activities that help partners address difficult and emerging nuclear security challenges.

GICNT has even held a mock trial focused on introducing nuclear forensic evidence in the courtroom to prosecute terrorist acts involving the use or unauthorized possession of nuclear or other radioactive materials. It underscored the need for countries to adopt strong legal provisions criminalizing these illicit acts before an incident occurs, reinforcing and

complementing the work the United States has already been doing in this area. It also highlighted the challenges of communicating scientific conclusions in judicial proceedings.

By focusing on the “human element” of nuclear security, the State Department’s Global Threat Reduction (GTR) program seeks to reduce the risk that non-state actors or proliferant states could develop an improvised nuclear device. While “guns, gates and guards” are an important aspect of nuclear security, GTR focuses on making sure that the staff at a nuclear facility are trustworthy and report suspicious activity. It is this human reliability factor that makes all the difference in nuclear security.

Developing a nuclear security culture is especially important in countries around the world that are now developing the underlying technical and human infrastructure. GTR works with nuclear technical organizations around the world to support the vetting of staff working to diminish the risk that an employee sympathetic to—or coerced by—terrorist groups, could divert nuclear materials or expertise.

There are also global legal structures that help reduce the risk of nuclear terrorism.

Back in June, the U.S. Congress enacted long-sought implementation legislation for the International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT), an amendment to the Convention on the Physical Protection of Nuclear Material, and the Protocols to the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. It is a mouthful, I know and the news of this Congressional action was certainly not a trending topic on Twitter.

Nevertheless, with enactment of this legislation, the United States was now in a position to move forward to ratify these important treaties. I will be depositing our instrument of ratification for the ICSANT at the United Nations next week. This legislation was also significant in its bipartisan support: it is important for our national security that nuclear security remain a high-priority, non-partisan issue on Capitol Hill.

The United States knows that nuclear security efforts are never “finished.” As long as nuclear and radioactive materials exist, they require our utmost commitment to their protection, control, accounting and disposition.

With that, I will close, so we have time for questions, but I want to leave you with a final point. Nuclear terrorism is an absolutely terrifying phenomenon—an unthinkable danger looming over our cities, our families, our children. We have to be aware of this danger and we have to be aware of the fact that we can prevent it from ever happening.

The nonproliferation efforts I have mentioned today are all critical to our safety, as is our continued work on arms control and disarmament. The smaller the amount of weapons and materials, the smaller the risk. It’s just that simple and when it comes to international security, simple is rare. So nuclear disarmament is a goal that is manifestly in our national interest. It is the way, once and for all, to deal with nuclear terrorism.

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6. Country-Specific Issues

a. Democratic People’s Republic of Korea (“DPRK” or “North Korea”)

On May 19, 2015, Assistant Secretary Rose delivered remarks on the U.S. response to the threat posed by North Korean ballistic missile and WMD programs. His remarks are excerpted below and available at

<http://www.state.gov/t/avc/rls/2015/242610.htm>.

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The Threat from the DPRK's Ballistic Missile and WMD Programs

Just ten days ago, according to U.S. government information, North Korea conducted a ballistic missile-related ejection test, which was related to the DPRK's effort to develop a ballistic missile submarine. While this test is just one step in a long process, it nevertheless heightened tensions on the Peninsula and in the region. The test was also a clear violation of multiple UN Security Council Resolutions, including UNSCR 1718, that require North Korea to suspend all activities related to its ballistic missile program.

North Korea's ballistic missile programs date back to the 1990s.

In 1998, the DPRK conducted a test launch of a long-range ballistic missile that overflew Japan and irresponsibly dropped a rocket stage close to Japanese territory. The launch was not a success. However, the launch was a highly provocative act that spurred a concerted effort by the United States and our Allies to monitor, deter, and counter North Korean ballistic missile capabilities.

Since that time, North Korea has continued to make quantitative and qualitative advances in its ballistic missile program. For example, in 2012 North Korea placed a satellite in orbit with its Taepo-Dong space launch vehicle, which could be used as a ballistic missile. Furthermore, at a parade in Pyongyang in 2012, the regime unveiled what appeared to be a mobile ICBM (KN-08) with a range purportedly capable of reaching the United States. In addition to this ICBM, North Korea also has an intermediate-range ballistic missile (IRBM), which has not been flight-tested, but that is potentially capable of holding Guam and the Aleutian Islands at risk.

As part of a series of provocations last year, North Korea conducted multiple short- and medium-range ballistic missile launches and threatened to conduct additional longer-range launches. Today, North Korea fields hundreds of Scud and No Dong missiles that can reach all of the Korean Peninsula and threaten U.S. forces deployed in the region.

Running in parallel with an ever-evolving ballistic missile program, North Korea's nuclear weapons program remains a priority for the ruling regime. The United States and its Five Party partners—the Republic of Korea, Japan, China, and Russia—remain committed to North Korea's complete, verifiable and irreversible denuclearization. We remain open to dialogue with the DPRK, with the aim of returning to credible and authentic negotiations on the denuclearization of the Korean Peninsula, but North Korea has thus far been defiant. One of North Korea's more inflammatory actions was its third nuclear test conducted February 2013, timed with the birthday of the late Kim Jong-il.

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The BMD Response to the Threat from North Korea

The U.S. approach to defending against the possible ballistic missile threats from North Korea is two pronged. First, the United States is improving its capability to protect the U.S. homeland from an intercontinental ballistic missile launched from North Korea. Second, the United States works with regional allies to defend their territories from North Korean aggression,

and in the case of our alliances with Seoul and Tokyo, to develop alliance solutions to these threats. Simply put, as long as North Korea continues to develop and deploy ballistic missiles, the United States will work with our allies and partners to defend against this threat. This is a measured, limited, and prudent response.

With respect to the defense of the United States homeland, we are working toward greater missile defense capability and capacity with our commitment to increase our homeland defenses to 44 Ground Based Interceptors (GBIs) by the end of 2017. Additionally, we are also working to field a new kill vehicle for our Ground Based Interceptors and are continuing the development of a Long-Range Discrimination Radar (LRDR) with persistent sensor coverage that will improve our ability to discern between decoys and real incoming missiles fired against the U.S. homeland.

Our regional missile defenses in the Asia-Pacific help to reassure our allies and to deter North Korea from seeking to coerce or attack its neighbors.

We have encouraged our allies to contribute to their own defense by providing capabilities that can enhance their own security and add to stability in the Asia-Pacific region. The Korean Integrated Air and Missile Defense capability is a means to do just that and we continue to support South Korea in its development.

There has been a lot of discussion in the press recently about the possible deployment of a Terminal High Attitude Area Defense or THAAD system in the region. I will underscore although we are considering the permanent stationing of a THAAD unit on the Peninsula, we have not made a final decision, and we have had no formal consultations with the Republic of Korea on THAAD deployment. To be clear, THAAD is a purely defensive system that would improve our ability to intercept short- and medium-range ballistic missiles from North Korea. It does not and cannot impact broader strategic stability with Russia and China.

Earlier this year, I had an opportunity to visit the Korean demilitarized zone. Seeing UN and North Korean military personnel just yards apart highlighted the immediate stake South Korea has in preventing missile strikes fired from the North. We have worked closely with South Korea to ensure that our Alliance has the capacity to do just that. The United States deploys Patriot PAC-3 batteries in South Korea to defend U.S. and South Korean forces. In addition, South Korea is taking steps to enhance its own air and missile defense systems, which include sea- and land-based sensors, and upgrading its Patriot PAC-2 batteries to the PAC-3 system. Additionally, the U.S. Department of Defense continues to consult with South Korea about how it can improve its missile defense capabilities as part of an Alliance response to the growing North Korean missile threat.

North Korea's missile development does not just threaten South Korea, it also explicitly threatens Japan and the U.S. ability to deploy forces into the region in the event of a crisis on the Korean Peninsula. A number of North Korea's provocative missile tests have overflowed the Sea of Japan, creating understandable cause for alarm. In response to this growing threat, the United States and Japan continue to deepen their cooperation on BMD in several ways. Just last December, the United States and Japan announced the deployment of the second AN/TPY-2 radar to Japan. This radar, along with the first AN/TPY-2 already deployed in Japan, provides a critical addition to our regional deterrence and defense architecture, and builds on a deep and broad cooperation between the United States and Japan. This cooperation also includes joint development of an advanced interceptor and continuing work on enhancing interoperability between U.S. and Japanese forces.

Finally, we welcomed the inclusion of missile defense in the updated guidelines for U.S.-Japan defense cooperation. This reflects the valuable contribution of BMD to our collective self-defense and an acknowledgement of North Korea's destabilizing role in the region.

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Conclusion

To conclude, the diplomatic pressure on North Korea continues to intensify. In January, President Obama signed an Executive Order that authorizes new sanctions. Last September, the IAEA General Conference unanimously condemned North Korea's nuclear program, which China has exhibited unprecedented firmness in opposing.

Even as the international community grows more united, the United States and its allies cannot and will not stand idle in the face of threats and destabilizing actions by North Korea. Simply put, North Korea cannot obtain the security, prosperity, or respect it wants without negotiating an end to its provocative nuclear and missile programs.

Our goal remains to bring North Korea into compliance with all relevant United Nations Security Council Resolutions and its commitments under the 2005 Joint Statement of the Six Party Talks. We continue to call on North Korea to take credible steps to demonstrate its genuine commitment to denuclearization. Until the day North Korea embraces that opportunity, the United States will work to build homeland and regional missile defenses to deter and to respond to North Korean aggression.

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b. Iran—the Joint Comprehensive Plan of Action

On July 14, 2015, Iran and the P5+1 (the United States, China, France, Russia, and the UK, plus Germany), in coordination with the EU, reached an understanding on a Joint Comprehensive Plan of Action ("JCPOA") to address concerns over Iran's nuclear program. This understanding, which is not a legally binding international agreement, builds on the Joint Plan of Action ("JPOA"), which negotiators reached on November 24, 2013 (see *Digest 2013* at 468-71) and became effective on January 20, 2014 (see *Digest 2014* at 620-29 and 825-30). Previously, on April 2, 2015, the EU, P5+1, and Iran had arrived at a consensus on the key parameters of what became the JCPOA. See April 2, 2015 State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/04/240170.htm>. Secretary Kerry's remarks after these parameters were announced in April in Lausanne are available at <http://www.state.gov/secretary/remarks/2015/04/240196.htm>. President Obama also delivered remarks on the April 2 parameters for the JCPOA, which he described as "cut[ting] off every pathway that Iran could take to develop a nuclear weapon." Daily Comp. Pres. Docs. 2015 DCPD Doc. No. 00230 (Apr. 2, 2015).

After the JCPOA was reached in July, the JPOA's provisions remained in place throughout 2015 as Iran began to take the key nuclear steps for implementation of the JCPOA. Under the JCPOA, once the International Atomic Energy Agency ("IAEA") verifies

that Iran has taken all of those key nuclear-related steps, the sanctions relief outlined in the JCPOA becomes effective.

Key excerpts from the JCPOA are identified in a White House summary, available at https://www.whitehouse.gov/sites/default/files/docs/jcpoa_key_excerpts.pdf and provided below. The JCPOA in its entirety is available at <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/>.

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Preamble and General Provisions

- The full implementation of this JCPOA will ensure the exclusively peaceful nature of Iran's nuclear program.
- Iran reaffirms that under no circumstances will Iran ever seek, develop, or acquire any nuclear weapons.
- This JCPOA will produce the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran's nuclear program.
- A Joint Commission consisting of the E3/EU+3 and Iran will be established to monitor the implementation of this JCPOA and will carry out the functions provided for in this JCPOA.
- The IAEA will be requested to monitor and verify the voluntary nuclear-related measures as detailed in this JCPOA. The IAEA will be requested to provide regular updates to the Board of Governors, and as provided for in this JCPOA, to the UN Security Council.
- The E3+3 will submit a draft resolution to the UN Security Council endorsing this JCPOA affirming that conclusion of this JCPOA marks a fundamental shift in its consideration of this issue and expressing its desire to build a new relationship with Iran.

Nuclear

Enrichment, Enrichment R&D, Stockpiles

- Iran's long term plan includes certain agreed limitations on all uranium enrichment and uranium enrichment-related activities including certain limitations on specific research and development (R&D) activities for the first 8 years, to be followed by gradual evolution, at a reasonable pace, to the next stage of its enrichment activities for exclusively peaceful purposes.
- Iran will begin phasing out its IR-1 centrifuges in 10 years. During this period, Iran will keep its enrichment capacity at Natanz at up to a total installed uranium enrichment capacity of 5060 IR-1 centrifuges. Excess centrifuges and enrichment-related infrastructure at Natanz will be stored under IAEA continuous monitoring.
(*Note: Iran currently has about 19,000 IR-1 and advanced IR-2M centrifuges installed*)
- Based on its long-term plan, for 15 years, Iran will keep its level of uranium enrichment at up to 3.67%.
(*Note: Prior to the Joint Plan of Action, Iran enriched uranium to near 20%*)
- Iran will refrain from any uranium enrichment and uranium enrichment R&D and from keeping any nuclear material at Fordow for 15 years.

(Note: Iran currently has about 2,700 IR-1 centrifuges installed at Fordow of which about 700 are enriching uranium)

- Iran will convert the Fordow facility into a nuclear, physics and technology center.
- 1044 IR-I machines in six cascades will remain in one wing at Fordow. Two of those six cascades will spin without uranium and will be transitioned, including through appropriate infrastructure modification, for stable isotope production. The other four cascades with all associated infrastructure will remain idle.
- During the 15 year period, Iran will keep its uranium stockpile under 300 kg of up to 3.67% enriched UF₆ or the equivalent in other chemical forms.

(Note: Iran currently maintains a stockpile of about 10,000 kg of low-enriched UF₆)

- All other centrifuges and enrichment-related infrastructure will be removed and stored under IAEA continuous monitoring.

Arak, Heavy Water, Reprocessing

- Iran will design and rebuild a modernized heavy water research reactor in Arak, based on an agreed conceptual design, using fuel enrichment up to 3.67%, in the form of an international partnership which will certify the final design. The reactor will support peaceful nuclear research and radioisotope production for medical and instructional purposes. The redesigned and rebuilt Arak reactor will not produce weapons grade plutonium.
- Iran plans to keep pace with the trend of international technological advancement in relying on light water for its future power and research with enhanced international cooperation including assurance of supply of necessary fuel.
- There will be no additional heavy water reactors or accumulation of heavy water in Iran for 15 years.
- Iran intends to ship out all spent fuel for all future and present power and research nuclear reactors.

Transparency and Confidence Building Measures

- Iran will provisionally apply the Additional Protocol to its Comprehensive Safeguards Agreement in accordance with Article 17 b) of the Additional Protocol.
- Iran will fully implement the “Roadmap for Clarification of Past and Present Outstanding Issues” agreed with the IAEA, containing arrangements to address past and present issues of concern relating to its nuclear program.
- Iran will allow the IAEA to monitor the implementation of the above voluntary measures for their respective durations, as well as to implement transparency measures, as set out by the JCPOA and its Annexes. These measures include: a long-term presence in Iran; IAEA monitoring of uranium ore concentrate produced by Iran from all uranium ore concentrate plants for 25 years; containment and surveillance of centrifuge rotors and bellows for 20 years; use of IAEA approved and certified modern technologies including on-line enrichment measure and electronic seals; and a reliable mechanism to ensure speedy resolution of IAEA access concerns for 15 years, as defined in Annex I.
- Iran will not engage in activities, including at the R&D level, that could contribute to the development of a nuclear explosive device, including uranium or plutonium metallurgy activities.
- Iran will cooperate and act in accordance with the procurement channel in this JCPOA, as detailed in Annex IV, endorsed by the UN Security Council resolution.

Sanctions

- The UN Security Council resolution endorsing the JCPOA will terminate all the provisions of the previous UN Security Council resolutions on the Iranian nuclear issue simultaneously with the IAEA-verified implementation of agreed nuclear-related measures by Iran and will establish specific restrictions.
- The EU will terminate all provisions of the EU Regulation, as subsequently amended, implementing all the nuclear related economic and financial sanctions, including related designations, simultaneously with IAEA-verified implementation of agreed nuclear-related measures by Iran as specified in Annex V.
- The United States will cease the application, and will continue to do so, in accordance with the JCPOA, of the sanctions specified in Annex II, to take effect simultaneously with the IAEA-verified implementation of the agreed upon related measures by Iran as specified in Appendix V.
(*Note: U.S. statutory sanctions focused on Iran's support for terrorism, human rights abuses, and missile activities will remain in effect and continue to be enforced.*)
- Eight years after Adoption Day or when the IAEA has reached the Broader Conclusion that all the nuclear material in Iran remains in peaceful activities, whichever is earlier, the United States will seek such legislative action as may be appropriate to terminate or modify to effectuate the termination of sanctions specified in Annex II.

Implementation Plan

- Finalization Day is the date on which negotiations of this JCPOA are concluded among the E3/EU+3 and Iran, to be followed promptly by submission of the resolution endorsing this JCPOA to the UN Security Council for adoption without delay.
- Adoption Day is the date 90 days after the endorsement of this JCPOA by the UN Security Council, or such earlier date as may be determined by mutual consent of the JCPOA participants, at which time this JCPOA and the commitments in this JCPOA come into effect.
- Implementation Day is the date on which, simultaneously with the IAEA report verifying implementation by Iran of the nuclear-related measures described in Sections 15.1 to 15.11 of Annex V, the EU and the United States takes the actions described in Sections 16 and 17 of Annex V.
- Transition Day is day 8 years after Adoption Day or the date on which the Director General of the IAEA submits a report stating that the IAEA has reached the Broader Conclusion that all nuclear material in Iran remains in peaceful activities, whichever is earlier.
- UN Security Council resolution termination day is the date on which the UN Security Council resolution endorsing this JCPOA terminates according to its terms, which is to be 10 years from Adoption Day.

Dispute Resolution Mechanism

- If Iran believed that any or all of the E3/EU+3 were not meeting their commitments under this JCPOA, Iran could refer the issue to the Joint Commission for resolution; similarly, if any of the E3/EU+3 believed that Iran was not meeting its commitments under the JCPOA, any of the E3/EU+3 can do the same. The Joint Commission would have 15 days to resolve the issue, unless the time period was extended by consensus.
- After Joint Commission consideration, any participant could refer the issue to ministers of foreign affairs, if it believed the compliance issue had not been resolved. Ministers

would have 15 days to resolve the issue, unless the time period was extended by consensus.

- If the issue has still not been resolved to the satisfaction of the complaining participant, and if the complaining participant deems the issue to constitute significant non-performance, then that participant could treat the unresolved issue as grounds to cease performing its commitments under this JCPOA in whole or in part and / or notify the UN Security Council that it believes the issue constitutes significant non-performance.

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President Obama delivered remarks on reaching the JCPOA with Iran on July 14, 2015. Daily Comp. Pres. Docs. 2015 DCPD No. 00493, pp. 1-4 (Apr. 2, 2015). The President's remarks are excerpted below.

* * * *

Today, after 2 years of negotiations, the United States, together with our international partners, has achieved something that decades of animosity has not: a comprehensive, long-term deal with Iran that will prevent it from obtaining a nuclear weapon.

* * * *

Today, because America negotiated from a position of strength and principle, we have stopped the spread of nuclear weapons in this region. Because of this deal, the international community will be able to verify that the Islamic Republic of Iran will not develop a nuclear weapon.

This deal meets every single one of the bottom lines that we established when we achieved a framework earlier this spring. Every pathway to a nuclear weapon is cut off. And the inspection and transparency regime necessary to verify that objective will be put in place. Because of this deal, Iran will not produce the highly enriched uranium and weapons-grade plutonium that form the raw materials necessary for a nuclear bomb.

Because of this deal, Iran will remove two-thirds of its installed centrifuges—the machines necessary to produce highly enriched uranium for a bomb—and store them under constant international supervision. Iran will not use its advanced centrifuges to produce enriched uranium for the next decade. Iran will also get rid of 98 percent of its stockpile of enriched uranium.

To put that in perspective, Iran currently has a stockpile that could produce up to 10 nuclear weapons. Because of this deal, that stockpile will be reduced to a fraction of what would be required for a single weapon. This stockpile limitation will last for 15 years.

Because of this deal, Iran will modify the core of its reactor in Arak so that it will not produce weapons-grade plutonium. And it has agreed to ship the spent fuel from the reactor out of the country for the lifetime of the reactor. For at least the next 15 years, Iran will not build any new heavy-water reactors.

Because of this deal, we will, for the first time, be in a position to verify all of these commitments. That means this deal is not built on trust, it is built on verification. Inspectors will have 24/7 access to Iran's key nuclear facilities.

Inspectors will have access to Iran's entire nuclear supply chain: its uranium mines and mills, its conversion facility, and its centrifuge manufacturing and storage facilities. This ensures that Iran will not be able to divert materials from known facilities to covert ones. Some of these transparency measures will be in place for 25 years.

Because of this deal, inspectors will also be able to access any suspicious location. Put simply, the organization responsible for the inspections, the IAEA, will have access where necessary, when necessary. That arrangement is permanent. And the IAEA has also reached an agreement with Iran to get access that it needs to complete its investigation into the possible military dimensions of Iran's past nuclear research.

Finally, Iran is permanently prohibited from pursuing a nuclear weapon under the Nuclear Non-Proliferation Treaty, which provided the basis for the international community's efforts to apply pressure on Iran.

As Iran takes steps to implement this deal, it will receive relief from the sanctions that we put in place because of Iran's nuclear program, both America's own sanctions and sanctions imposed by the United Nations Security Council. This relief will be phased in. Iran must complete key nuclear steps before it begins to receive new sanctions relief. And over the course of the next decade, Iran must abide by the deal before additional sanctions are lifted, including 5 years for restrictions related to arms and 8 years for restrictions related to ballistic missiles.

All of this will be memorialized and endorsed in a new United Nations Security Council resolution. And if Iran violates the deal, all of these sanctions will snap back into place. So there's a very clear incentive for Iran to follow through, and there are very real consequences for a violation.

That's the deal. It has the full backing of the international community. Congress will now have an opportunity to review the details, and my administration stands ready to provide extensive briefings on how this will move forward.

As the American people and Congress review the deal, it will be important to consider the alternative. Consider what happens in a world without this deal. Without this deal, there is no scenario where the world joins us in sanctioning Iran until it completely dismantles its nuclear program. Nothing we know about the Iranian Government suggests that it would simply capitulate under that kind of pressure. And the world would not support an effort to permanently sanction Iran into submission. We put sanctions in place to get a diplomatic resolution, and that is what we have done.

Without this deal, there would be no agreed-upon limitations for the Iranian nuclear program. Iran could produce, operate, and test more and more centrifuges. Iran could fuel a reactor capable of producing plutonium for a bomb. And we would not have any of the inspections that allow us to detect a covert nuclear weapons program. In other words, no deal means no lasting constraints on Iran's nuclear program.

Such a scenario would make it more likely that other countries in the region would feel compelled to pursue their own nuclear programs, threatening a nuclear arms race in the most volatile region of the world. It would also present the United States with fewer and less effective options to prevent Iran from obtaining a nuclear weapon.

But I will remind Congress that you don't make deals like this with your friends. We negotiated arms control agreements with the Soviet Union when that nation was committed to our destruction. And those agreements ultimately made us safer. I am confident that this deal will meet the national security interests of the United States and our allies. So I will veto any legislation that prevents the successful implementation of this deal.

We do not have to accept an inevitable spiral into conflict, and we certainly shouldn't seek it. And precisely because the stakes are so high, this is not the time for politics or posturing. Tough talk from Washington does not solve problems. Hard-nosed diplomacy, leadership that has united the world's major powers offers a more effective way to verify that Iran is not pursuing a nuclear weapon.

Now, that doesn't mean that this deal will resolve all of our differences with Iran. We share the concerns expressed by many of our friends in the Middle East, including Israel and the Gulf States, about Iran's support for terrorism and its use of proxies to destabilize the region. But that is precisely why we are taking this step, because an Iran armed with a nuclear weapon would be far more destabilizing and far more dangerous to our friends and to the world.

Meanwhile, we will maintain our own sanctions related to Iran's support for terrorism, its ballistic missile program, and its human rights violations. We will continue our unprecedented efforts to strengthen Israel's security, efforts that go beyond what any American administration has done before. And we will continue the work we began at Camp David to elevate our partnership with the Gulf States to strengthen their capabilities to counter threats from Iran or terrorist groups like ISIL.

However, I believe that we must continue to test whether or not this region, which has known so much suffering, so much bloodshed, can move in a different direction.

Time and again, I have made clear to the Iranian people that we will always be open to engagement on the basis of mutual interests and mutual respect. Our differences are real and the difficult history between our nations cannot be ignored. But it is possible to change. The path of violence and rigid ideology, a foreign policy based on threats to attack your neighbors or eradicate Israel—that's a dead end. A different path, one of tolerance and peaceful resolution of conflict, leads to more integration into the global economy, more engagement with the international community, and the ability of the Iranian people to prosper and thrive.

This deal offers an opportunity to move in a new direction. We should seize it.

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After the JCPOA was reached on July 14, Under Secretary of State for Political Affairs Wendy Sherman held a special briefing to explain key aspects of the deal. The briefing is excerpted below and available in full at <http://www.state.gov/p/us/rm/2015/245007.htm>. Secretary Kerry also made himself available for a press briefing in Vienna on July 14, a record of which is available at <http://www.state.gov/secretary/remarks/2015/07/244885.htm>.

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Put simply, we have always said that no deal is better than a bad deal and that we had to get a good deal and the right deal, and we believe that this is a very good deal. It fulfills the framework for a comprehensive deal that was reached in Lausanne and goes beyond that framework in several areas. It cuts off all of Iran's pathways to fissile material for a nuclear weapon; it ensures the vigorous inspections and transparency necessary to verify that Iran cannot pursue a nuclear weapon; it ensures that sanctions will snap back into place if Iran violates the deal; and it is a long-term deal, including elements that are permanent.

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This is an issue that was created by the world. It was created by the United Nations Security Council resolutions. It was solved by the world in the P5+1 and the European Union facilitating, and now will be endorsed in a UN Security Council resolution that was introduced by Ambassador Power yesterday and joined by the P5 and, we hope, by every member of the Security Council for passage—we hope early next week. The world has worked hard to resolve this peacefully, and as we come to the 70th anniversary of the United Nations, it is fitting that, in fact, multilateral diplomacy can be shown to work.

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[T]here is an interim period of 60 to 90 days that I think will accommodate ... congressional review. ...

So what we worked out is a process that allows this time and space for the congressional review before it takes effect. And there may be other legislatures who also want to look at this. So it anticipates that there is a period of review, while at the same time allowing the international community to speak.

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[W]hen [UN Security Council Resolution] 1929 was done, ... the arms restrictions sanctions and the missile restrictions, but particularly the arms, were really a consequence of Iran's behavior on the nuclear file and was meant as a further consequence to what it had done. But if you read 1929 carefully, it basically says that once Iran enters into a negotiated solution to show that its program is exclusively peaceful, one could read 1929 to mean that those sanctions should then come off.

However, we are all very concerned about Iran's activities in the region and around the world in terms of the import and export of arms. We are very concerned about the potential transfer of missile technology that might be designed for having the capability of being a delivery system for nuclear weapons. And even though Iran, China, Russia thought that these sanctions, these restrictions, should come off immediately, the rest of the P5+1 did not think they should come off immediately.

And so at the end of the day, we were able to negotiate that these restrictions would stay in place even though one could read 1929 to read that they should have technically come off. We kept them on. We kept them on under Article 41 of Chapter 7 of the UN Security Council resolutions, and we kept them on for some years—the arms for five and missiles for eight.

Now, there are many other resolutions at the UN that cover Hizballah, that cover Syria, that cover Yemen, that impose continuing restrictions on Iran. We have our own unilateral

sanctions that continue to impose restrictions because of their activities around the world that are connected to terrorism or human rights or other missile-related activity. So we think we actually negotiated a very tough consequence in this situation, given that not all of our partners were together. We also knew, because the partners were not together on this issue, that it would be an issue that would happen at the end and would not be resolved until the end, and that's what happened.

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The P5 members have made a political decision and conveyed to the secretary-general of the United Nations that at the end of the termination of the 10-year UNSCR that they will introduce an additional resolution to put in place the same mechanism for an additional five years.

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On July 19, 2015, the State Department transmitted the complete JCPOA, including annexes and related material, to Congress, in accordance with the Iran Nuclear Agreement Review Act of 2015. See State Department July 19, 2015 press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/07/245051.htm>. The transmittal included the Unclassified Verification Assessment Report on the JCPOA and the Intelligence Community's Classified Annex to the Verification Assessment Report. Transmittal of the JCPOA to Congress triggered the 60-day review period, beginning on July 20, under the Iran Nuclear Agreement Review Act.

Ambassador Power announced on the day the JCPOA was reached that the United States would submit a draft Security Council resolution on behalf of the P5+1 and the EU within days that would endorse the deal and take other steps, including replacing the existing Security Council sanctions regime with the restrictions in the JCPOA. See July 14, 2015 statement by Ambassador Power on the Joint Comprehensive Plan of Action, available at <http://iipdigital.usembassy.gov/st/english/texttrans/2015/07/20150714316677.html#axzz45odOagGZ>.

On July 20, 2015 the UN Security Council adopted Resolution 2231 on Iran. U.N. Doc. S/RES/2231 (2015). Ambassador Power provided the U.S. explanation of vote on the resolution, excerpted below and available at <http://usun.state.gov/remarks/6765>.

* * * *

Today we have adopted a UN Security Council resolution enshrining the Joint Comprehensive Plan of Action, JCPOA, agreed to six days ago in Vienna. By now, many are familiar with the basic tenets of the deal, which, if implemented, would cut off all pathways to fissile material for a nuclear weapon for the Islamic Republic of Iran, while putting in place a rigorous inspection and transparency regime to verify Iran's compliance.

The JCPOA will cut the number of Iran's centrifuges by two-thirds and prevent Iran from producing weapons-grade plutonium. Iran will also get rid of 98 percent of its stockpile of enriched uranium—going from a quantity that could produce approximately ten nuclear weapons, to a fraction of what is needed for a single nuclear weapon. The deal will quadruple Iran's breakout time—the time needed to produce enough weapons-grade uranium for one nuclear weapon—from the current estimate of two to three months, to one year. It will also require Iran and all states to comply with legally binding restrictions on nuclear-, conventional arms-, and ballistic missile-related activities.

Ninety days from today, when our respective capitals and legislatures have had a chance to carefully review the deal's provisions, the commitments in the JCPOA should take effect. Sanctions relief will begin only when Iran verifiably completes the initial steps necessary to bring its nuclear program in line with the deal.

It is important today to step back from the JCPOA to its larger lessons—lessons about enforcing global norms, the essential role of diplomacy, the need for ongoing vigilance, and the absolute necessity of the unity of this Council—lessons that have implications both for ensuring implementation of the deal and for tackling other crises that confront us today.

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The first lesson we can learn from how this deal was secured is that it is not enough to agree to global norms, such as that against the proliferation of nuclear weapons. This Council and all the countries of the United Nations must actually take steps to *enforce* global norms. In 2006, in response to Iran's efforts to develop a nuclear weapons program, the United Nations Security Council put in place one of the toughest sanctions regimes in its history, which was complemented by robust sanctions imposed by the United States, several other countries, and the European Union. Faced with Iran's ongoing noncompliance, the UN tightened its sanctions in 2007, 2008, and 2010. This sanctions regime played a critical role in helping lay the groundwork for the talks that would give rise to the JCPOA.

The second lesson is one most eloquently articulated more than fifty years ago by President John F. Kennedy and echoed last week by President Obama: "Let us never negotiate out of fear, but let us never fear to negotiate." Given the devastating human toll of war, we have a responsibility to test diplomacy. In 2010, when then-U.S. Ambassador to the United Nations Susan Rice spoke in this Chamber after the Council strengthened sanctions on Iran, she cited the ways in which Iran had violated its commitments to the IAEA and its obligations under prior Security Council resolutions. Yet she also said, "The United States reaffirms our commitment to engage in robust, principled, and creative diplomacy. We will remain ready to continue diplomacy with Iran and its leaders." And when a credible opening emerged for negotiations, that is exactly what the United States and the other members of the P5+1—the United Kingdom, France, Germany, Russia, and China—and the EU did.

There were many occasions over these last two years of grueling negotiations when any party could have walked away. The distances just seemed too great; the history between us searing; and the resulting mistrust defining. But the United States and our partners knew that we had a responsibility to try to overcome these obstacles and resolve the crisis peacefully. One only has to spend a week in the Security Council, *any* week, and hear accounts of the bloodshed and heartbreak in Yemen, Syria, South Sudan, Darfur, Mali, Libya or any other conflict-ridden part of the world—to be reminded of the consequences of war. Sometimes, as both the UN Charter

and history make clear, the use of force is required, but we all have a responsibility to work aggressively in diplomatic channels to try to secure our objectives peacefully.

This nuclear deal doesn't change our profound concern about human rights violations committed by the Iranian government, or about the instability Iran fuels beyond its nuclear program—from its support for terrorist proxies, to its repeated threats against Israel, to its other destabilizing activities in the region. That is why the United States will continue to invest in the security of our allies in the region and why we will maintain our own sanctions related to Iran's support for terrorism, its ballistic missiles program and its human rights violations.

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But denying Iran a nuclear weapon is important not *in spite* of these other destabilizing actions, but rather *because* of them. As President Obama pointed out, “that is precisely why we are taking this step—because an Iran armed with a nuclear weapon would be far more destabilizing and far more dangerous to our friends and to the world.” So while this deal does not address many of our profound concerns, if implemented, it would make the world safer and more secure.

Yet while reaching this deal matters, our work is far from finished. In the months and even years ahead, the international community must apply the same rigor to ensuring compliance to the JCPOA as we did to drafting and negotiating it. This is my third point: implementation is everything.

And that is precisely why so many verification measures have been built into this deal. The JCPOA will grant the IAEA access when it needs it, where it needs it, including 24/7 containment and surveillance of Iran's declared nuclear facilities. Inspectors will have access to the entire supply chain that supports Iran's peaceful nuclear program—from mining and milling, to conversion, to enrichment, to fuel manufacturing, to nuclear reactors, to spent fuel. If the terms of the deal are not followed, all sanctions that have been suspended can be snapped back into place. And if the United States or any other JCPOA participant believes that Iran is violating its commitments, we can trigger a process in the Security Council that will reinstate the UN sanctions.

The fourth and final lesson we can learn from the process that led us here today is that when our nations truly unite to confront global crises, our impact grows exponentially. The founders of the United Nations understood this concept intrinsically and enshrined it in the Charter, which calls on each of us “to unite our strength to maintain international peace and security.” In the twenty-first century, it is now an axiom that our nations can do more to advance peace, justice and human dignity by working together than any single country can achieve on its own. And indeed that only when we act as *united* nations can we address the world's most intractable problems.

Although we don't see this unity enough here at the UN, the countries of the United Nations did largely unite behind the cause of preventing nuclear proliferation in Iran. And it was the persistent, multilateral pressure that came out of this unity—combined with a critical openness to seeking a diplomatic solution—that gave the P5+1 and EU negotiators the leverage they needed to get the deal that would advance our collective security.

Let me conclude. Ultimately, the only proper measure of this deal—and all of the tireless efforts that went into it—will be its implementation. This deal gives Iran an opportunity to prove to the world that it intends to pursue a nuclear program solely for peaceful purposes. If Iran

seizes that opportunity; if it abides by the commitments that it agreed to in this deal, as it did throughout the period of the JCPOA negotiations; if it builds upon the mutual respect and diligence that its negotiators demonstrated in Lausanne and Vienna; and if it demonstrates a willingness to respect the international standards upon which our collective security rests; then it will find the international community and the United States willing to provide a path out of isolation and toward greater engagement.

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Resolution 2231 terminates all the measures under previous UN Security Council resolutions regarding Iran's nuclear program as of Implementation Day and replaces them with certain binding restrictions on Iran in the nuclear, arms, and missile areas. The resolution incorporates certain provisions of a letter to the Council from the P5+1 outlining the scope and duration of the new restrictions on Iran's nuclear, arms, and missile activities. Resolution 2231 further provides that the Security Council will work in concert with the Joint Commission established by the JCPOA to review proposed transfers to Iran of (primarily) Nuclear Security Group ("NSG")-controlled items and related services.

On July 28, 2015, Secretary Kerry testified before Congress, making the case for its acceptance of the JCPOA. His opening remarks before the House Committee on Foreign Relations are excerpted below and available at <http://www.state.gov/secretary/remarks/2015/07/245369.htm>.

* * * *

We are convinced that the plan that we have developed with five other nations accomplishes the task that President Obama set out, which is to close off the four pathways to a bomb. ...

* * * *

... And after 18 months of very intensive talks, the facts are pretty clear that the plan announced this month by six nations, in fact, accomplishes that. I might remind everybody, all of those other nations have nuclear power or nuclear weapons, and all of them are extremely knowledgeable in this challenge of proliferation.

So under the terms of this agreement, Iran has agreed to remove 98 percent of its stockpile of enriched uranium, dismantle two-thirds of its installed centrifuges, and destroy—by filling it with concrete—the existing core of its heavy water plutonium reactor.

Iran has agreed to refrain from producing or acquiring highly enriched uranium and weapons-grade plutonium for nuclear weapons forever. Now, how do we enforce or verify so that that is more than words, and particularly to speak to the ranking member's question what happens after 15 years, what happens is forever we have an extremely rigorous inspection verification regime, because Iran has agreed to accept and will ratify prior to the conclusion of the agreement and with—if they don't it's a material breach of the agreement—to ratify the

Additional Protocol, which requires extensive access as well as significant additional transparency measures, including cradle-to-grave accountability for the country's uranium, from mining to milling through the centrifuge production to the waste for 25 years. Bottom line: If Iran fails to comply with the terms of our agreement, our intel community, our Energy Department which is responsible for nuclear weaponry, are absolutely clear that we will quickly know it and we will be able to respond accordingly with every option available to us today.

And when it comes to verification and monitoring, there is absolutely no sunset in this agreement—not in 10 years, not in 15 years, not in 20 years, not in 25 years. No sunset ever.

Now remember, ...when we began our negotiations, we faced an Iran that was already enriching uranium up to 20 percent. They already had a facility built in secret underground in a mountain that was rapidly stockpiling enriched uranium. When we began negotiations, they had enough enriched uranium for 10 to 12 bombs already. Already they had installed as many as 19,000 nuclear centrifuges, and they had nearly finished building a heavy water reactor that could produce weapons-grade plutonium at a rate of one to two bombs per year.

Experts put Iran's breakout time when we began—which, remember, is not the old breakout time that we used to refer to in the context of arms control, which is the time to go have a weapon and be able to deploy it. Breakout time as we have applied it is extraordinarily conservative. It is the time it takes to have enough fissile material for one bomb, but for one potential bomb. It's not the amount of time to the bomb. So when we say they'll have one year to a certain amount of fissile material, they still have to go design the bomb, test, do a whole bunch of other things. And I think you would agree no nation is going to consider itself nuclear capable with one bomb.

...[W]hen we started negotiations, the existing breakout time was about two months. We're going to take it to one year and then it tails down slowly, and I'll explain how that provides us with guarantees. But if this deal is rejected, we immediately go back to the reality I just described without any viable alternative, except that the unified diplomatic support that produced this agreement will disappear overnight.

Let me underscore, the alternative to the deal that we have reached is not some kind of unicorn fantasy that contemplates Iran's complete capitulation. I've heard people talk about dismantling their program. That didn't happen under President Bush when they had a policy of no enrichment, and they had 163 centrifuges. They went up to the 19,000. Our intelligence community confirms ...

So in the real world we have two options: Either we move ahead with this agreement to ensure that Iran's nuclear program is limited, rigorously scrutinized, and wholly peaceful; or we have no agreement at all, no inspections, no restraints, no sanctions, no knowledge of what they're doing, and they start to enrich.

Now to be clear, if Congress rejects what was agreed to in Vienna, you will not only be rejecting every one of the restrictions that we put in place – and by the way, nobody's counting the two years that Iran has already complied with the interim agreement, and by the way complied completely and totally, so that we've already rolled their program back. We've reduced their 20 percent enriched uranium to zero. That's already been accomplished. But if this is rejected, we go back to their ability to move down that road. You'll not only be giving Iran a free pass to double the pace of its uranium enrichment, to build a heavy water reactor, to install new and more efficient centrifuges, but they will do it all without the unprecedented inspection and transparency measures that we have secured. Everything that we have tried to prevent will now happen.

Now what's worse? If we walk away, we walk away alone. Our partners are not going to be with us. Instead, they'll walk away from the tough multilateral sanctions that brought Iran to the negotiating table in the first place, and we will have squandered the best chance that we have to solve this problem through peaceful means.

Now make no mistake, from the very first day in office, President Obama has made it clear that he will never accept a nuclear-armed Iran, and he is the only president who has asked for and commissioned the design of a weapon that has the ability to take out the facilities and who has actually deployed that weapon. But the fact is Iran has already mastered the fuel cycle, they've mastered the ability to produce significant stockpiles of fissile material, and you have to have that to make a nuclear weapon. You can't bomb away that knowledge any more than you can sanction it away.

Now I was chair of the Senate Foreign Relations Committee when we ... joined together and put many ... of the Iran sanctions in place, and I know well, as you do, that the whole point was to bring Iran to the negotiating table. Even the toughest sanctions previously did not stop Iran's program from growing from a hundred and ... sixty-three, to 300, to 5,000, to more than 19,000 now. And it didn't stop Iran from accumulating a stockpile of enriched uranium.

Now, sanctions are not an end to themselves. They're a diplomatic tool that has enabled us to actually do what sanctions could not without the negotiation, and that is to rein in a nuclear program that was headed in a very dangerous direction and to put limits on it, to shine a spotlight on it, to watch it like no other nuclear program has ever been watched before. We have secured the ability to do things that exist in no other agreement.

Now, to those who are thinking about opposing this deal because of what might happen in year 15 or year 20, I ask you to simply focus on this: If you walk away, year 15 or 20 starts tomorrow and without any of the long-term access and verification safeguards that we have put in place. What is the alternative? What are you going to do when Iran does start to enrich, which they will feel they have a right to if we walk away from the deal? What are you going to do when the sanctions aren't in place and can't be reconstituted because we walked away from a deal that our five fellow nations accepted?

I've heard critics suggest that the Vienna agreement would somehow legitimize Iran's nuclear program. That is nonsense. Under the agreement, Iran's leaders are permanently barred from pursuing a nuclear weapon and there are permanent restraints and access provisions and inspection provisions to guarantee that. And I underscore: If they try to evade that obligation, we will know it because a civil nuclear program requires full access 24/7, requires full documentation, and we will have the ability to track that as no other program before.

The IAEA will be continuously monitoring their centrifuge production, as centrifuge—so centrifuges cannot be diverted to a covert facility. For the next 25 years, the IAEA will be continuously monitoring uranium from the point that it's produced all the way through production so that it cannot be diverted to another facility. For the life of this agreement, however long Iran stays in the NPT and is living up to its obligations, they must live up to the Additional Protocol, and that Additional Protocol, as we can get into today, greatly expands the IAEA's capacity to have accountability.

So this agreement ... gives us a far stronger detection capability, more time to respond to any attempt to break out toward a bomb, and much more international support in stopping it than we would have without the deal. If we walk away from this deal and then we decide to use military force, we're not going to have the United Nations or the other five nations that

negotiated with us because they will feel we walked away. And make no mistake: President Obama is committed to staying with a policy of stopping this bomb.

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Secretary Kerry spoke on several other occasions while the JCPOA was under review by Congress, advocating for Congressional support. See, *e.g.* September 2, 2015 remarks in Philadelphia, available at <http://www.state.gov/secretary/remarks/2015/09/246574.htm>. The 60-day period for Congressional review concluded without enactment of any legislation on the JCPOA, thus paving the way for implementation. See September 10, 2015 Presidential Statement, Daily Comp. Pres. Docs. 2015 DCPD No. 00607 p. 1 (Sep. 10, 2015). See also September 10, 2015 press statement by Secretary Kerry, available at <http://www.state.gov/secretary/remarks/2015/09/246804.htm> and September 17, 2015 State Department background briefing on JCPOA implementation, available at <http://www.state.gov/r/pa/prs/ps/2015/09/247017.htm>.

October 18, 2015 was “Adoption Day” for the JCPOA, 90 days after the Security Council adopted Resolution 2231 and the date on which the JCPOA came into effect. See State Department background briefing on the JCPOA Adoption Day, available at <http://www.state.gov/r/pa/prs/ps/2015/10/248310.htm>. See also President Obama’s statement on Adoption Day. Daily Comp. Pres. Docs. 2015 DCPD Doc. No. 00734 p. 1 (Oct. 18, 2015). The IAEA confirmed on October 15, 2015 that Iran completed its “Roadmap” steps required by the JCPOA to address issues of past concern, and Iran also notified the IAEA of its intent to provisionally apply the Additional Protocol. See October 18, 2015 press statement by Secretary Kerry, available at <http://www.state.gov/secretary/remarks/2015/10/248311.htm>. The October 18, 2015 press statement summarizes the significance of Adoption Day:

...Iran will now begin taking all of the necessary steps outlined in the JCPOA to restrain its nuclear program and ensure that it is exclusively peaceful going forward. This will include significant changes to its Arak reactor, substantial reductions to its uranium enrichment capacity as well as its enriched uranium stockpiles, and increased access to and continuous monitoring of Iran's declared nuclear facilities by the IAEA.

At the direction of the President, the Department of State and our colleagues throughout the U.S. government will continue taking steps to ensure we are prepared to meet our JCPOA commitments. In order to prepare to implement our sanctions-related commitments, we are today taking contingent action with respect to the waivers of certain statutory nuclear-related sanctions. These waivers will not take effect until Implementation Day, after Iran has completed all necessary nuclear steps, as verified by the IAEA.

As mentioned in Secretary Kerry's statement, President Obama issued a memorandum on Adoption Day, October 18, 2015, instructing federal agencies to prepare for implementation of the JCPOA. 80 Fed. Reg. 66,783 (Oct. 30, 2015). The presidential memo includes the following:

Consistent with section 11 of Annex V of the JCPOA, the Secretary of State, acting under previously delegated authority, is taking action with respect to waivers of relevant statutory sanctions, to take effect upon confirmation by the Secretary of State that Iran has implemented the nuclear-related measures specified in sections 15.1-15.11 of Annex V of the JCPOA, as verified by the International Atomic Energy Agency (IAEA).

I hereby direct you to take all appropriate additional measures to ensure the prompt and effective implementation of the U.S. commitments set forth in the JCPOA, in accordance with U.S. law. In particular, subject to the requirements of applicable U.S. law, I hereby direct you to take all necessary steps to give effect to the U.S. commitments with respect to sanctions described in section 17 of Annex V of the JCPOA, including preparation for the termination of Executive Orders as specified in section 17.4 and the licensing of activities as set forth in section 17.5, to take effect upon confirmation by the Secretary of State that Iran has implemented the nuclear-related measures specified in sections 15.1-15.11 of Annex V of the JCPOA, as verified by the IAEA.

A Joint Commission established under the JCPOA convened in October after Adoption Day and a second time on December 7, 2015 to consult on progress toward reaching "Implementation Day" under the JCPOA. U.S. Ambassador Tom Shannon led the U.S. delegation to the Joint Commission. See State Department media note, December 7, 2015, available at <http://www.state.gov/r/pa/prs/ps/2015/12/250419.htm>

In November, the participants to the JCPOA signed a document outlining the roles of each in the modernization project for reconstruction and redesign of Iran's Arak nuclear reactor such that it cannot be used to produce plutonium for a nuclear weapon. See November 23, 2015 State Department press statement, available at <http://www.state.gov/r/pa/prs/ps/2015/11/249896.htm>. As summarized in the press statement:

In this document, the United States has committed to provide technical support and review of the modernized reactor design, as well as analysis of fuel design and safety standards—consistent with national laws—to ensure it addresses our proliferation concerns and conforms with the design set forth in the JCPOA. In addition, the United States will co-chair with China a Working Group on the Arak project.

On December 15, 2015 the IAEA Board of Governors adopted by consensus a resolution on Iran's nuclear program, addressing the final assessment by the IAEA of the possible military dimensions of Iran's nuclear program in the past. The resolution marked an important step in the transition within the IAEA framework from past concerns regarding the Iranian nuclear program toward a focus on JCPOA implementation. The Director General of the IAEA had issued a report on December 2, 2015 concluding, as had the United States, that Iran had engaged in nuclear weapons-related activities until 2003 and had continued to engage in certain activities relevant to nuclear weaponization for several years beyond 2003. See December 15, 2015 press statement by Secretary Kerry, available at <http://www.state.gov/secretary/remarks/2015/12/250662.htm>.

On December 28, 2015, Secretary Kerry provided an update on progress made toward Implementation Day during the five months since the JCPOA was reached. See December 28, 2015 press statement, available at <http://www.state.gov/secretary/remarks/2015/12/250876.htm>. Excerpts follow from the December 28 press statement.

* * * *

Implementation Day will come when the International Atomic Energy Agency (IAEA) verifies that Iran has completed all of these nuclear commitments, which increase Iran's breakout time to obtain enough nuclear material for a weapon to one year, up from less than 90 days before the JCPOA.

One of the most significant steps Iran has taken toward fulfilling its commitments occurred today, when a ship departed Iran for Russia carrying over 25,000 pounds of low-enriched uranium materials. The shipment included the removal of all of Iran's nuclear material enriched to 20 percent that was not already in the form of fabricated fuel plates for the Tehran Research Reactor. This removal of all this enriched material out of Iran is a significant step toward Iran meeting its commitment to have no more than 300 kg of low-enriched uranium by Implementation Day. The shipment today more than triples our previous 2-3 month breakout timeline for Iran to acquire enough weapons grade uranium for one weapon, and is an important piece of the technical equation that ensures an eventual breakout time of at least one year by Implementation Day.

A number of commercial transactions made this shipment possible, with many countries playing important roles in this effort. Russia, as a participant in the JCPOA and a country with significant experience in transporting and securing nuclear material, played an essential role by taking this material out of Iran and providing natural uranium in exchange. Kazakhstan contributed significantly to this effort as well, providing some of the natural uranium material that Iran has received in exchange for its enriched material, and helping to facilitate the shipment. Kazakhstan's contribution builds on its hosting of early rounds of the P5+1 talks that led to the successful conclusion of the JCPOA. ... Azerbaijan also played a key role in facilitating the shipment.

... Norway contributed critical funding to the commercial transactions involved in reducing the amount of enriched uranium in Iran, and also provided expertise in managing some of these transactions...

The IAEA now must verify that Iran's enriched uranium stockpile is 300 kg or less, as well as confirm that Iran has met all of its other key nuclear steps in the JCPOA before Implementation Day can occur. These steps include removing much of Iran's uranium enrichment infrastructure, which we understand Iran is moving quickly to achieve. Iran also must remove and render inoperable the existing core of the Arak Reactor, effectively cutting off Iran's plutonium pathway to a nuclear weapon. We will continue to consult closely with both the IAEA and other P5+1 members as we move toward verification by the IAEA that Iran has met all of its key nuclear commitments.

The IAEA is also continuing its own preparations to implement the extensive monitoring and verification regime of Iran's entire nuclear program, as specified in the JCPOA. ...

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c. *Russia*

On May 26, 2015, President Obama issued Executive Order 13695, terminating the emergency with respect to the risk of nuclear proliferation created by the accumulation of a large volume of weapons-usable fissile material in the territory of the Russian Federation. Daily Comp. Pres. Docs. 2015 DCPD No. 00396, p. 1 (May 26, 2015). The emergency had been declared in Executive Order 13617 of June 25, 2012. As explained in E.O. 13695, "successful implementation of the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons," has changed the circumstances that gave rise to the declaration of an emergency in E.O. 13617. The President notified Congress of the termination of this emergency. Daily Comp. Pres. Docs. 2015 DCPD No. 00397, pp. 1-2 (May 26, 2015).

On November 12, 2015, Assistant Secretary Rose delivered remarks at a World Affairs Council Panel on Security Challenges Facing the West. His remarks, excerpted below, focus on actions by the Russian Federation, and are available at <http://www.state.gov/t/avc/rls/2015/249465.htm>.

* * * *

Over the past two decades, the United States built a partnership with Russia through dialogue and practical cooperation in areas of common interest, especially with regard to arms control and strategic stability. The good news is that cooperation on strategic arms control with the Russian Federation endures despite a downturn in relations due to Russia's actions in Crimea and Eastern Ukraine. The same cannot be said for many of the arms control instruments that shaped the Post-Cold War landscape and remain fundamental to mutual security in the Euro-Atlantic.

When the United States and Russia signed New START in 2010, bilateral relations were improving and expectations were that a fruitful partnership on further steps was in the making. Russia's illegal actions in Crimea and inconsistent implementation of its arms control obligations have triggered just the opposite. In light of this downturn in relations, the predictability and stability that the New START Treaty provides have proven all the more important. Without this tool, we would not have access to, or limits on, Russia's strategic nuclear forces.

Since the treaty's entry into force in 2011, the United States and Russia have each conducted its annual allocation of 18 on-site inspections and exchanged over 9,600 notifications related to deployment status, location, and movement of strategic nuclear forces. The verification regime of the New START Treaty provides confidence to both sides they will be able to determine whether the other will have met the Treaty's central limits when they take effect in 2018. We know we can do more, which is why President Obama proposed an up to a one-third reduction below the New START level of deployed strategic nuclear forces, an offer that Russia has yet to embrace.

While implementation of New START marches forward, the picture is less rosy with respect to the Intermediate-Range Nuclear Forces Treaty (INF). The United States takes its treaty obligations seriously and expects the same from others. My Bureau publishes the Annual Arms Control Compliance Report. We first announced in the 2014 edition, and reiterated in this year's edition, our determination of Russia's violation of the INF Treaty. Russia's violation is not a technicality or an issue of mistaken identity. This is a serious violation of one of the core tenets of the INF Treaty—not to produce or flight test intermediate-range ground launched cruise missile.

... Russia must abide by its legal obligations to us and others. ... Russia needs to return to compliance. If it does not, we will take whatever steps are needed to ensure our security and that of our allies.

We are pursuing various ways to motivate Russia to return to compliance with the INF Treaty, including possible economic and military responses should Russia persist in its violation and continue to reject our efforts to resolve the issue diplomatically. We will ensure that Russia does not gain any advantage over the United States or its Allies through its pursuit of such systems.

We will also forcefully and factually refute Russia's groundless and diversionary claims that it is the United States that is seeking to undermine the INF Treaty. Far from it, we are fully and faithfully complying with the INF. At every turn, we have offered to engage Russia on their concerns if they engage us on our, and in response we have received nothing but denials ...

At the signing of INF Treaty with General Secretary Gorbachev in 1987, President Reagan expressed hope that an arms control agreement backed by a strict verification regime would serve as a template for other treaties on conventional and nuclear weapons. Indeed, INF served as the forerunner to a future regimes that were staples of U.S. and regional security for decades before falling victim to a new way of operating in Russia—one that selectively implements its arms control agreements.

For example, Russia's illegal actions in Ukraine have violated international commitments and undermined multiple arms control and confidence-building obligations. The presence of Russian military forces in Crimea without Ukraine's consent is a violation of the CFE Treaty. Moreover, since Russia ceased implementation of the CFE Treaty in 2007, it has not been in compliance with its data submissions, notification, and inspection obligations under the Treaty.

Senior U.S. officials, along with our Allies, continue to highlight the need for Russia to fully implement its arms control obligations and commitments, including those in the CFE Treaty.

More recently, Russian aggressive actions in Ukraine and around its border with Ukraine run counter to the Vienna Document, in which the participating States stress the continued validity of commitments on refraining from the threat or use of force. In 1994, Russia welcomed Ukraine's decision to accede to the Nuclear Non-Proliferation Treaty and pledged through the Budapest Memorandum to respect the independence and existing borders of Ukraine. Russia's violation of Ukraine's sovereignty and territorial integrity are contrary to those commitments.

Instead of recommitting itself to these arms control instruments, Russia is leveling baseless claims against U.S. compliance to divert attention away from its own treaty violations. These claims are classic attempts at misdirection. For the record, we have engaged the Russians repeatedly and in depth on these issues, dating back to the 1990s and we continue to be willing to discuss our compliance with treaties and agreements. We see no such willingness from the Russians.

Russia has also repeatedly demanded legally-binding limitations on U.S. and NATO missile defense. U.S. policy, our capabilities, and our finite resources, all preclude the development of a ballistic missile defense architecture that is capable of threatening Russia's nuclear deterrent.

The 2010 Ballistic Missile Defense Review (or BMDR) makes clear that the United States' missile defenses are focused on defending against limited missile threats to the U.S. homeland and regional missile threats to our deployed forces, allies, and partners throughout the world. It also clearly states that our missile defenses are not directed against Russia.

That has not stopped Russian leaders from attacking the European Phased Adaptive Approach (EPAA), nor from stating falsely that President Obama had promised to scrap European missile defense "if the Iranian threat was eliminated." The United States and NATO have repeatedly said that the system is designed for ballistic missile threats from outside the Euro-Atlantic area and can neither negate nor undermine Russia's strategic deterrent capabilities. Prior to Russia's aggressive actions in Ukraine that led to a suspension of our dialogue on missile defense, the United States and NATO offered Russia various proposals to cooperate on missile defense. Russia elected to not take us up on our proposals.

The United States remains committed to advancing toward a world without nuclear weapons and furthering international security. To make progress, we need a willing partner and a conducive environment. We will continue to press Russia to reverse its current approach and recommit to measures that promote mutual security. For our part, the United States will neither waver in our commitment to the security of our allies nor our commitment to our arms control obligations.

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d. Republic of Korea

On November 25, 2015, the United States and the Republic of Korea exchanged diplomatic notes bringing into force a new Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy ("123 agreement"). The new agreement replaced a prior agreement that had been signed in 1973 and entered into force in 1974. See

Digest 2013 at 677-680 and *Digest 2014* at 833 regarding negotiations in anticipation of expiration of the prior agreement.

On June 16, 2015, President Obama submitted the agreement, along with a Nuclear Proliferation Assessment Statement and other supporting material, to Congress. H. Doc. 114-43 (114th Cong., 1st Sess.). That same day, the State Department issued a fact sheet, available at <http://www.state.gov/t/isn/rls/fs/2015/243872.htm>, [summarizing the agreement](#). The June 16 fact sheet is excerpted below.

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- The agreement would enhance the strategic relationship between the United States and the R.O.K. across the spectrum of political, economic, energy, science, and technology issues.
- The agreement would establish a new standing, High-Level Bilateral Commission for our two governments to work together to advance mutual objectives such as addressing spent fuel management, an assured stable fuel supply, nuclear security, and enhancing cooperation between the U.S. and R.O.K. nuclear industries.
- The new Commission would allow for deepened cooperation and more regular interaction between our two governments on the state of nuclear energy in both countries and allow us to account for new developments in technology, spent fuel management, security, and safety.
- The agreement would reinforce the importance of our ongoing Joint Fuel Cycle Study to review and identify appropriate options for addressing spent fuel management challenges, and facilitate cooperation on research and development (R&D) in this context, including R&D at specified facilities on the use of electrochemical reduction.
- The new agreement also would provide the R.O.K. with consent to produce radioisotopes for medical and research purposes, as well as to conduct examination of irradiated fuel rods using U.S.-obligated material.

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- The agreement would be fully reciprocal, requiring the United States to undertake most of the same obligations as the R.O.K. The only exceptions relate to different obligations that each country has under the Nuclear Non-Proliferation Treaty.

The New 123 Agreement Would Strengthen Nonproliferation Cooperation Between the United States and the Republic of Korea

- Like all our 123 agreements, this agreement contains essential provisions related to nonproliferation and nuclear security, and would thereby enhance the global nuclear nonproliferation regime.
- The terms of the U.S.-R.O.K. 123 agreement strongly reaffirm the two governments' shared commitment to nonproliferation as the cornerstone of their nuclear cooperation relationship.
- The R.O.K. has a strong track record on nonproliferation and the R.O.K. has consistently reiterated its commitment to nonproliferation. It has been an extremely active partner with the United States across a wide breadth of bilateral and multilateral activities designed to ensure the implementation of the highest standards of safety, security, and nonproliferation worldwide.

- The agreement would update the nonproliferation conditions from the prior agreement and fully meet the nonproliferation requirements of Section 123 of the Atomic Energy Act, as amended by the 1978 Nuclear Non-Proliferation Act (NNPA).
- The agreement would provide for the cooperation between the United States and the R.O.K. to be subject to the relevant IAEA safeguards requirements, assurance that all activities under the agreement will be for peaceful purposes only, and express reciprocal consent rights over any retransfers or subsequent reprocessing or enrichment of material subject to the agreement.

The R.O.K. Is a Strong Nonproliferation Partner

- The R.O.K. is one of the United States' strongest partners on nonproliferation and has consistently reiterated its commitment to nonproliferation.
- It is a member of the four multilateral nonproliferation regimes (Missile Technology Control Regime, Wassenaar Arrangement, Australia Group, and Nuclear Suppliers Group, for which it served as Chair in 2003-2004 and will do so again in 2016-17) and recently completed its term as chair of the Hague Code of Conduct Against Ballistic Missile Proliferation.
- The R.O.K. became a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons on April 23, 1975, and has in force a comprehensive safeguards agreement and additional protocol with the International Atomic Energy Agency (IAEA).
- The R.O.K. has also demonstrated its commitment to nuclear security and addressing the threat of nuclear terrorism, including through hosting the 2012 Nuclear Security Summit and being an active contributor to the Summit process, and through its support for the Global Initiative to Combat Nuclear Terrorism and the Nuclear Smuggling Outreach Initiative.
- The R.O.K. has been an active participant in the Proliferation Security Initiative (PSI) since 2009, having hosted regional and global meetings and two operational exercises. It has also conducted outreach to states that have not yet endorsed PSI.
- The R.O.K. has been a consistent advocate of nonproliferation in the IAEA Board of Governors, including support for strengthening safeguards and calling to account Iran and Syria for violations of their safeguards obligations.
- The R.O.K. has also been a strong and close partner in addressing the security and proliferation threat posed by North Korea's nuclear and missile programs, including at the IAEA and the UN Security Council. The United States and the R.O.K. continue to cooperate closely in our shared objective to achieve North Korea's complete, irreversible and verifiable denuclearization and to bring North Korea into compliance with its commitments under the 2005 Joint Statement of the Six-Party Talks and its obligations under the relevant UN Security Council resolutions.

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On October 1, 2015, Assistant Secretary Countryman testified before the Senate Foreign Relations Committee on the agreement. His testimony is excerpted below and available at http://www.foreign.senate.gov/imo/media/doc/100115_Countryman_Testimony.pdf

* * * *

As with all our 123 agreements, this Agreement is first and foremost an asset that advances U.S. nonproliferation policy objectives. The President's transmittal of the Agreement, and the Nuclear Proliferation Assessment Statement that accompanied it, include a detailed description of the contents of the Agreement so I will not repeat that here, but the Agreement contains all the U.S. nonproliferation guaranties required by the Atomic Energy Act and common to 123 agreements, including conditions related to International Atomic Energy Agency (IAEA) safeguards, peaceful uses assurances, physical protection assurances, and U.S. consent rights on storage, retransfer, enrichment, and reprocessing of U.S.-obligated nuclear material. It also has an initial duration of twenty (20) years with one automatic five year extension.

A unique feature of the Agreement is the establishment of a new standing, High-Level Bilateral Commission for our two governments to work together to advance mutual nuclear cooperation objectives. The Commission will be led on our side by the Deputy Secretary of Energy and on the ROK side by a Vice Minister of Foreign Affairs. As described in the text of the Agreement, the Commission will consist of four working groups, one on spent fuel management, one on assuring a stable fuel supply globally, a third on nuclear security, and finally a working group to address the promotion of exports and export control cooperation. This new Commission will allow for more regular interaction between our two governments on the state of nuclear energy in both countries. We expect these interactions to both deepen our bilateral nuclear cooperation relationship politically and to make further progress in tackling some of our shared challenges facing the future of the civil nuclear energy industry.

As you know, the United States and the ROK agreed to commence a ten year Joint Fuel Cycle Study in 2011 to explore strategies to address shared challenges. The Study is exploring the technical and economic feasibility and the nonproliferation acceptability of pyroprocessing and of other spent fuel management options. U.S. and ROK technical experts are working together to advance technical cooperation on the storage, transportation and disposal of spent nuclear fuel, and we expect the results of the Joint Study to inform the work of the High Level Bilateral Commission going forward. In addition to the cooperation to occur under the High Level Bilateral Commission and in the Joint Fuel Cycle Study, the Agreement also identifies other areas for future research and development collaboration, including nuclear safety, safeguards, radioactive waste management, and the development, construction, and operation of reactors.

As highlighted earlier, the Agreement clearly establishes U.S. consent rights on any future possible enrichment or reprocessing of U.S. obligated nuclear material. That said, it also contains a set of pathways toward possible U.S. Government decisions in the future on whether to grant advance consent to the ROK to enrich or reprocess U.S. obligated nuclear material. Through the High Level Bilateral Commission, U.S. and ROK officials will evaluate the technical feasibility, economic viability, safeguardability, and nonproliferation acceptability of potential reprocessing techniques and enrichment options. Any advance consent would require satisfactory outcomes from those studies and subsequent written agreement between the parties. The Secretary of Energy would have the final authority to decide whether or not granting advance consent would significantly increase the risk of proliferation.

ROK as a Nonproliferation Partner

The ROK is one of the United States' strongest partners on and has consistently displayed its commitment to nuclear nonproliferation. It is a member of the four multilateral nonproliferation regimes—the Missile Technology Control Regime, Wassenaar Arrangement, Australia Group, and Nuclear Suppliers Group. The ROK served as the Chair of the Nuclear

Suppliers Group in 2003-2004, and is scheduled to do so again in 2016- 2017. The ROK also recently completed its term as Chair of the Hague Code of Conduct Against Ballistic Missile Proliferation. The ROK became a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons on April 23, 1975, and has in force a comprehensive safeguards agreement and Additional Protocol with the International Atomic Energy Agency (IAEA). The ROK has also demonstrated its commitment to nuclear security and addressing the threat of nuclear terrorism, including through hosting the 2012 Nuclear Security Summit and providing useful contributions to the development of a high-density low enriched uranium fuel. It has also been an active and positive contributor to the Summit process since its inception, as well as through its support for the Global Initiative to Combat Nuclear Terrorism and Global Partnership Against the Spread of Weapons and Materials of Mass Destruction. The ROK has ratified key nuclear conventions, including the International Convention for the Suppression of Acts of Nuclear Terrorism and the Amendment to the Convention on the Physical Protection of Nuclear Material. The ROK has been an active participant in the Proliferation Security Initiative (PSI) since 2009, having hosted regional and global meetings and two operational exercises. It has also conducted outreach to states that have not yet endorsed PSI. The ROK has been a consistent advocate of nonproliferation in the IAEA Board of Governors, including support for strengthening safeguards in a variety of contexts. The ROK Foreign Minister has offered to chair the IAEA's 2016 Nuclear Security Conference. The ROK has also been a strong and close partner in addressing the threat posed by the Democratic People's Republic of Korea's (DPRK) nuclear and missile programs, including at the IAEA where it has joined the United States in addressing the DPRK's growing nuclear threat and holding the DPRK to its denuclearization commitments and obligations, and advocating for a continued strong role for the IAEA in the complete, verifiable, and irreversible denuclearization of the Korean Peninsula.

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In sum, we believe the nonproliferation and economic benefits of this agreement demonstrate that continuing nuclear cooperation with the ROK is in the best interests of the United States. The Agreement is one of the most sophisticated and dynamic peaceful nuclear cooperation agreements we've ever negotiated, which speaks to the state-of-the-art nature of the ROK's peaceful nuclear program and the many characteristics that our two nuclear programs share in common. Once it enters into force, this Agreement will be a significant achievement for both our governments and provide a strong foundation for our shared peaceful nuclear cooperation and nonproliferation objectives for decades to come.

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e. *China*

On October 29, 2015, a new Agreement for Cooperation between the Government of the United States of America and the Government of the People's Republic of China Concerning Peaceful Uses of Nuclear Energy ("123 agreement") entered into force. The agreement replaces a 1985 Agreement Concerning Peaceful Uses of Nuclear Energy.

On April 21, 2015, President Obama transmitted the 123 Agreement with China to Congress, along with a Nuclear Proliferation Assessment Statement and other

supporting documents. Daily Comp. Pres. Docs. 2015 DCPD No. 00293, pp. 1-2 (Apr. 21, 2015); see also H. Doc. 114-28 (114th Cong., 1st Sess.). His message to Congress transmitting the agreement is excerpted below.

* * * *

I am pleased to transmit to the Congress, pursuant to subsections 123 b. and 123 d. of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2153(b), (d)) (the “Act”), the text of a proposed Agreement for Cooperation Between the Government of the United States of America and the Government of the People’s Republic of China Concerning Peaceful Uses of Nuclear Energy (the “Agreement”). I am also pleased to transmit my written approval, authorization, and determination concerning the Agreement, and an unclassified Nuclear Proliferation Assessment Statement (NPAS) concerning the Agreement. (In accordance with section 123 of the Act, as amended by Title XII of the Foreign Affairs Reform and Restructuring Act of 1998 (Public Law 105–277), two classified annexes to the NPAS, prepared by the Secretary of State, in consultation with the Director of National Intelligence, summarizing relevant classified information, will be submitted to the Congress separately.) The joint memorandum submitted to me by the Secretaries of State and Energy and a letter from the Chairman of the Nuclear Regulatory Commission stating the views of the Commission are also enclosed. An addendum to the NPAS containing a comprehensive analysis of China’s export control system with respect to nuclear-related matters, including interactions with other countries of proliferation concern and the actual or suspected nuclear, dual-use, or missile-related transfers to such countries, pursuant to section 102A(w) of the National Security Act of 1947 (50 U.S.C. 3024(w)), is being submitted separately by the Director of National Intelligence.

The proposed Agreement has been negotiated in accordance with the Act and other applicable law. In my judgment, it meets all applicable statutory requirements and will advance the nonproliferation and other foreign policy interests of the United States.

The proposed Agreement provides a comprehensive framework for peaceful nuclear cooperation with China based on a mutual commitment to nuclear nonproliferation. It would permit the transfer of material, equipment (including reactors), components, information, and technology for nuclear research and nuclear power production. It does not permit transfers of any Restricted Data. Transfers of sensitive nuclear technology, sensitive nuclear facilities, and major critical components of such facilities may only occur if the Agreement is amended to cover such transfers. In the event of termination, key nonproliferation conditions and controls continue with respect to material, equipment, and components subject to the Agreement.

The proposed Agreement would obligate the United States and China to work together to enhance their efforts to familiarize commercial entities in their respective countries about the requirements of the Agreement as well as national export controls and policies applicable to exports and imports subject to the Agreement. It would have a term of 30 years from the date of its entry into force. Either party may terminate the proposed Agreement on at least 1 year’s written notice to the other party.

Since the 1980s, China has become a party to several nonproliferation treaties and conventions and worked to bring its domestic export control authorities in line with international standards. China joined the Treaty on the Non-Proliferation of Nuclear Weapons in 1992 as a nuclear weapon state, brought into force an Additional Protocol to its International Atomic

Energy Agency safeguards agreement in 2002, and joined the Nuclear Suppliers Group in 2004. China is a party to the Convention on the Physical Protection of Nuclear Material, which establishes international standards of physical protection for use, storage, and transport of nuclear material, and has ratified the 2005 Amendment to the Convention. A more detailed discussion of China's civil nuclear program and its nuclear nonproliferation policies and practices, including its nuclear export policies and practices, is provided in the NPAS and in two classified annexes to the NPAS submitted to you separately. As noted above, the Director of National Intelligence will provide an addendum to the NPAS containing a comprehensive analysis of the export control system of China with respect to nuclear-related matters.

I have considered the views and recommendations of the interested departments and agencies in reviewing the proposed Agreement and have determined that its performance will promote, and will not constitute an unreasonable risk to, the common defense and security. Accordingly, I have approved the proposed Agreement and authorized its execution and urge that the Congress give it favorable consideration.

This transmission shall constitute a submittal for purposes of both sections 123 b. and 123 d. of the Act. My Administration is prepared to begin immediately the consultations with the Senate Foreign Relations Committee and the House Foreign Affairs Committee as provided in section 123 b. Upon completion of the 30 days of continuous session review provided for in section 123 b., the 60 days of continuous session review provided for in section 123 d. shall commence.

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On May 12, 2015, Assistant Secretary Countryman testified before the Senate Foreign Relations Committee on the U.S.-China 123 agreement. His testimony is excerpted below and available at http://www.foreign.senate.gov/imo/media/doc/051215_Countryman_Testimony.pdf

* * * *

As you know, the U.S. relationship with China is one of the most important and complex relationships we have in the world. Over the last six years, the Obama Administration has established a “new normal” of U.S. engagement with the Asia-Pacific that includes relations with China defined by building high quality cooperation on a range of bilateral, regional, and global issues while constructively managing our differences and areas of competition. Through the implementation of this policy, the United States and China continue to improve diplomatic coordination to address the regional and global challenges of nuclear nonproliferation, energy security, and climate change, while growing both our economies. Peaceful nuclear cooperation with China is an example of collaboration that touches on all these challenges, and I’d like to explain why the Administration believes it is in the best interests of the United States to continue this important area of cooperation.

Description of Agreement

Like all 123 agreements, this agreement is first and foremost an asset that advances U.S. nonproliferation policy objectives. It took approximately two and a half years to negotiate

the agreement, and after numerous interventions by senior U.S. government officials throughout this period, our negotiators were able to win inclusion of significant new nonproliferation conditions that strengthen the agreement. The President's transmittal of the agreement, and the Nonproliferation Assessment Statement that accompanied it, include a detailed description of the contents of the agreement so I will not repeat that here, but the agreement contains all the U.S. nonproliferation guaranties required by the Atomic Energy Act and common to 123 agreements, including conditions related to International Atomic Energy Agency (IAEA) safeguards, peaceful uses assurances, physical protection assurances, and U.S. consent rights on storage, retransfer, enrichment, and reprocessing of U.S.-obligated nuclear material.

The agreement clearly states that equipment, information, and technology transferred under the agreement shall not be used for any military purpose, and the new text includes a right for the United States to suspend cooperation in the event of Chinese non-compliance, as well as our long-standing right to cease cooperation altogether. It also has a fixed duration of thirty (30) years. It is worth noting that the agreement does not commit the United States to any specific exports or other cooperative activities, but rather establishes a framework of nonproliferation conditions and controls to govern any subsequent commercial transactions.

Differences Between the 1985 and 2015 Agreements

The 2015 agreement enhances several U.S. nonproliferation controls beyond those contained in the current U.S.-China 123 agreement, which was signed in 1985. Unlike the 1985 agreement, the 2015 agreement requires China to make all U.S.-supplied nuclear material and all nuclear material used in or produced through U.S.-supplied equipment, components, and technology subject to the terms of China's safeguards agreement with the IAEA. The 2015 agreement also contains additional, elevated controls on unclassified civilian nuclear technology to be transferred to China. Further, the agreement requires the two Parties to enhance their efforts to familiarize commercial entities with the requirements of the agreement, relevant national export controls, and other policies applicable to imports and exports subject to the agreement—a requirement that will be implemented through joint training by U.S. and Chinese officials of commercial entities in both countries.

The background underlying the agreement has also changed. China's nonproliferation record has improved markedly since the first U.S.-China 123 agreement was signed in 1985, though it can still do better. Over the past thirty years, China has undertaken a variety of efforts to enhance its global standing on nonproliferation issues while significantly expanding its civil nuclear sector. Since the 1980s, China has become a party to several nonproliferation treaties and conventions and worked to bring its domestic export control authorities in line with international standards. China joined the Nuclear Nonproliferation Treaty in 1992, brought into force an additional protocol with the International Atomic Energy Agency in 2002, and joined the Nuclear Suppliers Group in 2004.

Justification for Agreement

In addition to the improved nonproliferation conditions that I have already described, the agreement will have benefits for the U.S.-China bilateral relationship, for nuclear safety in the United States and worldwide, for our economy, and for the climate. I'd like to touch on each of these for a moment.

Bringing a new 123 agreement with China into force will improve not only our bilateral nonproliferation relationship but also our overall bilateral relationship, and reflects the U.S. government effort to better rebalance our foreign policy priorities in Asia. We strongly believe that implementing this agreement will better position the United States to influence the Chinese

Government to act in a manner that advances our global nuclear nonproliferation objectives. Conversely, failing to do so would set us back immeasurably in terms of access and influence on issues of nonproliferation and nuclear cooperation. The current China 123 agreement has allowed for, and the agreement will continue to facilitate, deepened cooperation with China on nonproliferation, threat reduction, export control, and border security. We believe that continuing cooperation with China will allow us to push China further to adhere to international norms in this area and meet U.S. standards of nonproliferation, nuclear safety and security.

Nuclear Safety

With respect to nuclear safety, as U.S. and Chinese experts work together in the development of Westinghouse's AP1000 reactors in China, their collaboration enhances the strength of the safety culture in the Chinese civil nuclear program. Even the choice of AP1000 technology, with passive safety systems, over other, older, less safe technologies, enhances nuclear safety in China. It is fundamentally in the U.S. interest to promote the spread of U.S. best practices in nuclear safety as a nuclear accident anywhere is a global problem. The United States will have a far greater influence on Chinese nuclear safety practices if cooperation is continued than if it is cut off. When we export U.S. civil nuclear technology, we also export an American nonproliferation, safety, and security culture that encourages a safe and responsible Chinese civil nuclear program.

* * * *

Climate Change

The agreement can also help both of our countries to deploy non-fossil based energy sources to address the effects of global climate change. In November 2014, President Obama and Chinese President Xi took a historic step for climate change action and for the U.S.-China relationship by jointly announcing the two countries' respective post-2020 climate targets. The announcement was the culmination of a major effort between the two countries, inspired by our serious shared concern about the global effects of climate change and our commitment to leadership as the world's largest economies, energy consumers, and carbon emitters. One of China's announced targets is to increase the share of non-fossil energy to around 20% by 2030 – an approximate doubling from current levels. China sees the large scale development of civil nuclear power as key to meeting this and other climate targets, and these commitments strongly reinforce opportunities for U.S. nuclear suppliers in the Chinese market.

Negative Consequences of Lapse

I'd also like to take a moment to highlight some of the negative consequences should the United States cease nuclear cooperation with China. A failure, or delay, to put in place a new agreement to replace the current expiring agreement would undermine U.S. nonproliferation policy and our nuclear industry and would have a significant effect on the broader U.S.-China bilateral relationship.

As I described earlier, the current 123 agreement has been a vehicle for significant U.S. influence on China's nonproliferation policy. If cooperation ceases, U.S. influence on Chinese nonproliferation practices will be placed in serious jeopardy. A lapse in the agreement would most likely lead to a suspension of our nonproliferation dialogues, to include recently established mechanisms seeking to enhance China's export control enforcement capabilities, thereby damaging our cooperation in countering shared proliferation challenges. In addition, if the United States does not maintain its nuclear cooperation with China, that vacuum will be filled by

other nuclear suppliers who do not share the same nonproliferation and safety-focused practices in the execution of their civil nuclear cooperation.

Ending U.S.-China cooperation would also be devastating for our nuclear industry. All significant nuclear commerce between the United States and China would stop, and a large number of high-paying American jobs would likely be lost. More broadly, unilateral termination of this relationship would discredit the United States as a reliable supplier, undermining the ability of the U.S. civil nuclear industry to compete globally and enabling competitors such as Russia and France to gain a greater foothold in China's nuclear energy market, as well as in other markets. The construction of four Westinghouse AP1000 reactors in China is driving innovation in the U.S. civil nuclear industry, helping us domestically to make the AP1000 reactors currently under construction in the United States safer and more efficient. Without this continuous learning process, the United States will lose global market share. If there is no successor agreement, U.S. civil nuclear companies with joint ventures in China will also lose the technology and hardware they have already provided to China – there is no U.S. government right of return at the expiration of the agreement– and the United States will not benefit from future sales arising from these ventures.

Finally, it is worth emphasizing that China would view a lapse of this agreement as evidence that the United States is less willing to engage China at a high level on important commercial, energy, environmental, and security related issues. Stopping U.S.-China cooperation would also strengthen the position of those in China who advocate a more confrontational approach to the bilateral relationship and create new difficulties in our efforts to manage this complex relationship.

Conclusion

In sum, we believe that the strategic, nonproliferation, economic, and environmental benefits of this agreement demonstrate that the continuing nuclear cooperation with China is in the best interests of the United States. We are mindful of the challenges that this relationship and this agreement present, and yet we firmly believe the clear path forward is to remain engaged with China, constructively manage our differences, and work collaboratively to advance our numerous common objectives while bringing China toward international norms of behavior. This is not just a matter of U.S. engagement with China, it is frankly a test of U.S. leadership and our ability to continue to play a decisive and prominent role in crucial sectors such as the civilian nuclear power industry. The entry into force of this agreement will allow the United States to continue to develop and participate in the world's largest nuclear power market, which is the best way to ensure that fundamental U.S. national interests in this area are advanced in the long term.

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C. ARMS CONTROL AND DISARMAMENT

1. Conference on Disarmament

See Chapter 18 for discussion of conventional weapons issues arising at the Conference on Disarmament.

2. Comprehensive Nuclear Test Ban Treaty

Deputy Secretary of State Antony J. Blinken delivered remarks on September 29, 2015 at the UN Conference on Facilitating the Entry Into Force of the Comprehensive Nuclear Test Ban Treaty. His remarks are excerpted below and available at <http://www.state.gov/s/d/2015/247614.htm>. The Final Declaration of the Conference, on which the United States joined consensus, is available at https://www.ctbto.org/fileadmin/user_upload/Art_14_2015/FINAL_DECLARATION.pdf.

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Five-and-a-half years ago, in Prague, President Obama outlined a vision for achieving a peaceful, secure world without nuclear weapons through practical, responsible steps. In the years since, the United States has been working to limit and reduce the nuclear threat through efforts like the New START Treaty and the Nuclear Security Summit. As we look forward to the next year, the United States will expand its efforts to reintroduce the American public to the Comprehensive Nuclear Test Ban Treaty.

The United States was the first nation to sign the Comprehensive Nuclear Test Ban Treaty after it opened for signature in 1996. When the U.S. Senate considered giving its advice and consent to ratification in 1999, they expressed two concerns. The first was about our ability to maintain an effective nuclear deterrent absent nuclear explosive testing. The second was about our ability to verify compliance with the Treaty.

Over time, we have developed the tools we need to confidently and comprehensively address both of these points.

By pursuing a science-based Stockpile Stewardship Program, the United States is maintaining deterrent capabilities without nuclear explosive testing and without developing new nuclear warheads.

Our ability to monitor and verify compliance with the Treaty is also stronger than it has ever been. The International Monitoring System, the heart of the verification regime, was just a concept two decades ago. Today, it is a nearly complete, technically advanced, global network of sensors—including 35 stations in the United States—that can detect even relatively low-yield nuclear explosions.

It is important for all states to help complete this system, as well as take steps to mitigate emissions of radionuclides in the atmosphere from medical and industrial isotope production. On this point, I want to be clear: The United States does not seek to limit medical isotope production. Our priority is to safeguard the reliability of the IMS radionuclide network that we have built together over the last twenty years.

Our collective focus should be on voluntary measures that will minimize the release of radionuclides into the atmosphere. We support the efforts of the Provisional Technical Secretariat and the International Atomic Energy Agency to seek solutions to this problem and encourage them to work closely together.

The on-site inspection element of the Treaty's verification regime has also advanced significantly. A successful Integrated Field Exercise, hosted by Jordan in 2014, demonstrated the growing maturity of our capabilities in this regard. The United States thanks the CTBTO for the

impressive demonstration of the formidable technology and the expertise that the international community can bring to bear in the case of a suspected nuclear test.

Given the clear and convincing evidence, we know that an in-force Comprehensive Test Ban Treaty is good for the security of the United States and it is good for international security. It is a key step to diminishing the world's reliance on nuclear weapons and reducing the risk of a nuclear arms race.

The United States is committed to the Treaty, and we are working aggressively to build the case at home for ratification. Other Annex 2 states should also be actively pursuing ratification and sharing their plans for how they are doing so. There is no reason to wait on any other country. Our goal is universality.

We also need to translate statements of support for the Treaty into tangible resources—both financial and technical expertise. That means supporting the work of the Preparatory Commission to complete the Treaty's verification regime. It means enhancing the effectiveness of the Provisional Technical Secretariat. It means upgrading the International Data Center, which needs to be able to maintain the technological edge. And it means translating the momentum generated by last year's Integrated Field Exercise into an effective On-Site Inspection capability.

This is not an easy task, but it is a worthy one. The Comprehensive Nuclear Test Ban Treaty is not an abstract concept for a theoretical world. It is a firm and certain step towards peace, towards reason, and towards security for our own citizens and all the peoples of the world.

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3. International Partnership for Nuclear Disarmament Verification

As discussed in *Digest 2014* at 824-25, the United States announced its intent to establish an International Partnership for Nuclear Disarmament Verification ("IPNDV") in 2014. On March 19, 2015, Assistant Secretary of State Frank A. Rose delivered remarks at the kickoff of the IPNDV in Washington, DC. Mr. Rose's remarks are excerpted below and available at <http://www.state.gov/t/avc/rls/2015/239555.htm>.

* * * *

Understanding the hard lessons of the Cold War, the challenge we face now is not one of ambivalence towards disarmament, but rather how to realize this long-standing goal in a manner that enhances international peace and security.

Verification is the indispensable component in reaching that goal. Regardless of the political and diplomatic decisions that are made in the future, verification of nuclear weapons will become increasingly complex at lower numbers. At the same time, requirements for accurately determining compliance will increase dramatically.

As we will hear today, the United Kingdom and Norway have already pioneered this type of work. It is our hope that the IPNDV will build on the spirit of that experiment to create a non-traditional partnership that draws on the expertise of talented individuals around the world, in both the public and private sectors.

We are also pleased to be working with a partner like the Nuclear Threat Initiative. The intellectual energy and resources that they are bringing to the project will be so important to our success.

As I said, future steps in nuclear disarmament are expected to pose significantly more complex and intrusive verification challenges than past steps. Success in addressing future verification and monitoring challenges will be dependent, in part, on the development and application of new technologies or concepts. Make no mistake, we are facing some truly formidable technical challenges that must be overcome. Addressing these challenges, and finding solutions, is the bridge that spans the gap between the aspiration of nuclear disarmament and the fulfillment of nuclear disarmament.

Every nation on Earth has an interest in the success of these efforts. That is why the United States did not want this to be an area of engagement confined solely to the NWS. A larger, more diverse group of states with technical expertise in nuclear verification or the related sciences will contribute to the discussion and provide a broader intellectual basis for determining solutions. After all, the Nonproliferation Treaty makes no distinction between the NWS and NNWS when it comes to the obligation to pursue disarmament.

Everyone who shares the goal of a world without nuclear weapons should devote time and energy to address this challenge right now. Only through this upfront investment in the tools and technologies to verify nuclear weapons and associated items at lower numbers can we reap the reward we all seek. And it is on this that the International Partnership for Nuclear Disarmament Verification is premised.

The idea of a broad-based, international collaboration to identify and address these technical challenges has been proposed by multiple individuals and organizations. But today, in this room, for the first time, countries are set to embark on that very path.

And not just countries with nuclear weapons and nuclear weapons programs, but countries without them—countries that have, in fact, forsworn them.

There are many reasons why this type of “mixed” group of states is better equipped to address these challenges than one with only nuclear weapons states. Most importantly, a multilateral disarmament regime must achieve multilateral confidence in the effectiveness of its verification methods. It is not likely this kind of confidence is even possible absent truly joint, international research and development of the concepts and technologies that undergird its operation.

As we move forward today, we need to keep in mind that while not all research and development efforts *end* in success, few big innovations *start* without big ideas. The nuclear weapon states currently have the most knowledge and experience regarding the specific technical challenges facing us, they have begun the process of disarming and continue to do so.

The proof of U.S. progress on disarmament is in the numbers. At the height of Cold War tensions with the former Soviet Union, the United States stockpile consisted of 32,000 nuclear warheads. Decades of bilateral arms control treaties and agreements have slashed that number by 85%, retiring whole groups of weapons along the way.

Some might conclude that this is really just a job for the nuclear weapon states. But as the numbers of nuclear weapons go down, and the objects to be verified are smaller, the need for confidence will become increasingly difficult to address. We will need trained scientists and engineers from all over the world to help contribute to the solutions. We might suppose that innovation is the sole domain of those experts that have the most experience with the “questions”

being addressed. But if we do, we are on shaky ground as we know the opposite is usually what holds true.

Going forward, we look to, and can expect great contributions and ideas from our non-nuclear weapons states colleagues, as well as our nuclear weapons states colleagues. Over the next two days I look forward to your presentations, your comments and your ideas. The success of this group depends entirely on the vigorous engagement of its members, focusing on the technical issues at hand. I hope we will leave here on Friday ready to implement a partnership that can achieve some very good, useful things.

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The State Department issued a fact sheet on March 20, 2015 on the IPNDV, excerpted below and available at <http://www.state.gov/t/avc/rls/239557.htm>.

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The Partnership's first meeting was held March 19-20 in Washington, D.C., with a broadly representative group of states participating.

The IPNDV brings together both nuclear and non-nuclear weapon states under a cooperative framework to further understand and find solutions to the complex challenges involved in the verification of nuclear disarmament.

The United States believes such engagement will strengthen existing work towards the goals of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).

Nuclear Disarmament Verification and Technical Obstacles

Future steps in nuclear disarmament will pose significant verification challenges. Success in addressing these future challenges will require the development and application of new technologies or concepts. All countries have an interest in the success of these efforts. A larger, more diverse group of states with technical expertise in nuclear verification or the related sciences will contribute to the discussion and provide a broader intellectual basis for determining solutions.

The Partnership

The IPNDV will consider verification challenges across the nuclear weapons lifecycle—including material production and control, warhead production, deployment, storage, dismantlement, and disposition. It will build on lessons learned from efforts such as the United States-United Kingdom Technical Cooperation Program and the United Kingdom-Norway Initiative.

To take this Partnership forward, the U.S. government will work with the Nuclear Threat Initiative (NTI) through an official public-private partnership. Drawing from its recently concluded project, [*Innovating Verification*](#), NTI will bring its expertise and resources to bear to help guide the process of standing up the International Partnership and assist in the development and implementation of a program of work.

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The Department provided an update on the IPNDV in a September 21, 2015 fact sheet, available at <http://www.state.gov/t/avc/rls/247127.htm>. The fact sheet identifies the three working groups formed by the 26 member states:

1. **Working Group One:** “Monitoring and Verification Objectives,” will be chaired by Italy and the Netherlands.
2. **Working Group Two:** “On-Site Inspections,” will be chaired by Australia and Poland.
3. **Working Group Three:** “Technical Challenges and Solutions,” will be chaired by Sweden and the United States.

The Partnership convened again in November to finalize the terms of reference and officially launch the working groups. See State Department November 19, 2015 media note, available at <http://www.state.gov/r/pa/prs/ps/2015/11/249801.htm>. Assistant Secretary Rose’s opening remarks at the Second Plenary Meeting of the IPNDV in Oslo, Norway on November 16, 2015 are available at <http://www.state.gov/t/avc/rls/2015/249526.htm>. Assistant Secretary Rose delivered further remarks on the IPNDV at the Vienna Center for Disarmament and Nonproliferation on November 19, 2015. His remarks, available at <http://www.state.gov/t/avc/rls/2015/249906.htm>, include announcement that the Third Plenary of the IPNDV will be held in 2016 in Japan.

4. **New START Treaty**

The U.S. and Russian delegations to the Bilateral Consultative Commission (“BCC”), which was established under the New START Treaty, met in Geneva twice in 2015 to discuss practical issues related to implementation of the treaty. The Tenth Session of the BCC took place October 7-20, 2015. See October 20, 2015 press release, available at <https://geneva.usmission.gov/2015/10/20/press-release-tenth-session-of-the-bilateral-consultative-commission-under-the-new-start-treaty/>. At the Tenth Session, the parties signed an agreement on changing the timing on the annual discussion of the issue of the exchange of telemetric information on launches of ICBMs and SLBMs. Decisions and agreements reached by the BCC are available at <https://www.state.gov/t/avc/newstart/c39917.htm>.

5. **INF Treaty**

See Section A.6.c, *supra*, for discussion of arms control discussions between the United States and the Russian Federation, including U.S. concerns over Russian noncompliance with the Intermediate-Range Nuclear Forces Treaty (“INF Treaty”). On March 24, 2015, Jon Wolfsthal of the U.S. National Security Council staff participated in a Carnegie International Nuclear Policy Conference on “The INF Treaty and Beyond: Where Does

Arms Control Go from Here?” Mr. Wolfsthal’s remarks are excerpted below. A transcript of the conference is available at <http://carnegieendowment.org/files/13-armscontrol240315wintro-formatted.pdf>.

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[F]or those of us that have focused on arms control, and having literally come of age as the INF was coming of age, we’re gravely concerned about Russia’s violation of this important bedrock treaty.

The evidence is compelling, and it is conclusive because of the sources, we are in, I would say, a disadvantaged position, but it’s been made very clear to Russian government authorities the nature of our concerns, and we provided more than enough information to engage in a substantive discussion.

Unfortunately, instead of trying to deal with this in a quiet and sustained way, as we have preferred, we have been responded to with a series of baseless counter-charges. And from our point of view, this makes it extremely difficult for us to try and resolve the outstanding INF issues, and also to continue to make progress on what the President has laid out as a very ambitious set of ideas for continuing the arms reduction process with Russia; one that has served our country’s security interest for decades, and one that I believe, over the long term will still be something we will want to rely on, but will be increasingly difficult if we cannot engage seriously on the INF issue.

I do want to indulge the panel and the audience for a couple of minutes, because I think, until now we really haven’t made an effort to try and respond to some of the counter-charges that have been made by Russia. I just want to spend a minute or two, if I can, on that.

In response to our finding of non-compliance, Russia, which had not raised U.S. compliance issues for many years under the INF Treaty immediately threw up what we regard as a kind of smokescreen to shield allegations of their own non-compliance related to three issues. The booster rockets that we use for targets for our ballistic missile program, armed UAVs, and our Aegis Ashore missile defense launchers.

And in terms of the specific details, again, I don’t want to get into too much arcane arms control language... But from our point of view, I want to talk just for a second about our process and then about the specific charges.

One is, we have a very clear regulated and legislated process for ensuring that the United States is in compliance with all of our arms control treaties. They are the law of the land. And as people here understand, the United States is very serious about ensuring that we abide by our legal obligations. And this is a process that’s run out of the Department of Defense but with a full inter-agency to ensure that our military programs are compliant with international treaties. And to put it bluntly, if they’re not compliant, we don’t do them, period. That’s the law of the land.

In terms of the specific allegations, on ballistic missile targets, the INF Treaty ...Paragraph 12 of Section 7 of the INF explicitly permits the production and use of existing types of booster stages to create such ground launch booster systems for use as ballistic missile targets. The goal is that these systems not be used for research and development for missiles, but that they be used solely for testing the ballistic missile defense systems, and that is exactly what

the United States does. And so we view this as basically just a chaff that's being thrown up to counter our serious concerns.

The second issue of armed UAVs, put very simply, a UAV is a UAV. It is not a Cruise Missile. A Cruise Missile is a Cruise Missile. And we do not have ground launch Cruise Missiles that are within the ranges of the treaty limits. It's no secret that we have armed UAVs. It's something that has been known for some time. It's an important part of our security strategy. But the INF provides no restrictions on such capabilities. Russia has maintained that armed UAVs meet the definition of Cruise Missile for that treaty. We disagree. We're happy to have that kind of discussion with Russia if we're prepared to have a two-way discussion, but from our point of view, this is simply an unsupportable claim.

And then the third charge of our compliance relates to the Aegis Ashore missile defense program. Russia maintains that this represents a violation because it is capable of launching a Tomahawk Cruise Missile. ... The Aegis Ashore system is only capable of launching air and missile defense interceptor missiles, such as the SM3, which are not missiles subject to the INF Treaty. The system is not capable of launching any offensive type of missile, such as a Tomahawk Cruise Missile. The launching system for the Aegis Ashore Missile System has never been used for any purpose other than to launch missiles compliant with the INF Treaty. And Aegis Ashore has not and will not be designed, tested, or deployed to launch missiles other than those that have been developed and tested solely to intercept or counter objects not located on the surface of the earth, which again, are not INF missiles.

... I think it's important if we're going to have a serious and sustained dialogue. We want to have that, and we want to do that in a professional, serious way. But we are very concerned that that process cannot move forward if we engage in this increasingly public, and I think, difficult debate.

What we'd like to have is a serious discussion with Russian government officials to bring Russia back into compliance with this very important treaty. We think it's in our interest. We believe it is in Russia's security interest. Our allies believe it's in our continued mutual interest to have this treaty preserved, and we hope that Russia will see it the same way, and begin to engage us in a serious way. ...

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6. Open Skies Treaty and Treaty on Conventional Armed Forces in Europe

a. Open Skies Review Conference

On June 10, 2015, Under Secretary Gottemoeller delivered remarks at the Open Skies Treaty Third Review Conference in Vienna, Austria. Her remarks are excerpted below and available at <http://www.state.gov/t/us/2015/243689.htm>.

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It is vital for Treaty Parties to have the opportunity to reflect on the successes of the past five years and to discuss the challenges that lie ahead and the potential going forward. Just as we did during our school years, we need to review our progress and identify room for improvement. It

is clear that in regards to our “European security report card,” we did not make passing grades in some areas. This is the case for Open Skies, as well as other parts of the conventional arms control regime in Europe. We can and must do better.

As you all know, the security situation in Europe has changed dramatically since we last met in 2010, and not for the better. Russia’s occupation and attempted annexation of Crimea, and its ongoing destabilizing and aggressive activity in and around Ukraine have undermined peace, security, and stability across the region. While diplomacy continues, no one can ignore that Russia’s aggression in Ukraine has violated the very principles upon which cooperation is built. Russia’s selective implementation of the Vienna Document and Open Skies Treaty and long-standing non-implementation of the Conventional Armed Forces in Europe Treaty (or “CFE”) have eroded the positive contributions of these arms control instruments.

We must find a way to rectify the current situation. Even during the Cold War, NATO and Warsaw Pact nations agreed it was in their common interest to build trust, provide early warning of developing tensions, and be transparent about military plans and postures. This was exactly the type of transparency called for by President Dwight Eisenhower in 1955, and again by President George H. W. Bush in 1989 when the concept of the Open Skies Treaty was first advanced. The arms control and confidence building regimes we developed towards the end of the Cold War showed the world, as President Bush said at the time, “the true meaning of the concept of openness.”

Our success was possible because we shared a commitment to the Helsinki principles and to cooperative approaches to security which, unfortunately, is lacking in Europe today. We need to find a way forward—not walk away because Russia has veered off course. We call on Russia to join us in improving security in Europe and to return to full implementation of its OSCE commitments, including the Vienna Document, as well as its obligations under CFE and the Open Skies Treaty.

Russia-Ukraine

While Russian aggression in Ukraine has undermined security and confidence in Europe, the current crisis has also demonstrated the value of functioning arms control agreements. More than a dozen Open Skies flights over Ukraine and western Russia since last February, including the first use of the Treaty’s provision for “Extraordinary Observation Flights,” demonstrated the commitment of Treaty Parties to uphold this key element of the Euro-Atlantic security architecture. Unfortunately, since the tragic missile shoot-down of flight MH-17 last July from a missile system in separatist-held territory, we have been unable to conduct overflights of either Russia or Ukraine near their shared international border.

In addition to Open Skies flights, other European conventional arms control mechanisms have been used to promote stability and provide transparency. Russia’s suspension of the CFE Treaty in 2007 significantly reduced transparency about its military forces. But, CFE inspections in Ukraine and elsewhere in the neighborhood have been a source of vital information about the military forces in a time of tension.

The Vienna Document’s Confidence and Security-Building Measures have also been used extensively and in creative ways. I’m thinking in particular of the voluntary visits to dispel concerns and above-quota inspections that Ukraine has hosted throughout the crisis.

Regrettably, these steps have not been reciprocated. Russia has refused to provide substantive answers to requests for clarification under the Vienna Document’s Risk Reduction provisions and has chosen not to facilitate transparency on the buildup of Russian forces on Ukraine’s border.

Compliance

My government is very concerned about Russia's adherence to its treaty obligations. Russia's poor compliance record with CFE and INF is now well documented, as is its practice of selective implementation of the Vienna Document and, as we have discussed, the Open Skies Treaty. We have identified a number of compliance issues that impact the conduct of Open Skies flights, including the imposition of several restrictions that impede the full implementation of these treaties.

Many of these issues are described in the United States Compliance Report for calendar year 2014, which was released last Friday on June 5. Russia should take steps to remedy these problems immediately.

Looking to the Future

Now, let me look to the future. As I said, there are certainly some problems with our report card. It is now up to all of us to get European security—and conventional arms control—back on track. As we work together to rebuild the trust and confidence that has been lost in recent years, we must also look to the future.

During the 2010 Review Conference chaired by the U.S., a major theme was the need to transition to digital sensor capability. I appreciate that the Open Skies States Parties have made a good start in the transition to digital sensors which was initiated by the Russian Federation. That first digital sensor certification was more complicated than we imagined and I want to thank everyone who has worked so hard this past year to reach agreement on improved technical decisions for future certification events that will involve digital sensors.

This was a good start, but much work remains ahead to sustain this regime. In addition to completing the digital sensor transition, we must devote further efforts to modernize and improve the fleet of aircraft. We also need to make the financial investments now that will sustain the Open Skies infrastructure in the future.

We have work to do in other parts of our conventional arms control agenda, as well. The crisis in Ukraine has highlighted the critical need to update and modernize the Vienna Document CSBMs to reflect modern military realities. It has also focused our attention on the importance of having sufficient verification opportunities in time of crisis. This will not be easy work, but it is vital nonetheless. The United States is developing proposals to contribute to this effort and we encourage all OSCE participating States to engage meaningfully and productively in this effort.

The United States and all members of NATO have consistently said that conventional arms control in Europe, based on longstanding Helsinki principles, has a role to play in building a stable and secure Europe. You all know that this has proven true in the most difficult of circumstances, building mutual confidence in the Western Balkans through the Dayton Article IV agreement. We can still explore ways to improve security in the Euro-Atlantic region, even though the security situation is not currently amenable to comprehensive new negotiations.

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b. Open Skies Consultative Commission

Among the decisions adopted by the Open Skies Consultative Commission in 2015, there were several of significance, including one that updates the procedures for certifying digital sensors. Decision No. 4/15 on the "Certification Process for Digital Sensors," issued March 27, 2015, is available

at <http://www.state.gov/documents/organization/242489.pdf>. Decision No. 5/15 on the “Methodology for calculating the minimum height above ground level at which each video camera with real time display installed on an observation aircraft may be operated during an observation flight,” also dated March 26, 2015, is available at <http://www.state.gov/documents/organization/242490.pdf>. Decision No. 7/15 on “Additional non-destructive testing equipment,” issued April 20, 2015, is available at <http://www.state.gov/documents/organization/242492.pdf>. And Decision No. 8/15 on “The format in which data is to be recorded and exchanged on recording media other than photographic film,” dated April 20, 2015, is available at <http://www.state.gov/documents/organization/242493.pdf>.

c. Treaty on Conventional Armed Forces in Europe (“CFE”)

As alluded to *supra* sections B.6.c. and C.6.a., Russia suspended its implementation of the CFE Treaty in 2007. The United States identified Russia’s further violations of its CFE Treaty obligations in its 2015 report on the Treaty, submitted pursuant to Condition (5)(C) of the Senate Resolution of Advice and Consent to Ratification of the May 31, 1996, Document Agreed Among the States Parties to the CFE Treaty (“the CFE Flank Document”), available at <http://www.state.gov/t/avc/rls/rpt/2016/255560.htm>. The 2015 report notes:

On March 10, 2015, Russia announced it was suspending its participation in the Treaty’s JCG [Joint Consultative Group, the body created by the Treaty to resolve questions related to Treaty compliance] as of March 11, 2015. Until this announcement, Russia had continued to participate in the JCG even though it had “suspended” implementation of the Treaty in 2007.

D. CHEMICAL AND BIOLOGICAL WEAPONS

1. Chemical Weapons Convention

On September 22, 2015, the United States welcomed Angola as the 192nd State Party to the Chemical Weapons Convention. The State Department press statement on Angola joining the CWC is available at <http://www.state.gov/r/pa/prs/ps/2015/09/247179.htm>, and also expresses support for Angola’s efforts and conveys an offer of technical assistance with implementation.

2. Chemical Weapons Use in Syria

On March 19, 2015, the United States condemned the latest use of chemical weapons by the Assad regime in Syria. See March 19, 2015 press statement by Secretary Kerry, available at <http://www.state.gov/secretary/remarks/2015/03/239510.htm>. Secretary Kerry’s statement calls the latest example of Assad’s use of chemical weapons a violation of the Chemical Weapons Convention and a “direct violation of UN Security

Council Resolution 2209, which specifically condemned the use of chlorine as a chemical weapon in Syria and made clear such a violation would have consequences.” The statement goes on to say:

Any and all credible allegations of chemical weapons use, including the use of toxic industrial chemicals, must be investigated, and we continue to support the OPCW Fact Finding Mission in its continuing critical mission.

The Assad regime’s horrifying pattern of using chlorine as a chemical weapon against the Syrian people underscores the importance of investigating this allegation as quickly as possible, holding those who perpetrated such abhorrent acts in violation of international law accountable, and continuing to support the complete elimination chemical weapons in this volatile region.

On April 16, 2015, Ambassador Power delivered remarks at a UN Security Council stakeout following an “Arria-formula” meeting on Syria chemical weapons victims. Her remarks are excerpted below and available at <http://usun.state.gov/remarks/6429>.

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Thank you all for coming out. The first thing I want to do is to encourage you to, later this afternoon, have the experience that the Council just had, which is to listen to three remarkable individuals who testified to the experiences that they have had inside Syria, related to Syrian chemical weapons use—chlorine use most recently. And in the case of Qusai Zakarya, his experience of being left for dead in August 2013 in the chemical weapons attack in Moadamiya.

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In terms of the Council, we held this meeting—we brought the Council members together with these remarkable individuals because the Security Council has come together to pass Security Council resolution 2118, which has come a long way in dismantling Assad’s declared chemical weapons program. But that resolution, which was a resolution—unusual for Syria that all members of the council were able to agree upon, and very much the product of U.S.-Russian cooperation in dismantling the Syrian chemical weapons program—has not resulted in the end of chemical weapons use in Syria. And the council, as you know, came together again recently in resolution 2209 to make very clear that chlorine use is a form of Syrian chemical weapons use. It’s not what people think of necessarily. They think of it being a household product. But when you stick it in a barrel bomb and you turn it into a toxic weapon, it is prohibited by the chemical weapons convention, it is prohibited by resolution 2118 and it is made very clear that it is utterly condemned and prohibited by resolution 2209.

So what we’ve done today is brought individuals who can testify to what happened; brought the facts to the council in as rapid and moving a way as we could do, and it is now in our view, incumbent on the Council to go further than we have been able to come to this point, to get past the old divisions, to draw on the unity that we have managed to show on the single issue of chemical weapons, and stop these attacks from happening. Now the form that that takes, of

course, getting everything through 15 members of the Security Council is extremely challenging—there were 4 vetoes issued on Syria, on attempted Syrian resolutions in the past—but we feel as though anybody who witnessed what we just witnessed, and what you will hear from these individuals later today I hope, can't be anything but changed, can't be anything but motivated. And we need an attribution mechanism so we know precisely who carried out these attacks; all of the evidence of course shows that they come from helicopters, only the Assad regime has helicopters; that's very clear to us. But we need to move forward in a manner that also makes it very clear to all Council members, and then those people responsible for these attacks have to be held accountable.

The very last thing I'd say, because I know there's a lot of skepticism about accountability, because of the veto that we experienced when we put forward, with our partners, a referral of the crimes in Syria to the ICC: it is true that we failed to secure an ICC referral out of the Security Council, but it is not true that that means that accountability will not happen in Syria. Individuals who are responsible for attacks like that will be held accountable, and the documentary record is being built, the testimonies are being gathered and the long arm of justice is taking more time than any of us would wish right now, but this documentary record will be used at some point in a court of law and the perpetrators of these crimes need to bear that in mind.

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... So we need to think through what are the right modalities for an attribution mechanism. The OPCW already, as you know, has fact-finding missions that it has dispatched and they have produced very important layers and layers of testimonies and eyewitness reports and have shown, and reported with high confidence, that chlorine is being used as a chemical weapon in Syria, systematically. But what the OPCW has never done is point the finger and establish attribution. And that has not been in their mandate up until this point. Bear in mind, again, that the traditional model for OPCW is parties to the chemical weapons convention who want the OPCW's help getting rid of their chemical weapons stockpile or monitoring it—we haven't had a circumstance like this where we have a party to the chemical weapons convention that is still prepared to use chemical weapons. And so OPCW and the UN Security Council have to come together and deal with a devastating and grotesque historical anomaly.

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On August 7, 2015, Ambassador Power provided the U.S. explanation of vote on Security Council Resolution 2235 creating a UN OPCW Joint Investigative Mechanism for Syria chemical weapons. Ambassador Power's statement follows and is available at <http://usun.state.gov/remarks/6790>.

* * * *

Thank you, Madame President. Today, the UN Security Council has taken another step aimed at stopping the use of chemical weapons in Syria.

The step is necessary because—despite our previous efforts to stop the use of chemical weapons—the attacks have continued. Those efforts included the Council’s adoption in September 2013 of Resolution 2118, which required the Syrian regime to dismantle and destroy its chemical weapons program under international supervision. But while the resolution made significant progress toward that end, the attacks continued. Our efforts also included the adoption of Resolution 2209, which condemned the use of chlorine as a chemical weapon and made clear that such attacks were a violation of the Chemical Weapons Convention and Resolution 2118. Yet still, the attacks continued.

We know that these chemical attacks continued not only because of the testimonies of survivors and medical professionals And we know not only because of the gruesome footage of those suffering from the effects of such attacks—the seizures, the asphyxiation, the foaming at the mouth—footage that we have all seen.

We know for a fact because the OPCW has carried out thorough and impartial investigations into alleged attacks—and ultimately concluded that chemical weapons were used.

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Witness accounts, photographs, and videos of the attacks and their victims, and other forms of evidence led the OPCW to determine that there was “compelling confirmation” that a toxic chemical was used “systematically and repeatedly” as a weapon in the villages of Talmenes, Tamanah, and Kafr Zita, between April and August of 2014. The OPCW reported that 32 witnesses saw or heard the sound of helicopters over the three opposition-held towns right before the attacks occurred.

Until we adopted today’s resolution, there was no mechanism to take the obvious next step—determining who is involved in such attacks. Even when there were obvious signs pointing to the parties responsible, investigators were not empowered to point the finger. This has compounded an already-rampant sense of impunity in Syria.

Pointing the finger matters. Imagine for a moment if we asked an investigative team to determine whether certain atrocities occurred—such as rapes, tortures, or executions—but did not ask that team to determine who was involved in such brutal acts. As we all know, that determination ties the perpetrator to the action. And that link is essential to eventual accountability and helping prevent future abuses from occurring.

That is what the new UN OPCW Joint Investigative Mechanism will do in response to incidents in Syria that involved or likely involved the use of chemicals as weapons. The mechanism will gather evidence aimed at identifying the individuals and entities that have a hand in such attacks—and it will do all it can to name those individuals or entities.

Now, we all know that we currently lack an effective mechanism for holding criminally accountable those responsible. But when the day comes that we have one—and that day will come—the evidence gathered by the Joint Investigative Mechanism will stand as a record not just of what has been done, but of who has done it.

To those who think that impunity will last forever for the perpetrators and all others involved in chemical weapons attacks—those who order chemical attacks, those who fill munitions with chemicals, those who drop chemical weapons—look at all of the perpetrators today who find themselves being forced to answer for acts committed years or even decades ago.

Look at those who have been convicted for carrying out the genocide and war crimes in the Balkans, or those now being prosecuted in The Hague. Look at Hissene Habre, currently standing trial for atrocities he carried out in Chad three decades ago.

Let me conclude. Today's resolution has been adopted with the Council's unanimous support. This sends a clear and powerful message to all those involved in chemical weapons attacks in Syria: the Joint Investigative Mechanism will identify you if you gas people. It bears repeating, as well, that we need to bring the same unity that we have shown today to urgently find a political solution to the Syrian crisis.

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On November 6, 2015, Katharine C. Crittenberger, Adviser to the U.S. Mission to the UN in New York, delivered an explanation of vote at the UN General Assembly First Committee on behalf of the United States and 42 other delegations on draft resolution L.27/Rev.1, "Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction," sponsored by Poland. The resolution was subsequently adopted by the General Assembly on December 7, 2015 by a vote 174 in favor, none against, with 4 abstentions (China, Iran, the Russian Federation, and Syria). U.N. Doc. No. A/RES/70/41. Ms. Crittenberger's statement, emphasizing U.S. support for the OPCW-UN Joint Investigative Mechanism, is excerpted below and available at <http://usun.state.gov/remarks/6967>.

* * * *

Mr. Chairman, our respective countries intended to join consensus on this resolution as we believe it reflects the objectives and goals of the Chemical Weapons Convention, CWC, and the extraordinary work of the Organization for the Prohibition of Chemical Weapons, OPCW. Equally important, this resolution captures the current realities and state of play regarding Syria's obligations under the CWC and efforts by the international community to identify those involved in the use of chemical weapons in Syria through the establishment of an OPCW-UN Joint Investigative Mechanism, JIM.

Mr. Chairman, we believe there is no greater challenge to the CWC than a State Party using chemical weapons and the international community has been clear in its response to and condemnation of such use, including by supporting efforts to hold those who use chemical weapons accountable. The JIM is the culmination of a year-long diplomatic effort that sends a clear message to all those involved in chemical weapons attacks in Syria that the international community has tools to identify you. The JIM will soon be fully operational and begin its important work "to identify to the greatest extent feasible individuals, entities, groups, or governments who were perpetrators, organizers, sponsors or otherwise involved in the use of chemicals as weapons" in the Syrian Arab Republic.

Toward that end, we continue to express our strong support for the JIM along with the work of the OPCW Fact-Finding Mission, FFM, and the efforts of the Declaration Assessment

Team, DAT, to address the gaps and discrepancies in Syria's CWC declaration. It is our strong belief that any effort to deliberately ignore these serious issues risks undermining the work of the International Community to date, detracts from the extraordinary efforts undertaken by the OPCW, and calls into question the credibility of the CWC.

Mr. Chairman, our countries remain deeply concerned that two years after the adoption of Security Council Resolution 2118 and the September 27th OPCW Executive Council decision by consensus on the elimination of the Syrian chemical weapons program in 2013, we are still facing very serious issues of continued chemical weapons use and undeclared chemical weapons. The international community must squarely confront the reality before us and finish the work that was started. The preamble of the Chemical Weapons Convention makes clear that we must be "Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons." The extraordinary situation in Syria is a test of that goal and now, for the sake of all people everywhere—but especially for the people of Syria – we must act to exclude completely the possibility of the continued use of chemical weapons.

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3. Biological Weapons Convention

On March 30, 2015, Ambassador Robert Wood, U.S. Special Representative for Biological and Toxin Weapons Convention ("BWC") Issues, delivered remarks on the 40th anniversary of the entry into force of the BWC. His remarks are excerpted below and available at <https://geneva.usmission.gov/2015/03/30/40th-anniversary-of-the-bwc-treaty/>.

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Mr. Chairman, Excellencies, Distinguished Colleagues, Ladies and Gentlemen, 40 years after its entry into force, the Biological Weapons Convention continues to be an essential element in the international community's efforts to prohibit and eliminate such weapons, the use of which the Convention's preamble so aptly states "would be repugnant to the conscience of mankind." While not yet universal, the BWC is the centerpiece of a global norm that possession and use of these weapons are unacceptable.

During these four decades, we have witnessed astounding innovations in the life sciences that represent remarkable progress. Such advances contribute to a brighter future for all people around the world and reflect both the tremendous possibilities and great success of international cooperation in this field. At the same time, with these advances technology has become more easily accessible, putting the biological weapons within reach of a much wider array of individuals and groups. President Obama has acknowledged that "we are more susceptible to bioterrorism than ever" but pledged that, "as we take action to counter these threats, we will work together to advance our own health security and provide for the improved condition of all humanity." The world has changed; the nature of the biological weapons threat has changed; and our approach to the Biological Weapons Convention needs to keep pace.

Allow me to address some of the main challenges to the BWC as we look toward its next 40 years. The primary objective of the United States in the BWC is to work with other States

Parties to strengthen the Convention as an instrument for combatting bioweapons proliferation and terrorism. We will continue to emphasize the importance of effective national implementation of the BWC and of transparency regarding implementation as a means of assuring other States Parties about compliance with the Convention. And we will continue to be active in providing practical assistance to other States Parties that contributes to implementation and transparency.

The scientific advances and spread of technology I mentioned earlier offer incredible benefits, but they also pose thorny questions for those who seek to ensure that biological weapons will never again be used. How do we ensure that the life sciences are used for solely peaceful purposes, while still promoting their broad access to those benefits and further advancement in these fields? We know some of the answers: effective export controls, strong biosafety and biosecurity, active outreach and awareness-raising. But these are challenging issues and require ongoing attention.

Recently, the United States and the international community have begun to grapple with a specific dual-use challenge: what we have come to call “dual use research of concern.” This is legitimate life science research that can be reasonably anticipated to provide knowledge, information, products, or technologies that could be directly misapplied to pose a significant threat with broad potential consequences to public health and safety, agricultural crops and other plants, animals, the environment, materiel, or national security. We must work to preserve the benefits of life science research, while taking steps to minimize the risk of misuse of the products of such research by monitoring and mitigating such risks throughout the research process.

In addition to banning biological weapons, BWC Article VII commits States Parties to provide assistance to any other State Party if the UN Security Council decides “that such Party has been exposed to danger as a result of violation of the Convention.” Since it can be difficult and time consuming to determine whether biological weapons have been used, much of what needs to be done to fulfill this provision for assistance is also necessary to prepare for and respond to outbreaks of disease that occur naturally. This, in turn, means that the work of the BWC is closely tied to global efforts to prepare for any type of public health emergency. As the international community considers the lessons of the Ebola outbreak in West Africa for how to prepare for future health crises, now is a good time to examine and discuss what this experience of a naturally occurring epidemic might teach us about fulfilling the assistance commitments under Article VII in case a bioweapon were to be used anywhere in the world.

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The fact that 173 States have joined the Convention is an extraordinary endorsement of the BWC’s principles, but we seek a Convention in which all are Parties. Universal membership in the Convention would reflect a truly global consensus that biological weapons are illegitimate and that all states have a responsibility to prevent anyone from obtaining them. Let us strive to reach that lofty objective well before the next 40 years of the BWC have passed.

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Ambassador Wood also delivered the U.S. statement at the Meeting of Experts to the BWC on August 10, 2015. Those remarks are excerpted below and available at <https://geneva.usmission.gov/2015/08/10/u-s-statement-at-the-meeting-of-experts->

[to-the-bwc/](#). Other U.S. submissions at the 2015 Meeting of Experts are available on the website of the Implementation Support Unit (“ISU”) for the BWC at [http://www.unog.ch/80256EE600585943/\(httpPages\)/46CAC219B57F8B49C1257DB20030BCE8?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/46CAC219B57F8B49C1257DB20030BCE8?OpenDocument). U.S. Working Papers for the 2015 Meeting available from the ISU include BWC/MSP/2015/MX/WP.5 (“Advances in Science and Technology: Production and Delivery”); BWC/MSP/2015/MX/WP.6 (“Tacit Knowledge: The concept and its implications for biological weapons proliferation”); and BWC/MSP/2015/MXP/WP.19. U.S. statements at the 2015 Meeting, which are available on the ISU website, address international cooperation and assistance; developments in science and technology; strengthening national implementation; and Article VII.

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First, the United States would like to welcome Andorra as the newest State Party to the Biological Weapons Convention, becoming the 173rd. In addition, I am pleased to note that the United States is sponsoring Guinea’s participation in our meeting this week as a non-Party observer, and looks forward to the time when that country and all others not now in the BWC join us in the important obligations of the Convention. Every state that adheres to the BWC brings us closer to our fundamental goal of universal adherence.

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Clearly, a critical area of this dialogue is international cooperation and assistance, and the United States remains committed to doing our part to facilitate the fullest possible exchange of relevant material, equipment, and information, including through the Global Health Security Agenda. We look forward to a continuation of our discussion on practical ways to strengthen such exchanges, including in such areas as public health, bio-risk management, and national implementation of the Convention.

Closely related is our consideration of how more effectively to implement Article VII. We seek the widest possible agreement on means of addressing the major obstacles and challenges to international response to a major disease outbreak, whether or not it is deliberate in origin. The world’s experience with Ebola reminds us that these challenges are significant, and as BWC Parties, we must consider how we would deal with the even more horrific scenario of an outbreak caused intentionally.

Mr. Chairman, Article XII of the Convention, which states that our review of the operation of the Convention should take into account relevant new scientific and technological developments, is particularly significant for the business of this experts meeting. The United States will continue to contribute to the BWC discussion of developments in the life sciences, including how to mitigate the risks of dual-use and gain-of-function research. Our emphasis is on identifying areas where there may be a need for Parties to take action and on promoting convergence of views on such matters.

The United States will also continue to stress the vital importance of national implementation of the Convention, which is important to ensure that the BWC actually fulfills its lofty objectives and—through transparency—that Parties have confidence that others are complying with our mutually held obligations. We believe that these goals can best be served

through increased availability of information about national implementation and a more common understanding of what effective implementation involves.

To implement Article III in particular, the Seventh RevCon called for appropriate measures, including effective national export controls. To respond to this call, we and [29] other Parties have submitted a working paper proposing a common understanding on key elements of an effective national export control system that fulfill the obligations of Article III. We urge all Parties to support this understanding.

Of course another critical aspect of implementation is effective bio-risk management. Parties may be aware of recently discovered, inadvertent shipments of live anthrax spores by the U.S. Department of Defense. These samples were shipped to industry, academia, international, and other Federal laboratories for research, development, testing, and evaluation of countermeasures to protect military and civilian populations from the threat of biological agents. The United States has undertaken numerous actions to rectify this situation, including notification to the recipients of samples from all 149 batches produced since 2003, IHR Article 7 notification to the World Health Organization, and a comprehensive review by an independent committee.

As directed by the Deputy Secretary of Defense, a full accountability investigation is underway, and a moratorium for inactivation and shipping of inactivated anthrax spores has been imposed until new measures can be put in place. To maximize transparency, a great deal more information is available on a website, updated daily to provide the latest information to the public. The address is http://www.defense.gov/home/features/2015/0615_lab-stats/. In addition, a representative from the Department of Defense will be available to address States Parties questions on Thursday. The time and the room number for this briefing will be announced in advance.

Finally, Mr. Chairman, as we are now less than 15 months from our next Review Conference, I would like to remind Parties of the need this year to begin our preparations for that Conference, the culmination of our efforts over five years. ...

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On December 14, 2015, Ambassador Wood addressed the opening plenary of the annual meeting of States Parties to the Biological Weapons Convention. His remarks are excerpted below and available at <https://geneva.usmission.gov/2015/12/14/ambassador-robert-wood-addresses-biological-weapons-convention-opening-plenary/>. U.S. Working Papers for the 2015 annual meeting available on the website of the ISU at [http://www.unog.ch/unog/website/disarmament.nsf/\(httpPages\)/52f94df16e2c376ec1257ede0033c774?OpenDocument&ExpandSection=1#_Section1](http://www.unog.ch/unog/website/disarmament.nsf/(httpPages)/52f94df16e2c376ec1257ede0033c774?OpenDocument&ExpandSection=1#_Section1), include BWC/MSP/2015/MXP/WP.3 ("Strengthening the ability to take action: A realistic agenda for the Eighth Review Conference") and BWC/MSP/2015/MXP/WP.5 ("International activities of the Global Partnership against the spread of weapons and materials of mass destruction related to Article X of the Biological and Toxin Weapons Convention," submitted by a group of 13 States Parties including the United States).

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Every December, we discuss the threat of biological weapons and ways to address it. Every December, we recall the task entrusted to us: to develop common understandings and promote effective action under the Biological Weapons Convention. And every December, we adopt a report that consists mostly of recycled material and broad generalities. Have we advanced understanding of the threats and how to address them? Have our reports led to effective action? Certainly not enough.

We can do better. We need to do better. We do not have to revert to old habits.

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International Cooperation and Assistance

International cooperation is an important element of the BWC. We know there are disagreements about how to advance the goals of Article X of the Convention; but we should not allow those disagreements to prevent us from agreeing where we can and identifying specific steps we can take.

We have agreed on the importance of States Parties submitting reports on their experiences in implementing Article X. But very few States Parties have submitted such reports. We should call on all States Parties to submit reports before the 8th Review Conference. Further, we could invite those States Parties who have undergone Global Health Security Agenda or International Health Regulations core capacity assessments to consider using those assessments to identify needs for international cooperation, either in their Article X reports or in submissions to the Assistance and Cooperation Database.

We should also improve the database. We should call on the ISU to organize information about assistance and capacity-building programs thematically, and include links to other sources of technical information, assistance, and advice, not only from States Parties but from institutions like Interpol and WHO. The Article X undertakings apply to States Parties, but adding links to such information would make the database and website more useful – and if it is more useful, it will be used more.

Developments in Science and Technology

Mr. Chairman, we have had constructive discussions about advances in science and technology. Here, too, there is room for specific, useful language. A list of developments with “potential for uses contrary to the convention” and another of developments with “potential benefits,” in our view, gloss over the fact that nearly all of these technologies have the potential to be used in both harmful and beneficial ways. We should recognize this, seek to articulate those risks and benefits, and indicate whether there are steps States Parties should take to mitigate the risks while preserving the benefits. I would hope that we could also further develop our understandings on dual-use and gain-of-function research.

Strengthening National Implementation

We were given a mandate to strengthen national implementation. It is essential that our report recognize that better information about what countries are doing to implement the Convention is a critical requirement and must be addressed. Without such information, how can we understand what needs to be strengthened, or how best to go about it?

We should also further develop our shared understanding of what measures will help to achieve the goal of effective national implementation. As long ago as the 6th Review

Conference, States Parties agreed on the importance of effective national export controls. Last year, we discussed specific elements widely recognized as key to such systems. This year, 37 States Parties proposed that we recognize the value of these elements in our report. This would be a valuable contribution – a common understanding that would, indeed, promote effective action. For this meeting, India and the United States have jointly submitted a working paper outlining further steps that could be taken in this area by the 8th RevCon. This working paper is an important cross-regional initiative that will be a significant contribution to our future work, and we welcome the support of other States Parties in this effort.

Strengthening Implementation of Article VII

The international public health and emergency response architecture is in the midst of significant change right now. It is critical that the steps we take to strengthen Article VII are integrated into the new architecture that emerges. But that does not mean that no action in the BWC is possible. We should more explicitly recognize the inter-relationship between Article X and Article VII: efforts to assist States Parties in building their public health and response capabilities are not “assistance” in the sense of Article VII – but in the event of biological weapons use, may be even more valuable than response efforts after the fact.

And we should recognize and deal with a practical challenge: how is Article VII actually activated? Here, the proposals made by South Africa in working paper BWC/MSP/2015/MXP/WP.10 provide an excellent basis for further work, and could be provisionally applied now, without need for further delay.

Looking Toward the Review Conference

We have another task this week: to take decisions on arrangements for next year’s Review Conference. My delegation strongly supports the proposal that we should prepare for our three-week RevCon with two separate, week-long preparatory meetings that will focus on substance as well as procedure. Such preparatory work is critical if we are to arrive at a strong, substantive outcome at the RevCon. It will ensure that our work is transparent, inclusive, and thoughtful. And, according to the estimates, it is affordable. The majority of States Parties will be asked to pay less than 100 dollars more than they were assessed for the 2011 Review Conference.

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Some have called for a new round of negotiations on a supplementary treaty to the BWC. But we’ve been down that road. There continue to be deep divisions among delegations on critical issues. This is the path to deadlock and delay—it is a road that goes nowhere. We see a better option: BWC States Parties already have the necessary authority to take practical steps that command wide support; we should marshal the political will to make use of that authority and take such steps. Instead of attempting to negotiate a new treaty, we should make better use of the powers we have under the treaty we’ve got.

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My delegation is pleased to present a working paper ... entitled “Strengthening the Ability to Take Action: A Realistic Agenda for the 8th Review Conference,” which sets out our ideas on reinforcing our working processes and structures, including the authority of annual meetings such as this one.

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As Ambassador Wood mentioned, there was discussion at the 2015 meeting of States Parties of the possibility of elaborating a new protocol to the BWC. The United States provided a statement at a side event on that possibility, excerpted below, which explains U.S. opposition.

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Overall, the approach strikes us as more complicated and protracted than it needs to be:

- First, negotiate a mandate – and we’ve already heard this evening that there are real differences of opinion on the scope of such a mandate, so this would not be easy;
- Then, negotiate a treaty: we know there are a range of views on many of the issues, and I am not nearly as confident as my Russian colleagues that it would be possible to simply borrow old Protocol text to quickly assemble a text; I expect that it would be quite a protracted process – and one with a genuine risk of deadlock and failure.
- Even if it was successful, we would then have to wait for a sufficient number of States Parties to ratify to bring the treaty into force. Add several more years – and much more if the goal is widespread participation.
- All in all, that’s quite a gamble – and one that would take many years even if it paid off.

So let’s step back a moment and ask ourselves: do we NEED a new legal instrument to do the things we want to do?

Do we have the authority to create new governance structures? Yes: The BWC only provided for one Review Conference. All the rest of the RevCons, the intersessional process, the Ad Hoc Group, various expert groups over the years, were all established without an underlying legal instrument. So it’s clear that we can assemble ourselves into any configuration we can agree on in order to address an issue.

Do we have the authority to hire staff? I hope so, since we’re paying the ISU and they are providing important services to BWC States Parties. It seems clear we don’t need a new instrument to do this.

Do we have the authority to decide on policies, implement programs, and take action? Here, too, the record seems pretty clear. Review Conferences have taken a number of important policy decisions to interpret or implement provisions of the Convention. We have established a system of Confidence-Building Measures, an assistance database, and a sponsorship program. These are small steps, perhaps, but they demonstrate that we already have the authority we need.

So let’s ACT at the Review Conference:

- Let’s create the structures that we need;
- Let’s establish whatever policies, and actions to support them, we can agree on;
- Let’s reinforce the ISU if we believe that is required;
- And let’s establish a process to continue to work on issues that require further discussion.

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E. ARMS TRADE TREATY

For background on the Arms Trade Treaty, see *Digest 2013* at 710-15 and *Digest 2012* at 674-79. In August 2015, the First Conference of States Parties to the Arms Trade Treaty convened in Cancun, Mexico. Assistant Secretary Countryman delivered the U.S. Statement on August 25, 2015, which is excerpted below and available at <http://www.state.gov/t/isn/rls/rm/2015/246314.htm>.

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We are here to take foundational decisions to operationalize this Treaty, to turn it from mere words on the page into a reality that makes a difference around the world. We are here to breathe life into this Treaty by standing up its international operation.

To be successful, we must keep in mind certain fundamental principles. First, we must remind ourselves of the shared commitment that we all have to the text that we all have signed. That text enjoys overwhelming international support, and we need to remain faithful to its provisions, which were the result of difficult choices made during a multi-year negotiation.

Second, The Treaty contains obligations for States Parties, not for other entities. The decisions made here must reflect this fact. Civil society and industry played important roles during the negotiation, but neither one can join the Treaty. Only States Parties can. However, the Treaty must operate in an open, transparent, and inclusive manner that allows civil society and industry, without discrimination, to continue to play an important role as observers assisting States Parties.

Third, we acknowledge and admire the hard work many States have done to prepare for this conference, but it is even more important for States to devote still greater energy to their national decisions that will implement their NATIONAL obligations under this INTERNATIONAL Treaty. The location of the Secretariat is NOT as important as decisions made by national governments to pass legislation and create procedures for import and export, to fight corruption in government, police and the military, and to build bilateral cooperation against arms traffickers. The ATT Secretariat can and should be a support mechanism for States making those hard choices. The Secretariat can NOT implement the Treaty; it cannot serve as a supranational decision mechanism; nor can it be a substitute for hard decisions in capitals. The United States, which has long implemented laws and practices that are fully consistent with ATT requirements, will continue to offer assistance to States determined to establish the laws, the processes, the control lists and the border controls that will allow them to implement fully this Treaty.

Finally, the Treaty is not a solution by itself to the problems of armed conflict that plague the world, but it is a tool that we can use, energetically and effectively, to address those problems. The United States will continue its commitment to the Arms Trade Treaty. Like so many of you, we worked hard for years to achieve a Treaty that is both workable and meaningful. Decisions taken in this room, but especially the decisions taken at home by the

governments represented in this room, will determine whether the ATT will live up to its potential.

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Cross References

Congressional correspondence regarding the JCPOA, **Chapter 4.A.4.**

Iran claims, **Chapter 8.B.**

Ukraine/Russia, **Chapter 9.B.1.**

Outer space, **Chapter 12.B.**

Iran sanctions, **Chapter 16.A.1.**

Nonproliferation sanctions, **Chapter 16.A.5.**

Export controls, **Chapter 16.B.**

Conventional weapons, **Chapter 18.B.**