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Contemporary Practice of the United States Relating to International Law

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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY KRISTINA DAUGIRDAS AND JULIAN DAVIS MORTENSON

A NOTE TO OUR READERS

With this issue, Kristina Daugirdas and Julian Davis Mortenson take on this section of the *American Journal of International Law* as co-editors. The Board of Editors extends its warmest thanks to John Crook for his distinguished service as editor of the Contemporary Practice section since January 2005 (vol. 99, no. 1).

In this section:

- Progress Is Made Implementing U.S.-Russia Framework for Eliminating Syrian Chemical Weapons
- United States Advocates for Syrian Peace Conference
- United States Extends Deadline for Signing of Bilateral Security Agreement with Afghanistan
- China Announces New Air Defense Identification Zone over East China Sea, Prompting U.S. Response
- United States and Six Other States Reach Interim Agreement on Iranian Nuclear Program

GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

Progress Is Made Implementing U.S.-Russia Framework for Eliminating Syrian Chemical Weapons

Several weeks after an attack in the suburbs of Damascus that killed large numbers of Syrian civilians by exposure to sarin nerve gas in August 2013, the United States and Russia agreed to a “Framework for Elimination of Syrian Chemical Weapons.” Pursuant to the framework, the Organization for the Prohibition of Chemical Weapons (OPCW) would supervise the identification and destruction of Syria’s chemical weapons by mid-2014.¹ The Security Council adopted Resolution 2118 to support the implementation of the framework.²

The joint OPCW-UN advance team arrived in Damascus at the beginning of October to begin working with Syrian officials to arrange inspections and destruction.³ The government of Syrian President Bashar al-Assad welcomed the inspectors while still denying responsibility for the August chemical weapons attack.⁴ In part because Syria’s disclosures of its chemical weapons inventory were incomplete, the team depended heavily on Syrian cooperation.⁵ The team’s initial task was to destroy “category 3” weapons, including warheads and aerial bombs, with this portion of the work expected to take roughly a month.⁶ Also in early October—a few days after the team began working—UN Secretary-General Ban Ki-moon issued a report, as required by Resolution 2118, proposing the deployment of up to one hundred UN and OPCW specialists for the joint mission in Damascus, with a staging ground in Cyprus.⁷

The OPCW’s director general, Ahmet Üzümcü, described the Syrian government as “constructive” and “cooperative” in executing the plan.⁸ Both Secretary of State John Kerry and Russian officials expressed satisfaction with the OPCW-led process and conveyed optimism that the 1000-ton arsenal could be demolished over the next eight months.⁹ Less than two weeks into the disarmament program, the OPCW was awarded the Nobel Peace Prize for its work.¹⁰

¹ See John R. Crook, *Contemporary Practice of the United States*, 107 AJIL 900 (2013).

² See *id.* at 905–06 (quoting SC Res. 2118 (Sept. 27, 2013)).

³ Organization for the Prohibition of Chemical Weapons [OPCW] Press Release, *OPCW-UN Team Arrives in Damascus and Sets Up Operational Base* (Oct. 1, 2013), at <http://www.opcw.org/news/article/opcw-un-team-arrives-in-damascus-and-sets-up-operational-base/>.

⁴ Anne Barnard, *Weapons Inspection Team Begins Work in Syria*, N.Y. TIMES, Oct. 3, 2013, at A6.

⁵ Michael R. Gordon, *Plan for Ridding Syria of Chemical Arms Includes Brute Force and Chemistry*, N.Y. TIMES, Oct. 6, 2013, at A10.

⁶ OPCW Press Release, *Syria Chemical Weapons Destruction Begins* (Oct. 6, 2013), at <http://www.opcw.org/news/article/syria-chemical-weapons-destruction-begins/>; Nick Cumming-Bruce, *Weapons Group Calls Syrian Authorities Cooperative*, N.Y. TIMES, Oct. 10, 2013, at A11.

⁷ Letter Dated 7 October 2013 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2013/591 (Oct. 7, 2013).

⁸ *Chemical Weapons Watchdog OPCW Confirms 12 More Inspectors Will Be Sent to Syria*, EURONEWS (Oct. 9, 2013), at <http://www.euronews.com/2013/10/09/chemical-weapons-watchdog-opcw-confirms-12-more-inspectors-will-be-sent-to-syria/>.

⁹ Ben Hubbard, *Second Team of Experts on Weapons to Go to Syria*, N.Y. TIMES, Oct. 9, 2013, at A8.

¹⁰ Norwegian Nobel Committee, *The Nobel Peace Prize for 2013* (Oct. 11, 2013), at http://nobelpeaceprize.org/en_GB/laureates/laureates-2013/announce-2013/.

The Chemical Weapons Convention¹¹ officially entered into force for Syria in mid-October.¹² By the end of the month, in accordance with Convention requirements,¹³ Syria had submitted a formal declaration of its chemical weapons holdings.¹⁴ By that same time, the international inspectors had visited thirty-nine of the forty-one facilities and twenty-one of the twenty-three sites. The equipment from the remaining two locations, in areas said to be too dangerous for inspectors, had reportedly been moved to the accessible sites.¹⁵ All of the production facilities were destroyed, and the remaining chemicals were secured.¹⁶ According to an OPCW statement, “no further inspection activities [were] currently planned.”¹⁷ Subsequently, inspectors confirmed that one of the two unvisited sites, located in Aleppo, had been destroyed.¹⁸

With the remaining chemicals secured, attention shifted to identifying a location for their disposal. The Convention prohibits transporting chemicals across borders, but the Security Council resolution allowed for extraordinary measures, given the unique circumstances.¹⁹ Syrian officials said that they would not turn over chemical weapons to the United States.²⁰ The United States sought assistance from Albania and Norway to destroy chemical weapons, but both states declined, with Norway citing the “time constraints and external factors, such as capacities [and] regulatory requirements.”²¹ Despite these difficulties, the OPCW approved a Syrian plan to transport the most sensitive chemicals out of the country by the end of December, with almost all of the remainder to be removed by February 5, 2014.²² Without a set disposal site, the OPCW invited private chemical disposal firms to express their interest in the

¹¹ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 UNTS 316, S. TREATY DOC. No. 103-21.

¹² OPCW Press Release, Syria’s Accession to the Chemical Weapons Convention Enters into Force (Oct. 14, 2013), *at* <http://www.opcw.org/news/article/syria-submits-its-initial-declaration-and-a-general-plan-of-destruction-of-its-chemical-weapons-pro/>.

¹³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *supra* note 11, Art. III(1) (requiring state party to submit a declaration that specifies “the precise location, aggregate quantity and detailed inventory of chemical weapons it owns or possesses” and that provides “its general plan for destruction of chemical weapons”).

¹⁴ OPCW Press Release, Syria Submits Its Initial Declaration and a General Plan of Destruction of Its Chemical Weapons Programme (Oct. 27, 2013), *at* <http://www.opcw.org/news/article/syria-submits-its-initial-declaration-and-a-general-plan-of-destruction-of-its-chemical-weapons-pro/>.

¹⁵ OPCW Press Release, Syria Completes Destruction Activities to Render Inoperable Chemical Weapons Production Facilities and Mixing/Filling Plants (Oct. 31, 2013), *at* <http://www.opcw.org/news/article/syria-completes-destruction-activities-to-render-inoperable-chemical-weapons-production-facilities-a/>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Alan Cowell & Rick Gladstone, *Inspectors in Syria Have Only One Site Left to Check*, N.Y. TIMES, Nov. 8, 2013, at A13.

¹⁹ SC Res. 2118, *supra* note 2, para. 10 (authorizing “Member States to acquire, control, transport, transfer and destroy chemical weapons” identified through the OPCW inspection).

²⁰ Nick Cumming-Bruce & Michael R. Gordon, *Syria: War Hinders Arms Inspectors*, N.Y. TIMES, Oct. 29, 2013, at A6.

²¹ Alan Cowell, *Norway: American Request to Help Destroy Chemical Arms Is Denied*, N.Y. TIMES, Oct. 26, 2013, at A5; Nick Cumming-Bruce & Michael R. Gordon, *Albania Won’t Aid in Destruction of Syria’s Chemical Arms*, N.Y. TIMES, Nov. 16, 2013, at A9.

²² OPCW Executive Council Decision 1, 34th Mtg., UN Doc. EC-M-34/DEC.1 (Nov. 15, 2013).

disposal project.²³ In the meantime, the United States devised a plan to dispose of the “priority chemicals,” which were scheduled for destruction by December 31 on a modified U.S. naval ship—a solution welcomed by the OPCW.²⁴

United States Advocates for Syrian Peace Conference

The United States has undertaken efforts to broker peace talks to end the Syrian conflict both before and since the events relating specifically to the use of chemical weapons. The United States participated in the UN-backed Action Group for Syria, which forged a communiqué outlining the steps for a peaceful transition in June 2012 (2012 Geneva Communiqué).¹ An excerpt follows:

- All parties must re-commit to a sustained cessation of armed violence in all its forms and implementation of the six-point plan immediately and without waiting for the actions of others. The government and armed opposition groups must cooperate with [the UN Supervision Mission in Syria] with a view to furthering the implementation of the above in accordance with its mandate.
- A cessation of armed violence must be sustained with immediate, credible and visible actions by the Government of Syria to implement the other items of the six-point plan [negotiated by Kofi Annan in 2012] including:
 - Intensification of the pace and scale of release of arbitrarily detained persons, including especially vulnerable categories of persons, and persons involved in peaceful political activities; provision without delay through appropriate channels of a list of all places in which such persons are being detained; the immediate organization of access to such locations; and the provision through appropriate channels of prompt responses to all written requests for information, access or release regarding such persons;
 - Ensuring freedom of movement throughout the country for journalists and a non-discriminatory visa policy for them;
 - Respecting freedom of association and the right to demonstrate peacefully as legally guaranteed.
- In all circumstances, all parties must show full respect for [the UN Supervision Mission in Syria’s] safety and security and fully cooperate with and facilitate the Mission in all respects.
- In all circumstances, the Government must allow immediate and full humanitarian access to humanitarian organizations to all areas affected by the fighting. The Government and all parties must enable the evacuation of the wounded, and all civilians who

²³ OPCW Press Release, Commercial Chemical Companies Invited to Dispose of a Significant Part of Chemicals from Syria (Nov. 22, 2013), at <http://www.opcw.org/news/article/commercial-chemical-companies-invited-to-dispose-of-a-significant-part-of-chemicals-from-syria/>. Despite indications that the December 31 deadline for priority chemicals may slip to early January, the OPCW expressed “confidence” that the disposal project was otherwise on track for completion by the end of June 2014. Rick Gladstone, *Delay Foreseen in Removing Syrian Chemicals* N.Y. TIMES, Dec. 10, 2013, at A8.

²⁴ OPCW Press Release, United States Offers to Destroy Syria’s Priority Chemicals (Nov. 30, 2013), at <http://www.opcw.org/news/article/united-states-offers-to-destroy-syrias-priority-chemicals/>.

¹ Action Group for Syria, Final Communiqué (June 30, 2012), at <http://www.un.org/News/dh/infocus/Syria/FinalCommuniqueActionGroupforSyria.pdf>.

wish to leave to do so. All parties must fully adhere to their obligations under international law, including in relation to the protection of civilians.

Despite high hopes,² little progress was made toward setting a date for the follow-up peace conference, called Geneva II. Even basic efforts at scheduling proved complicated.³ After meeting with Russian Foreign Minister Sergey Lavrov in July 2013, U.S. Secretary of State John Kerry cited a general desire that a peace conference be held “sooner rather than later,” yet differences persisted on the structure, purpose, and membership of the meeting.⁴ The United States opposed participation by Iran. Russia sought to pave the way for attendance by several different opposition groups, which U.S. officials feared would diminish the opposition’s bargaining power.⁵

In late July, Lavrov announced that President Bashar al-Assad was ready to engage in peace negotiations without preconditions and called on Western leaders to secure the participation of the rebels.⁶ Within days, Ahmad al-Jarba, the new president of the opposition Syrian National Coalition, announced that he would attend peace talks without preconditions.⁷ He quickly reversed course, however, by rejecting the participation of Assad altogether and declaring that the rebels would not participate “unless the situation on the ground is in favor of the revolution.”⁸ Peace talks were soon sidelined by the crisis stemming from the use of chemical weapons outside Damascus in August.

The peace process gained renewed attention in September, after the United States and Russia began negotiating the destruction of Syria’s chemical weapons.⁹ At a press conference with Lavrov, Kerry affirmed that the Obama administration was “deeply committed to a negotiated solution,” while Lavrov lamented that the agreed terms contained in the 2012 Geneva Communiqué had been “basically abandoned.”¹⁰ As the weapons crisis came to a head, President Barack Obama addressed the UN General Assembly and pushed for progress in the Geneva talks:

We are committed to working [a] political track. And as we pursue a settlement, let’s remember this is not a zero-sum endeavor. We’re no longer in a Cold War. There’s no Great Game to be won, nor does America have any interest in Syria beyond the wellbeing

² Peter Beaumont & Shiv Malik, *Syria Crisis: Geneva Talks Sound Death Knell for Assad Regime*, GUARDIAN (July 1, 2012), at <http://www.theguardian.com/world/2012/jul/01/syria-crisis-geneva-talks-assad>.

³ Nick Cumming-Bruce & Michael R. Gordon, *U.S. and Russia Agree to Meet on Syria*, N.Y. TIMES, June 26, 2013, at A12.

⁴ U.S. Dep’t of State Press Release No. 2013/T09-21, John Kerry, Secretary of State, Press Statement After Meeting with Russian Foreign Minister Lavrov (July 2, 2013), at <http://www.state.gov/secretary/remarks/2013/07/211465.htm>.

⁵ Michael R. Gordon, *Kerry, Meeting Russian Official, Seeks Syria Talks Soon*, N.Y. TIMES, July 3, 2013, at A3.

⁶ Sergey Lavrov, Russian Foreign Minister, Introductory Speech at the Meeting with Syrian Government Delegations Headed by President of the Council of Ministers of the Syrian Arab Republic Qadri Jamil (July 22, 2013), at http://www.mid.ru/bdomp/brp_4.nsf/english.

⁷ Michael R. Gordon, *Syrian Opposition Leader Says He Would Meet Assad Officials*, N.Y. TIMES, July 29, 2013, at A7.

⁸ Ben Hubbard, *Head of Syrian Opposition Rejects Talks with Assad*, N.Y. TIMES, Aug. 1, 2013, at A6.

⁹ Ben Hubbard, *U.S.-Russia Talks on Syria’s Arms Make Progress*, N.Y. TIMES, Sept. 14, 2013, at A1.

¹⁰ U.S. Department of State Press Release No. 2013/T14-03, Joint Statements After Trilat (Sept. 13, 2013) (remarks by John Kerry, U.S. secretary of state, and Sergey Lavrov, Russian foreign minister), at <http://www.state.gov/secretary/remarks/2013/09/214176.htm>.

of its people, the stability of its neighbors, the elimination of chemical weapons, and ensuring that it does not become a safe haven for terrorists.

I welcome the influence of all nations that can help bring about a peaceful resolution of Syria's civil war. And as we move the Geneva process forward, I urge all nations here to step up to meet humanitarian needs in Syria and surrounding countries. America has committed over a billion dollars to this effort, and today I can announce that we will be providing an additional \$340 million. No aid can take the place of a political resolution that gives the Syrian people the chance to rebuild their country, but it can help desperate people to survive.¹¹

The UN Security Council also endorsed the Geneva II concept in its chemical weapons resolution, despite the persistent differences over process and preconditions. The relevant text of Resolution 2118 provides:

16. *Endorses* fully the Geneva Communiqué of 30 June 2012 (Annex II), which sets out a number of key steps beginning with the establishment of a transitional governing body exercising full executive powers, which could include members of the present Government and the opposition and other groups and shall be formed on the basis of mutual consent;

17. *Calls* for the convening, as soon as possible, of an international conference on Syria to implement the Geneva Communiqué, and *calls upon* all Syrian parties to engage seriously and constructively at the Geneva Conference on Syria, and *underscores* that they should be fully representative of the Syrian people and committed to the implementation of the Geneva Communiqué and to the achievement of stability and reconciliation.¹²

While the international community contemplated peace talks, the views of the Syrian parties remained unclear. Assad's position seemed to soften, acknowledging that "mistakes" had occurred and that "[r]eality isn't black and white."¹³ A Syrian deputy minister suggested that the regime would pursue domestic political solutions, circumventing the rebels and any peace talks.¹⁴ When a senior Syrian official said that the Geneva conference could take place in late November,¹⁵ he was soon dismissed for failing to "coordinat[e] with the government."¹⁶ The rebels, meanwhile, remained fractured, as the rising prominence of extremists with Al Qaeda affiliations challenged the Syrian National Coalition.¹⁷

In late October, the United States and ten Arab and European countries met in London to jump-start the Geneva II efforts, expressing hopes of holding a conference in November.¹⁸ Those meetings resulted in a communiqué setting out basic principles for Geneva II:

¹¹ Address to the UN General Assembly (Sept. 24, 2013), at <http://www.whitehouse.gov/the-press-office/2013/09/24/remarks-president-obama-address-united-nations-general-assembly>.

¹² SC Res. 2118 (Sept. 27, 2013) (endorsing 2012 Geneva Communiqué, *supra* note 1).

¹³ Dieter Bednarz & Klaus Brinkbäumer, *Interview with Bashar Assad*, DER SPIEGEL, at <http://www.spiegel.de/international/world/spiegel-interview-with-syrian-president-bashar-assad-a-926456.html>.

¹⁴ Anne Barnard, *Stance on Peace Talks Suggests Syria and West Differ on Tactics*, N.Y. TIMES, Sept. 25, 2013, at A15.

¹⁵ Alan Cowell, *Syrian Official Says Peace Talks Could Be Held in Late November*, N.Y. TIMES, Oct. 18, 2013, at A12.

¹⁶ Anne Barnard, *Syria Fires Official Who Tried to Broker Peace*, N.Y. TIMES, Oct. 30, 2013, at A4.

¹⁷ Michael R. Gordon & Ben Hubbard, *Qaeda-Linked Group Is Seen Complicating the Drive for Peace in Syria*, N.Y. TIMES, Oct. 22, 2013, at A10.

¹⁸ Those eleven countries (the "London 11") were Egypt, France, Germany, Italy, Jordan, Qatar, Saudi Arabia, Turkey, the United Arab Emirates, the United Kingdom, and the United States. Michael R. Gordon & Alan Cowell, *U.S. and 10 Other Nations Back Peace Talks, but Syrian Moderates Are Uncertain*, N.Y. TIMES, Oct. 23, 2013, at A17.

10. The Geneva II conference must lead to a political transition based on the full implementation of the Geneva Communiqué of June 30, 2012, while preserving the sovereignty, independence, unity and territorial integrity of the Syrian State.

11. The future Syria must be democratic, pluralistic, and respectful of human rights and of the rule of law. Every citizen must enjoy full equality before the law regardless of his religious or ethnic background.

12. The Conference must achieve two main aims:

- (a) the establishment, by mutual consent, of a [Transitional Governing Body (TGB)] with full executive powers with control over all governmental institutions, including the armed forces, security services and intelligence apparatuses. The TGB must be the only source of legitimacy and legality in Syria, and any elections in Syria must be conducted within the framework of the political transition;
- (b) the adoption, by the parties, of a declaration on the principles, steps and timeframe of the political transition to democracy.

13. Negotiations to form the TGB must not be open-ended. Delaying tactics should not be tolerated. It should be possible with the commitment and good faith of both sides to establish the TGB expeditiously within the coming months.¹⁹

Diplomats from the United States and Russia subsequently met to set a date for the Geneva II conference but failed to reach a decision.²⁰ Persistent disagreement over attendance, including the roles of Iran and President Assad, proved insurmountable,²¹ and officials acknowledged that a peace conference might not happen before the end of the calendar year.²² After continued negotiation, UN Secretary-General Ban Ki-moon announced in late November that the Geneva II conference would be convened on January 22, 2014, and would be attended by both the Syrian government and the opposition.²³ In Washington, Kerry lauded the announcement and described the conference as an opportunity to “form a new transitional governing body through mutual consent.”²⁴

Despite Ban’s assurances, it remained unclear whether both the Syrian government and the opposition would participate, and in what configuration. The Syrian Foreign Ministry indicated that a government delegation would participate but noted that the delegation would not be “hand[ing] over authority to anybody.” The government continued to frame the terms of debate around “eliminating terrorism” and indicated resistance to the participation of armed rebels, saying that the conference would not serve the interests of “those who have shed the

¹⁹ U.S. Dep’t of State Press Release No. 2013/1276, Communiqué of the London 11, paras. 10–13 (Oct. 22, 2013), at <http://www.state.gov/r/pa/prs/ps/2013/10/215729.htm>.

²⁰ Nick Cumming-Bruce & Rick Gladstone, *Diplomats Fail to Agree on Details for Syria Peace Talks*, N.Y. TIMES, Nov. 6, 2013, at A6.

²¹ *Id.*

²² Alan Cowell & Rick Gladstone, *Inspectors in Syria Have Only One Site Left to Check*, N.Y. TIMES, Nov. 8, 2013, at A13.

²³ UN News Centre Press Release, Ban Ki-moon’s Speeches: Remarks at Press Encounter on Syria (Nov. 25, 2013), at http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=2067#.Upn7JGRDvj8.

²⁴ U.S. Dep’t of State Press Release No. 2013/1475, Geneva Conference in Syria (Nov. 25, 2013) (statement by John Kerry, secretary of state), at <http://www.state.gov/secretary/remarks/2013/11/218045.htm>.

blood of this people.”²⁵ Meanwhile, the Syrian National Coalition had voted in mid-November to participate in the Geneva process,²⁶ a decision hailed by the United States as “a significant step forward in the process to convene the Geneva conference.”²⁷ The Syrian National Coalition’s legitimacy was challenged, however, by the Islamic Front, a newly unified group of Islamist rebels that emerged in late November.²⁸ Moreover, the coalition indicated that it would not attend the scheduled conference without a guarantee that Assad would be removed, and the Free Syria Army, the coalition’s military wing, said that it would continue fighting despite the conference.²⁹

United States Extends Deadline for Signing of Bilateral Security Agreement with Afghanistan

Throughout 2013, the United States and Afghanistan attempted to negotiate an agreement authorizing as many as fifteen thousand U.S. troops to remain in the Afghanistan beyond 2014.¹ For much of this time, it was the United States’ position that failure to reach an agreement by the end of 2013 would risk the termination of America’s military presence in Afghanistan entirely—an outcome described as the “zero option.”²

On November 20, 2013, Secretary of State John Kerry announced that the two states had “reached an agreement as to the final language of the Bilateral Security Agreement,”³ making it appear likely that negotiations would be concluded before the December 31 deadline that had been imposed by the United States.⁴ As released in draft form by the Afghan foreign ministry, the draft agreement affirmed the United States’ exclusive jurisdiction over U.S. troops and affiliated personnel, and exempted U.S. forces and companies from Afghan taxes in the following terms:

Article 13. Status of Personnel

1. Afghanistan, while retaining its sovereignty, recognizes the particular importance of disciplinary control, including judicial and non-judicial measures, by the United States forces authorities over members of the force and of the civilian component. Afghanistan therefore agrees that the United States shall have the exclusive right to exercise jurisdiction over such persons in respect of any criminal or civil offenses committed in the territory of Afghanistan.

²⁵ H. Sain, *Syria Welcomes the Announced Date Set for Geneva 2 Conference*, SYRIAN ARAB NEWS AGENCY (Nov. 28, 2013), at <http://213.178.225.235/eng/21/2013/11/28/514657.htm>.

²⁶ Anne Barnard & Hwaida Saad, *Leading Syrian Opposition Group, Yielding to Pressure, Votes to Join Peace Talks*, N.Y. TIMES, Nov. 12, 2013, at A6.

²⁷ U.S. Department of State Press Release No. 2013/1395, *Statement on Syria* (Nov. 12, 2013), at <http://www.state.gov/r/pa/prs/ps/2013/11/217501.htm>.

²⁸ Loveday Morris, *Seven Syrian Islamist Rebel Groups Form New Islamic Front*, WASH. POST, Nov. 23, 2013, at A14.

²⁹ Ben Hubbard, *Syria: Planned Peace Conference Hits Roadblocks*, N.Y. TIMES, Nov. 27, 2013, at A7.

¹ Tim Craig & Karen DeYoung, *New Uncertainty About Afghan Deal*, WASH. POST, Nov. 22, 2013, at A8.

² Rod Norland & Alissa J. Rubin, *Karzai’s Bet: U.S. Bluffing*, N.Y. TIMES, Nov. 27, 2013, at A1.

³ U.S. Dep’t of Defense News Transcript, *Joint Media Availability with Secretary Kerry, Secretary Hagel, Foreign Minister Bishop and Defence Minister Johnson in the Ben Franklin Room*, U.S. Department of State (Nov. 20, 2013), at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5329>.

⁴ Anne Gearan & Ernesto Londono, *U.S. Backing Off Dec. 31 Deadline for Afghanistan Security Deal*, WASH. POST, Dec. 12, 2013, at A10.

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Article 17. Taxation

1. The acquisition in Afghanistan of articles and services by or on behalf of United States forces shall not be subject to any taxes or similar or related charges assessed within the territory of Afghanistan.

2. United States forces, including members of the force and of the civilian component, shall not be liable to pay any tax or similar or related charges assessed by the Government of Afghanistan within the territory of Afghanistan.⁵

One issue of particular note had been the ongoing nighttime raids of Afghan homes by U.S. forces. Although Afghan President Hamid Karzai had initially demanded that the raids cease altogether, his position seemed to soften after President Barack Obama sent a letter promising to “respect the sanctity and dignity of Afghans in their homes.”⁶ The draft text of the agreement acknowledged that “U.S. military operations to defeat al-Qaida and its affiliates may be appropriate in the common fight against terrorism”⁷ but specified that U.S. operations are only “intended to complement and support [Afghan National Defense and Security Forces’] counter-terrorism operations, with the goal of maintaining [Afghan National Defense and Security Forces’] lead, and with full respect for Afghan sovereignty and full regard for the safety and security of the Afghan people, including in their homes.”⁸

With the form and terms of the agreement thus having apparently been settled, Karzai surprised U.S. officials when he stated during his opening speech before the Loya Jirga on November 21, 2013, that the “agreement will be signed when we hold honorable and proper elections.”⁹ The implication was that even if the Loya Jirga—a council of Afghan elders whose authorization is required before submitting the draft for parliamentary approval¹⁰—endorsed the language of the agreement, Karzai would not finalize the agreement until April 5, 2014, when the next Afghan presidential election is scheduled.¹¹

On behalf of the United States, Kerry objected to the delay, detailing the problems it posed for American and North American Treaty Organization forces:

[T]his is not fooling around. This is serious business. There are over 50 nations who are engaged here through NATO in trying to help Afghanistan. And those nations have budget cycles. Those nations have planning requirements. Those nations have equipment

⁵ Afghanistan Ministry of Foreign Affairs Press Release, Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan (Nov. 20, 2013), at <http://mfa.gov.af/en/news/bsa>.

⁶ Office of the President of Afghanistan Press Release, President Obama’s Letter to President Karzai on BSA (Nov. 20, 2013), at [http://president.gov.af/Content/files/President%20Obama%27s%20Letter%20to%20President%20Karzai\(1\).pdf](http://president.gov.af/Content/files/President%20Obama%27s%20Letter%20to%20President%20Karzai(1).pdf); Rod Norland, *Key Issue Said to Be Resolved in U.S.-Afghan Security Talks*, N.Y. TIMES (Nov. 19, 2013), at <http://www.nytimes.com/2013/11/20/world/middleeast/key-issue-said-to-be-resolved-in-us-afghan-security-talks.html>.

⁷ Afghanistan Ministry of Foreign Affairs Press Release, *supra* note 5.

⁸ *Id.*

⁹ Craig & DeYoung, *supra* note 1.

¹⁰ See Norland, *supra* note 6.

¹¹ Craig & DeYoung, *supra* note 1.

requirements. They have deployment requirements. And all of those things are best managed with planning.¹²

After four days of deliberation, the Loya Jirga recommended that Karzai promptly sign the agreement.¹³ Consistent with his earlier statement, however, Karzai rejected the recommendation and imposed three additional conditions to an acceptable security agreement: “an immediate end to raids on Afghan homes, good-faith efforts by the Americans to promote the peace process and their assurance of ‘transparency’ in elections.”¹⁴

In the hopes of ending the political impasse, Obama sent his top national security adviser, Susan Rice, to meet with Karzai. Both sides stuck to their hard-line stances during the two-hour meeting.¹⁵ According to the White House:

Ambassador Rice stressed that we have concluded negotiations and that deferring the signature of the agreement until after next year’s elections is not viable, as it would not provide the United States and NATO allies the clarity necessary to plan for a potential post-2014 military presence. Nor would it provide Afghans with the certainty they deserve regarding their future, in the critical months preceding elections. Moreover, the lack of a signed [Bilateral Security Agreement] would jeopardize NATO and other nations’ pledges of assistance made at the Chicago and Tokyo conferences in 2012. Ambassador Rice reiterated that, without a prompt signature, the U.S. would have no choice but to initiate planning for a post-2014 future in which there would be no U.S. or NATO troop presence in Afghanistan. The United States will continue to work with Afghanistan to support a smooth security transition and to help ensure free and fair elections.¹⁶

For his part, Karzai not only reiterated the conditions that he had already stated, but added a new one: the release of the seventeen Afghan citizens currently held at Guantánamo Bay in Cuba.¹⁷ This position appeared to reflect the Karzai government’s skepticism that the United States military would vacate Afghanistan altogether. In the words of Karzai’s spokesman, Aimal Faizi, “We don’t believe there’s any zero option.”¹⁸

Not all Afghans have share the Karzai government’s skepticism concerning the zero option. In response to Karzai’s rejection of the Loya Jirga’s recommendation, Afghan opposition leader Abdullah Abdullah stated that he had “no doubt . . . there are politicians thinking back in the U.S. about the zero option and this will further strengthen their argument. There’s a possibility that will backfire and the price will be paid by the people of Afghanistan.”¹⁹ A member of

¹² U.S. Dep’t of State Press Release No. P2013/T19-03, Secretary John Kerry, Solo Press Availability at NATO (Dec. 3, 2013), at <http://www.state.gov/secretary/remarks/2013/12/218268.htm>.

¹³ Rod Norland, *Elders Back Security Pact That Karzai Won’t Sign*, N.Y. TIMES, Nov. 25, 2013, at A4.

¹⁴ *Id.*

¹⁵ Tim Craig & Karen DeYoung, *Security Pact with Afghans Cast into Doubt*, WASH. POST, Nov. 26, 2013, at A1.

¹⁶ White House Press Release, *Readout of National Security Advisor Susan E. Rice’s Meeting with President Hamid Karzai in Afghanistan* (Nov. 25, 2013), at <http://www.whitehouse.gov/the-press-office/2013/11/25/readout-national-security-advisor-susan-e-rices-meeting-president-hamid->.

¹⁷ Craig & DeYoung, *supra* note 15.

¹⁸ Norland & Rubin, *supra* note 2.

¹⁹ Norland, *supra* note 13.

Afghan's Parliament, Sayed Ishaq Gailani, feared that if Afghanistan did "not sign [the] security agreement with the Americans, things will get worse than Iraq and the 1990s Afghan civil war."²⁰

Much of the domestic Afghan anxiety on this point stemmed from the potential loss of over \$8 billion in international aid if the countries fail to reach a security agreement.²¹ The Afghan finance minister, Omar Zakhilwal, highlighted to Karzai during a cabinet meeting that "every element of government development"²² in Afghanistan depends on international support. Following this cabinet session, both Zakhilwal and Faizi suggested that Karzai would drop his insistence on the release of Afghan prisoners from Guantánamo Bay.²³ Days later, however, a U.S. drone strike resulting in an Afghan civilian casualty "damaged the whole atmosphere," and Karzai's Guantánamo Bay demand was reaffirmed.²⁴

The stalled negotiations prompted Kerry to suggest that an Afghan official other than Karzai might sign the security agreement.²⁵ Faizi quashed this talk, stressing that the agreement had to be "signed by two sovereign states when it is mutually acceptable to both countries. . . . As long as Afghan demands are not accepted, President Karzai will not authorize any minister to sign it."²⁶ Afghan officials also accused the United States of withholding fuel from Afghan forces to compel Karzai's agreement.²⁷ American-led coalition officials denied the allegations: "We remain committed to supporting our [Afghan National Security Forces] partners and will continue to do so."²⁸

On December 7, 2013, Afghanistan's defense minister reassured his American counterpart, Secretary of Defense Chuck Hagel, that a security agreement would be signed. Hagel affirmed:

[T]he minister of defense assured me that the [Bilateral Security Agreement] would be signed and would be signed in a very timely manner. I think it's—from what I heard and heard today, the ministers all believe that it is in the interest of Afghanistan to have that just as the Loya Jirga recommended to have that [agreement] signed and signed in a very timely manner. The minister of defense assured me that it would be.²⁹

During his trip to Afghanistan, Hagel "never asked for a meeting with President Karzai," emphasizing that "this trip is about the troops."³⁰

Events seem so far to have borne out the skepticism of some Afghan officials that the "zero option" would be implemented. As December 31 approached, the United States' stance

²⁰ Norland & Rubin, *supra* note 2.

²¹ Craig & DeYoung, *supra* note 15.

²² Rod Norland, *Afghans Assail Karzai's Disparate Views on Killings*, N.Y. TIMES, Nov. 30, 2013, at A10.

²³ *Id.*

²⁴ *Id.*

²⁵ U.S. Dep't of State Press Release No. P2013/T19-03, *supra* note 12.

²⁶ Anne Gearan & Tim Craig, *U.S. Seeks Solution to Afghan Impasse*, WASH. POST, Dec. 5, 2013, at A8.

²⁷ Tim Craig, *Afghans Say U.S. Is Using Fuel as Leverage*, WASH. POST, Dec. 2, 2013, at A14.

²⁸ *Id.*

²⁹ U.S. Dep't of Defense News Transcript, Media Availability with Secretary Hagel in Kabul, Afghanistan (Dec. 7, 2013), at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5337>.

³⁰ *Id.*

toward the deadline appeared to moderate. In a statement before the House Committee on Foreign Affairs, Special Representative James Dobbins stated, “Let me make clear . . . that plans [for removing U.S. and NATO troops post-2014] are not decisions, and assure you that we are not about to decide to abandon all we and the Afghan people have achieved over the past 12 years.”³¹ General Martin Dempsey, the chairman of the Joint Chiefs of Staff, stated that “we wouldn’t be at a level where [the lack of an agreement] would begin to affect the options until probably early summer.”³² A U.S. official, speaking on condition of anonymity, stated, “I don’t know if I would call it bluffing, but it looks like that’s what we were doing, and now it looks like Karzai is calling us out.”³³ Official Obama administration statements portrayed December 31, 2013, as a date at which coalition forces would start developing an exit strategy in the absence of an agreement, and not as a hard deadline at which negotiations would cease:

We’ve been clear that our preference is to conclude the [Bilateral Security Agreement] by the end of the year, and that if we cannot conclude [an agreement] promptly thereafter, then we will be forced to initiate planning for a post-2014 future in which there would be no U.S. or NATO troop presence in Afghanistan. That has not changed.³⁴

Karzai contends that he prefers to reach a security agreement with the United States but emphasized that “Afghans’ homes should be protected from American operations, and Afghanistan should not become the battleground of a continuous war.”³⁵

Afghanistan has also begun negotiations with other NATO members to ensure their presence in Afghanistan beyond 2014.³⁶ Since any NATO-Afghanistan security agreement is expected to piggyback on the U.S.-Afghanistan Bilateral Security Agreement, however, uncertainty surrounding the latter threatens the continued presence of NATO forces in Afghanistan more generally.³⁷ Anders Fogh Rasmussen, NATO’s secretary general, has emphasized this derivative quality of the NATO-Afghanistan security agreement: “Many provisions in those agreements will be the same. So if there is no signature on the bilateral security, we can’t finalize a NATO Status of Forces Agreement.”³⁸ Although NATO officials noted that talks with Afghanistan were ongoing, they stressed that “the NATO status of forces agreement will not be concluded or signed until the signature of the bilateral security agreement between the governments of Afghanistan and the United States.”³⁹

³¹ James F. Dobbins, U.S. Special Representative for Afghanistan and Pakistan, Testimony Before the United States House of Representative Committee on Foreign Affairs 3 (Dec. 11, 2013), at <http://docs.house.gov/meetings/FA/FA00/20131211/101578/HHRG-113-FA00-Wstate-Dobbins-20131211.pdf>.

³² Gearan & Londono, *supra* note 4.

³³ Matthew Rosenberg, *US Softens Deadline for Deal to Keep Troops in Afghanistan*, N.Y. TIMES, Dec. 24, 2013, at A4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See U.S. Dep’t of State Press Release No. P2013/T19-03, *supra* note 12.

³⁸ NATO Press Release, General Anders Fogh Rasmussen, Press Conference Following the Meeting of NATO Foreign Ministers with Non-NATO ISAF Contributing Nations (Dec. 4, 2013), at http://www.nato.int/cps/en/natolive/opinions_105367.htm.

³⁹ NATO Press Release, General Anders Fogh Rasmussen, NATO Secretary General Welcomes the Start of Negotiations on Status of Forces Agreement with Afghanistan (Dec. 21, 2013), at http://www.nato.int/cps/en/natolive/news_105875.htm?selectedLocale=en.

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

China Announces New Air Defense Identification Zone over East China Sea, Prompting U.S. Response

On November 23, 2013, China announced a new air defense identification zone (ADIZ) over the East China Sea, warning that any noncommercial aircraft entering the zone would have to identify itself or face “defensive emergency measures” by the Chinese armed forces.¹ A number of coastal states, including the United States, have established such zones.² U.S. federal regulations define an ADIZ as “an area of airspace over land or water in which the ready identification, location, and control of all aircraft . . . is required in the interest of national security.”³

China’s announcement quickly aggravated tensions with Japan. The announced zone overlaps with Japan’s ADIZ and covers a group of islands, known as the Senkaku in Japan and the Diaoyu in China, which both Japan and China claim as their own.⁴ Secretary of Defense Chuck Hagel registered the United States’ disapproval of the Chinese announcement:

The United States is deeply concerned by the People’s Republic of China announcement today that it is establishing an air defense identification zone in the East China Sea. We view this development as a destabilizing attempt to alter the status quo in the region. This unilateral action increases the risk of misunderstanding and miscalculations.

....

The United States is conveying these concerns to China through diplomatic and military channels, and we are in close consultation with our allies and partners in the region, including Japan.⁵

The United States has a mutual defense treaty with Japan,⁶ and in responding to China’s claimed air zone, Hagel confirmed the treaty’s applicability to the islands: “We remain steadfast in our commitments to our allies and partners. The United States reaffirms its longstanding policy that Article V of the U.S.-Japan Mutual Defense Treaty applies to the Senkaku Islands.”⁷

Within forty-eight hours of China’s announcement, the United States tested China’s response to incursions by flying two military planes into the zone. The planes flew in the zone for an hour before returning to U.S. territory. A military spokesperson noted that the flights

¹ Ministry of National Defense of the People’s Republic of China Press Release, Statement by the Government of the People’s Republic of China on Establishing the East China Sea Air Defense Identification Zone (Nov. 23, 2013), at http://eng.mod.gov.cn/Press/2013-11/23/content_4476180.htm; Simon Denyer, *China in a Fix as Bluff Is Called over New Air Defense Zone*, WASH. POST, Nov. 28, 2013, at A12.

² See generally Peter A. Dutton, *Caelum Liberum: Air Defense Identification Zones Outside Sovereign Airspace*, 103 AJIL 691 (2009).

³ 14 CFR §99.3 (2012).

⁴ Jane Perlez & Martin Fackler, *China Patrols Air Zone over Disputed Islands*, N.Y. TIMES, Nov. 28, 2013, at A16.

⁵ U.S. Dep’t of Defense Press Release, Hagel Issues Statement on East China Sea Air Defense Identification Zone (Nov. 23, 2013), at <http://www.defense.gov/news/newsarticle.aspx?id=121223>.

⁶ Treaty of Mutual Cooperation and Security Between the United States and Japan, U.S.-Japan, Jan. 19, 1960, 11 UST 1632.

⁷ U.S. Dep’t of Defense Press Release, Hagel Issues Statement on East China Sea Air Defense Identification Zone (Nov. 23, 2013), at <http://www.defense.gov/news/newsarticle.aspx?id=121223>.

were “uneventful” and were part of a previously scheduled training exercise, but Pentagon officials said that the flights were meant to send a message to China regarding Washington’s stance on the zone.⁸ China issued a subdued response, announcing that it had identified and monitored the planes without any further action.⁹ While China’s Foreign Ministry emphasized in a statement that the zone was a defensive measure meant to increase communication in the region,¹⁰ a spokesperson commented that “[w]e will make corresponding responses according to different situations and how big the threat is.”¹¹

The political repercussions of the announcement continued to unfold during the week of November 25. A White House spokesperson encouraged the Chinese government to engage in diplomatic rather than military measures to resolve the conflict:

[I]t continues to be our view that the policy announced by the Chinese over the weekend is unnecessarily inflammatory and has a destabilizing impact on the region, when the fact of the matter is these are the kinds of differences that should not be addressed with threats or inflammatory language, but rather can and should be resolved diplomatically.¹²

In the days following the flights, the United States “closely collaborat[ed]” with Japan over the air defense zone, and in a phone call with Japan’s foreign minister, Secretary of State John Kerry described the zone’s establishment as a “dangerous act.”¹³ The U.S. ambassador to Japan, Caroline Kennedy, took a similar position in a speech, asserting that the air defense zone “only serves to increase tension in the region.”¹⁴ In a defense meeting on November 28, South Korea asked China to consider redrawing the zone, but China rejected the request.¹⁵

Meanwhile, military activity in the announced zone continued in the days following the U.S. flights. A Japanese spokesperson claimed that Japanese military planes had been conducting routine flights in the zone throughout the week without notifying China.¹⁶ Similarly, on November 28, South Korea announced that it had sent surveillance aircraft into the area.¹⁷ On the same day, China sent military aircraft to patrol the airspace.¹⁸

⁸ Craig Whitlock, *U.S. Flies Two Warplanes over East China Sea, Ignoring New Chinese Air Defense Zone*, WASH. POST, Nov. 26, 2013, at A1.

⁹ Simon Denyer & Chico Harlan, *China Sends Warplanes to New Air Defense Zone After U.S., Japan, S. Korea Incursions*, WASH. POST, Nov. 28, 2013, at A1.

¹⁰ Denyer, *supra* note 1.

¹¹ Jane Perlez, *After Challenges, China Appears to Backpedal on Air Zone*, N.Y. TIMES, Nov. 28, 2013, at A14.

¹² White House Press Release, Press Gaggle by Principal Deputy Press Secretary Josh Earnest—Los Angeles, CA (Nov. 26, 2013), at <http://www.whitehouse.gov/the-press-office/2013/11/26/press-gaggle-principal-deputy-press-secretary-josh-earnest-los-angeles-c>.

¹³ Whitlock, *supra* note 8.

¹⁴ U.S. Embassy (Japan) Press Release, Ambassador Caroline Kennedy Addresses [the American Chamber of Commerce in Japan] and the America-Japan Society (Nov. 27, 2013), at <http://japan.usembassy.gov/e/p/tp-20131127-01.html>.

¹⁵ Perlez & Fackler, *supra* note 4.

¹⁶ Prime Minister of Japan and His Cabinet Press Release, Press Conference by the Chief Cabinet Secretary (Excerpt) (Nov. 28, 2013), at http://www.kantei.go.jp/foreign/tyoukanpress/201311/28_p.html; Japan Ministry of Defense, Press Conference by the Defense Minister (Nov. 29, 2013), at <http://www.mod.go.jp/e/pressconf/2013/11/131129.html>; see also Denyer & Harlan, *supra* note 9.

¹⁷ Denyer & Harlan, *supra* note 9.

¹⁸ Perlez & Fackler, *supra* note 4.

Military activity was not the only concern in the zone, however, as China clarified that its notification requirements would also apply to commercial aircraft.¹⁹ The United States took a different approach to this issue. On November 29, the Obama administration asked American commercial airlines, for safety reasons, to comply with China's notification requirements before entering the zone.²⁰ The administration emphasized, however, that this guidance "does not indicate U.S. government acceptance of China's requirements for operating in the newly declared ADIZ."²¹ Chinese officials reported that as of December 5, fifty-five airlines from nineteen countries had submitted flight plans.²²

For its part, Japan had a different reaction: it asked the two largest Japanese commercial airlines to reverse their initial decisions to comply with the notification requirement.²³ Japan also asked the International Civil Aviation Organization to assess whether the zone could endanger civilian flights.²⁴ Some experts cautioned that the Japanese approach was not without risk to commercial aircraft.²⁵

On December 4 and 5, U.S. Vice President Joseph Biden embarked on a previously planned trip to Beijing, Seoul, and Tokyo.²⁶ During the trip, Biden met with Chinese President Xi Jinping for over five hours. In a speech to a group of American and Chinese businessmen following the meeting, Biden stated that he "was very direct about our firm position and our expectations" and emphasized that China should avoid "taking steps that will increase tension," though he stopped short of asking China to rescind the zone.²⁷ Xi did not discuss the air defense zone after the meeting but did say that China "stand[s] ready to work together with the U.S. side . . . to appropriately handle sensitive issues and differences between us so that together we can make sure our bilateral relationship will continue to move forward."²⁸ Chinese

¹⁹ Martin Fackler, *Japan Takes Airspace Issue to U.N. Agency*, N.Y. Times, Nov. 30, 2013, at A10.

²⁰ U.S. Dep't of State Press Release No. 2013/1498, *China's Declared ADIZ—Guidance for U.S. Air Carriers* (Nov. 29, 2013), at <http://www.state.gov/r/pa/prs/ps/2013/11/218139.htm>; U.S. Dep't of State Daily Press Briefing (Nov. 27, 2013), at <http://www.state.gov/r/pa/prs/dpb/2013/11/218105.htm> (last visited Jan. 3, 2014).

²¹ U.S. Dep't of State Release No. 2013/1498, *supra* note 20.

²² Dave Boyer & Ashish Kumar, *No Territorial Budgeting by Biden or Beijing; Both Sides Are 'Clear' About the Air Defense Zone*, WASH. TIMES, Dec. 5, 2013, at A1.

²³ Whitlock, *supra* note 8; Charlotte So, *Passenger Safety Not at Risk for Planes Which Fly over China's New Air Defence Zone*, SOUTH CHINA MORNING POST (Nov. 27, 2013; updated Nov. 29, 2013), at <http://www.scmp.com/news/asia/article/1367390/passenger-safety-not-risk-planes-which-fly-over-chinas-new-air-defence>. The original press release (in Japanese) of the Scheduled Airlines Association is at <http://www.teikokyo.gr.jp/re131126.html>.

²⁴ Japan Ministry of Foreign Affairs Press Release, 200th Session of the Council of the International Civil Aviation Organization (ICAO) (Nov. 30, 2013), at http://www.mofa.go.jp/press/release/press4e_000114.html.

²⁵ Mizuho Aoki, *Airlines Urged to Defy China's ADIZ*, JAPAN TIMES (Dec. 2, 2013), at <http://www.japantimes.co.jp/news/2013/12/02/national/airlines-urged-to-defy-chinas-adiz/#.UtNH1vQW0ww>.

²⁶ David Nakamura, *Biden to Try Damage Control in Visit with Chinese Leader*, WASH. POST, Dec. 1, 2013, at A14.

²⁷ White House Press Release, *Remarks by the Vice President at a Breakfast with the American Chamber of Commerce in Beijing and the U.S.-China Business Council* (Dec. 5, 2013), at <http://www.whitehouse.gov/the-press-office/2013/12/05/remarks-vice-president-breakfast-american-chamber-commerce-beijing-and-u>.

²⁸ White House Press Release, *Remarks by Vice President Joe Biden and President Xi Jinping of the People's Republic of China* (Dec. 4, 2013), at <http://www.whitehouse.gov/the-press-office/2013/12/04/remarks-vice-president-joe-biden-and-president-xi-jinping-peoples-republ>.

officials stressed that the zone is consistent with international law and practice, and does not affect freedom of aviation.²⁹

To date, the fallout from the Chinese actions continues to develop, and the newly announced Chinese ADIZ may raise more complex issues. An unnamed White House official claimed that the dispute “isn’t really about the islands,” suggesting that some Chinese officials may be seeking “to assert themselves in ways that until recently they didn’t have the military capacity to make real.”³⁰

USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

United States and Six Other States Reach Interim Agreement on Iranian Nuclear Program

Iran has been subject to sanctions imposed by the Security Council since 2006 for its failure to establish the exclusively peaceful nature of its nuclear program; the United States and the European Commission have separately imposed additional sanctions.¹ On November 24, 2013, the United States and Iran, together with the other permanent members of the UN Security Council and Germany, reached an agreement to limit Iranian nuclear development and alleviate some Western sanctions. The parties to the new agreement hoped it would facilitate reaching a “comprehensive solution” that would allow all remaining sanctions—including the Security Council sanctions—to be lifted.²

Negotiations among the seven states began in late February 2013,³ while U.S. and Iranian officials concurrently engaged in secret bilateral talks.⁴ These negotiations gained momentum after the election of a new Iranian president, Hassan Rouhani, in July. In September, soon after taking office, Rouhani traveled to New York to attend a session of the UN General Assembly and promised increased nuclear transparency.⁵ Rouhani and U.S. President Barack Obama also shared a phone call, the first contact between U.S. and Iranian leaders since the Iranian revolution in 1979.⁶ In New York, the new Iranian foreign minister Javad Zarif discussed the

²⁹ *China Bitterly Attacks Japanese Prime Minister over Air Zone Remarks*, GUARDIAN (Dec. 15, 2013), at <http://www.theguardian.com/world/2013/dec/15/china-attacks-japan-prime-minister-air-zone>.

³⁰ David E. Sanger, *In the East China Sea, a Far Bigger Test of Power*, N.Y. TIMES, Dec. 1, 2013, at A3.

¹ SC Res. 1737 (Dec. 23, 2006); SC Res. 1747 (Mar. 24, 2007); SC Res. 1803 (Mar. 3, 2008); SC Res. 1929 (June 9, 2010); U.S. Dep’t of Treasury, Office of Foreign Assets Control, *Iran: What You Need to Know About U.S. Economic Sanctions* (Jan. 23, 2012), at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran.pdf>; European Commission, *European Union—Restrictive Measures (Sanctions) in Force* (July 31, 2013), at http://eeas.europa.eu/cfsp/sanctions/docs/measure_en.pdf.

² Joint Plan of Action, Nov. 24, 2013, at http://eeas.europa.eu/statements/docs/2013/131124_03_en.pdf.

³ See U.S. Dep’t of State Daily Press Briefing No. 34 (Feb. 27, 2013), at <http://www.state.gov/r/pa/prs/dpb/2013/02/205323.htm>; U.S. Dep’t of State Daily Press Briefing No. 45 (Mar. 15, 2013), at <http://www.state.gov/r/pa/prs/dpb/2013/03/206324.htm>; Scott Peterson, *World Powers Expect Iran to Be Ready for Progress at Next Nuclear Talks*, CHRISTIAN SCI. MONITOR (Apr. 4, 2013), at <http://www.csmonitor.com/World/Middle-East/2013/0404/World-powers-expect-Iran-to-be-ready-for-progress-at-next-nuclear-talks>.

⁴ Bradley Klapper, Matthew Lee & Julie Pace, *Secret US-Iran Talks Set Stage for Nuke Deal*, ASSOCIATED PRESS (Nov. 24, 2013), at <http://bigstory.ap.org/article/secret-us-iran-talks-set-stage-nuke-deal>.

⁵ Islamic Republic of Iran Permanent Mission to the United Nations Press Release, Statement by H.E. Dr. Hassan Rouhani President of the Islamic Republic of Iran at the Sixty-Eighth Session of the UN General Assembly (Sept. 24, 2013), at <http://iran-un.org/en/2013/09/24/24-september-2013-2/>.

⁶ White House Press Release, Statement by the President (Sept. 27, 2013), at <http://www.whitehouse.gov/the-press-office/2013/09/27/statement-president>.

nuclear negotiations with Western diplomats, including Secretary of State John Kerry,⁷ and the United States began informing its Western allies about the secret bilateral talks.⁸ Obama personally disclosed the news to Israeli Prime Minister Benjamin Netanyahu,⁹ who denounced Rouhani as seeking to “have his yellowcake and eat it too” and decried the nuclear negotiations as a “ruse” and a “ploy.”¹⁰

The agreement, entitled a “Joint Plan of Action,” called for a six-month pause in Iran’s nuclear program. Under the terms of the agreement, Iran agreed to limit its enrichment activities and allow enhanced monitoring of its nuclear facilities. The United States and the European parties to the agreement agreed to lift or suspend certain sanctions, refrain from imposing new ones, and permit the repatriation of an unspecified amount of revenue held abroad. The key provisions of the Joint Plan of Action follow:

The goal for these negotiations is to reach a mutually-agreed long-term comprehensive solution that would ensure Iran’s nuclear programme will be exclusively peaceful. Iran reaffirms that under no circumstances will Iran ever seek or develop any nuclear weapons. This comprehensive solution would build on these initial measures and result in a final step for a period to be agreed upon and the resolution of concerns. This comprehensive solution would enable Iran to fully enjoy its right to nuclear energy for peaceful purposes under the relevant articles of the [Treaty on the Non-proliferation of Nuclear Weapons] in conformity with its obligations therein. This comprehensive solution would involve a mutually defined enrichment programme with practical limits and transparency measures to ensure the peaceful nature of the programme. This comprehensive solution would constitute an integrated whole where nothing is agreed until everything is agreed. This comprehensive solution would involve a reciprocal, step-by-step process, and would produce the comprehensive lifting of all UN Security Council sanctions, as well as multilateral and national sanctions related to Iran’s nuclear programme.

There would be additional steps in between the initial measures and the final step, including, among other things, addressing the UN Security Council resolutions, with a view toward bringing to a satisfactory conclusion the UN Security Council’s consideration of this matter. The E3 + 3 and Iran will be responsible for conclusion and implementation of mutual near-term measures and the comprehensive solution in good faith. A Joint Commission of E3/EU + 3 and Iran will be established to monitor the implementation of the near-term measures and address issues that may arise, with the [International Atomic Energy Agency (IAEA)] responsible for verification of nuclear-related measures. The Joint Commission will work with the IAEA to facilitate resolution of past and present issues of concern.

Elements of a first step

The first step would be time-bound, with a duration of 6 months, and renewable by mutual consent, during which all parties will work to maintain a constructive atmosphere for negotiations in good faith.

⁷ U.S. Dep’t of State Press Release No. 2013/1194, Remarks After the P-5+1 Ministerial on Iran (Sept. 26, 2013) (statement by John Kerry, U.S. secretary of state), at <http://www.state.gov/secretary/remarks/2013/09/214827.htm>.

⁸ Bradley Klapper, Matthew Lee & Julie Pace, *Secret US-Iran Talks Set Stage for Nuke Deal*, ASSOCIATED PRESS (Nov. 24, 2013), at <http://bigstory.ap.org/article/secret-us-iran-talks-set-stage-nuke-deal>.

⁹ *Id.*

¹⁰ Benjamin Netanyahu, Israeli Prime Minister, Speech at the UN General Assembly (Oct. 1, 2013), at <http://www.pmo.gov.il/English/MediaCenter/Speeches/Pages/speechUN011013.aspx>.

Iran would undertake the following voluntary measures:

- From the existing uranium enriched to 20%, retain half as working stock of 20% oxide for fabrication of fuel for the [Tehran Research Reactor]. Dilute the remaining 20% UF₆ to no more than 5%.
- No reconversion line.
- Iran announces that it will not enrich uranium over 5% for the duration of the 6 months.
- Iran announces that it will not make any further advances of its activities at the Natanz Fuel Enrichment Plant, Fordow, or the Arak reactor, designated by the IAEA as IR-40.
- Beginning when the line for conversion of UF₆ enriched up to 5% to UO₂ is ready, Iran has decided to convert to oxide UF₆ newly enriched up to 5% during the 6 month period, as provided in the operational schedule of the conversion plant declared to the IAEA.
- No new locations for the enrichment.
- Iran will continue its safeguarded R&D practices, including its current enrichment R&D practices, which are not designed for accumulation of the enriched uranium.
- No reprocessing or construction of a facility capable of reprocessing.
- Enhanced monitoring:
 - Provision of specified information to the IAEA, including information on Iran's plans for nuclear facilities, a description of each building on each nuclear site, a description of the scale of operations for each location engaged in specified nuclear activities, information on uranium mines and mills, and information on source material. This information would be provided within three months of the adoption of these measures.
 - Submission of an updated DIQ for the reactor at Arak, designated by the IAEA as the IR-40, to the IAEA.
 - Steps to agree with the IAEA on conclusion of the Safeguards Approach for the reactor at Arak, designated by the IAEA as the IR-40.
- Daily IAEA inspector access when inspectors are not present for the purpose of Design Information Verification, Interim Inventory Verification, Physical Inventory Verification, and unannounced inspections, for the purpose of access to offline surveillance records, at Fordow and Natanz.
- IAEA inspector managed access to:
 - centrifuge assembly workshops;
 - centrifuge rotor production workshops and storage facilities; and,
 - uranium mines and mills.

In return, the E3/EU+3 would undertake the following voluntary measures:

- Pause efforts to further reduce Iran's crude oil sales, enabling Iran's current customers to purchase their current average amounts of crude oil. Enable the repatriation of an agreed amount of revenue held abroad. For such oil sales, suspend the EU and U.S. sanctions on associated insurance and transportation services.

- Suspend U.S. and EU sanctions on:
 - Iran’s petrochemical exports, as well as sanctions on associated services.
 - Gold and precious metals, as well as sanctions on associated services.
- Suspend U.S. sanctions on Iran’s auto industry, as well as sanctions on associated services.
- License the supply and installation in Iran of spare parts for safety of flight for Iranian civil aviation and associated services. License safety related inspections and repairs in Iran as well as associated services.
- No new nuclear-related UN Security Council sanctions.
- No new EU nuclear-related sanctions.
- The U.S. Administration, acting consistent with the respective roles of the President and the Congress, will refrain from imposing new nuclear-related sanctions.
- Establish a financial channel to facilitate humanitarian trade for Iran’s domestic needs using Iranian oil revenues held abroad. Humanitarian trade would be defined as transactions involving food and agricultural products, medicine, medical devices, and medical expenses incurred abroad. This channel would involve specified foreign banks and non-designated Iranian banks to be defined when establishing the channel.
 - This channel could also enable:
 - transactions required to pay Iran’s UN obligations; and,
 - direct tuition payments to universities and colleges for Iranian students studying abroad, up to an agreed amount for the six month period.
- Increase the EU authorisation thresholds for transactions for non-sanctioned trade to an agreed amount.¹¹

The plan further outlined elements of a “comprehensive solution, which the parties aim to conclude negotiating and commence implementing no more than one year after the adoption of the [Joint Plan of Action].”¹² These elements include defining the parameters for Iran’s continued enrichment and lifting the remaining multilateral and national sanctions.¹³

The Joint Plan of Action does not appear to be binding as a matter of international law. As the quoted language indicates, the participating states indicated that they “would undertake” specified “voluntary measures”—suggesting that the participating states did not intend to create binding obligations. News reports indicate the agreement was signed, but the agreement does not include any terms addressing entry into force or ratification. (The Obama administration has not sought approval of the agreement from the Senate or Congress as a whole.)

According to the White House:

For the first time in nearly a decade, we have halted the progress of the Iranian nuclear program, and key parts of the program will be rolled back. Iran has committed to halting

¹¹ Joint Plan of Action, P5+1–Iran, Nov. 24, 2013, at http://eeas.europa.eu/statements/docs/2013/131124_03_en.pdf.

¹² *Id.*

¹³ *Id.*

certain levels of enrichment and neutralizing part of its stockpiles. Iran cannot use its next-generation centrifuges, which are used for enriching uranium. Iran cannot install or start up new centrifuges, and its production of centrifuges will be limited. Iran will halt work at its plutonium reactor. And new inspections will provide extensive access to Iran's nuclear facilities and allow the international community to verify whether Iran is keeping its commitments.

These are substantial limitations which will help prevent Iran from building a nuclear weapon. Simply put, they cut off Iran's most likely paths to a bomb. Meanwhile, this first step will create time and space over the next six months for more negotiations to fully address our comprehensive concerns about the Iranian program. And because of this agreement, Iran cannot use negotiations as cover to advance its program.

On our side, the United States and our friends and allies have agreed to provide Iran with modest relief, while continuing to apply our toughest sanctions. We will refrain from imposing new sanctions, and we will allow the Iranian government access to a portion of the revenue that they have been denied through sanctions. But the broader architecture of sanctions will remain in place and we will continue to enforce them vigorously. And if Iran does not fully meet its commitments during this six-month phase, we will turn off the relief and ratchet up the pressure.

Over the next six months, we will work to negotiate a comprehensive solution. We approach these negotiations with a basic understanding: Iran, like any nation, should be able to access peaceful nuclear energy. But because of its record of violating its obligations, Iran must accept strict limitations on its nuclear program that make it impossible to develop a nuclear weapon.

Over the last few years, Congress has been a key partner in imposing sanctions on the Iranian government, and that bipartisan effort made possible the progress that was achieved today. Going forward, we will continue to work closely with Congress. However, now is not the time to move forward on new sanctions—because doing so would derail this promising first step, alienate us from our allies and risk unraveling the coalition that enabled our sanctions to be enforced in the first place.¹⁴

Kerry appeared before the House Foreign Affairs Committee on December 10, 2013. He indicated that the agreement would be implemented “in the next few weeks,” and provided some additional information about the scope of sanctions relief under the agreement:

We have red-teamed and vetted and cross-examined and run through all the possible numbers through the intel community, through the Treasury Department, through the people in charge of sanctions, and our estimates are that at the end of the six months, if they fully comply, if this holds, they would have somewhere in the vicinity of \$7 billion total.

....

I want you to keep in mind this really pales in comparison to the amount of pressure that we are leaving in place. Iran will lose \$30 billion over the course of this continued sanctions regime over the next six months. So compare that—they may get \$7 billion of relief, but they're going to lose \$30 billion. . . .

....

¹⁴ White House Press Release, Statement by the President on First Step Agreement on Iran's Nuclear Program (Nov. 23, 2013), at <http://www.whitehouse.gov/the-press-office/2013/11/23/statement-president-first-step-agreement-irans-nuclear-program>.

. . . [W]e have committed . . . to not impose any new nuclear-related sanctions for the period of the six months. . . [I]t was undeniable that the pressure we put on Iran through these sanctions is exactly what has brought Iran to the table today, and I think Congress deserves an enormous amount of credit for that.

. . . .

This is a very delicate diplomatic moment, and we have a chance to address peacefully one of the most pressing national security concerns that the world faces today with gigantic implications of the potential of conflict. We're at a crossroads. We're at one of those, really, hinge points in history. One path could lead to an enduring resolution in international community's concerns about Iran's nuclear program. The other path could lead to continued hostility and potentially to conflict. And I don't have to tell you that these are high stakes.¹⁵

Despite warnings from Obama and Kerry about the dangers of imposing further sanctions on Iran, a bipartisan group of twenty-six senators has introduced legislation threatening new sanctions on Iran.¹⁶ Iran has made it clear that any further sanctions would extinguish the potential for a comprehensive agreement.¹⁷ In a statement to the press on December 20, Obama elaborated on his opposition to new sanctions:

On Iran, there is the possibility of a resolution to a problem that has been a challenge for American national security for over a decade now, and that is getting Iran to, in a verifiable fashion, not pursue a nuclear weapon. Already, even with the interim deal that we struck in Geneva, we had to the first halt and, in some cases, some rollback of Iran's nuclear capabilities—the first time that we've seen that in almost a decade. And we now have a structure in which we can have a very serious conversation to see it is possible for Iran to get right with the international community in a verifiable fashion to give us all confidence that any peaceful nuclear program that they have is not going to be weaponized in a way that threatens us or allies in the region, including Israel.

And as I've said before and I will repeat, it is very important for us to test whether that's possible, not because it's guaranteed, but because the alternative is possibly us having to engage in some sort of conflict to resolve the problem with all kinds of unintended consequences.

Now, I've been very clear from the start, I mean what I say: It is my goal to prevent Iran from obtaining a nuclear weapon. But I sure would rather do it diplomatically. I'm keeping all options on the table, but if I can do it diplomatically, that's how we should do it. And I would think that would be the preference of everybody up on Capitol Hill because that sure is the preference of the American people.

. . . .

. . . I've heard some logic that says, well, Mr. President, we're supportive of the negotiations, but we think it's really useful to have this club hanging over Iran's head. Well, first of all, we still have the existing sanctions already in place that are resulting in Iran losing

¹⁵ U.S. Dep't of State Press Release No. 2013/1553, The P5+1's First Step Agreement with Iran on Its Nuclear Program (Dec. 10, 2013) (remarks by John Kerry, U.S. secretary of state), at <http://www.state.gov/secretary/remarks/2013/12/218578.htm>.

¹⁶ Joby Warrick & Karen DeYoung, *On Iran, Senators Defy White House, Threaten New Sanctions*, WASH. POST, Dec. 19, 2013, at A19.

¹⁷ *Id.*

billions of dollars every month in lost oil sales. We already have banking and financial sanctions that are still being applied even as the negotiations are taking place. It's not as if we're letting up on that.

I've heard arguments, well, but this way we can be assured and the Iranians will know that if negotiations fail even new and harsher sanctions will be put into place. Listen, I don't think Iranians have any doubt that Congress would be more than happy to pass more sanctions legislation. We can do that in a day, on a dime. But if we're serious about negotiations, we've got to create an atmosphere in which Iran is willing to move in ways that are uncomfortable for them and contrary to their ideology and rhetoric and their instincts and their suspicions of us. And we don't help get them to a position where we can actually resolve this by engaging in this kind of action.¹⁸

¹⁸ White House Press Release, Press Conference by the President (Dec. 20, 2013), at <http://www.whitehouse.gov/the-press-office/2013/12/20/press-conference-president>.