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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

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## GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

*Another Mexican National Executed in Texas in Defiance of Avena Decision*

In 1994, Mexican national Edgar Arias Tamayo was arrested and charged with killing a Houston police officer who had apprehended him for robbery.<sup>1</sup> When he was arrested, local authorities failed to inform him of his right to contact the Mexican consulate, an omission that violated U.S. obligations under the Vienna Convention on Consular Relations (VCCR).<sup>2</sup> Tamayo was convicted and sentenced to death. His execution was subsequently carried out by the state of Texas on January 22, 2014.<sup>3</sup>

In 2004, following the convictions of Tamayo and fifty other Mexican nationals who had been sentenced to death but who had not been informed of their post-arrest VCCR rights, the International Court of Justice (ICJ) ordered in the *Avena* decision that the United States review and reconsider each case to determine specifically whether the VCCR violations prejudiced those defendants.<sup>4</sup> In the 2008 case of *Medellín v. Texas*, the U.S. Supreme Court held that the ICJ decision was not self-executing and that, unless Congress adopted implementing legislation, the U.S. president lacked authority to compel the Texas state courts to provide review and reconsideration.<sup>5</sup> Such implementing legislation has been introduced, but to date it has not been adopted.<sup>6</sup>

In September 2013, Secretary of State John Kerry wrote a letter to Texas Governor Rick Perry and Texas Attorney General Greg Abbott, urging them to review Tamayo's case in compliance with the United States' international obligations:

I write to you regarding an urgent and important matter that implicates the welfare of U.S. citizens and members of the United States Armed Forces traveling abroad, as well as our relations with key U.S. allies. I respectfully request your assistance in taking all available steps to protect these vital U.S. interests.

. . . I want to be clear: I have no reason to doubt the facts of Mr. Tamayo's conviction, and as a former prosecutor, I have no sympathy for anyone who would murder a police officer. This is a process issue I am raising because it could impact the way American citizens are treated in other countries. As you know, Mr. Tamayo is one of 51 Mexican nationals named in [*Avena*]. . . This decision is binding on the United States under international law. As one of the Mexican nationals named in the *Avena* decision, Mr. Tamayo's case directly impacts U.S. foreign relations as well as our country's ability to provide consular assistance to U.S. citizens overseas. Without commenting on the guilt of the defendant or on the sentence in this case, I write to inform you of the important interests at stake in this case. . . .

. . . Compliance sends a strong message that the United States takes seriously its obligations under the VCCR to provide consular notification and access to foreign citizens

<sup>1</sup> Manny Fernandez, *Plan to Execute Mexican May Harm Ties Abroad, Kerry Tells Texas*, N.Y. TIMES, Dec. 12, 2013, at A27.

<sup>2</sup> *Id.*; Vienna Convention on Consular Relations, Art. 36, Apr. 24, 1963, 21 UST 77, 596 UNTS 261.

<sup>3</sup> Fernandez, *supra* note 1, at A27.

<sup>4</sup> *Avena (Mex. v. U.S.)*, 2004 ICJ REP. 12 (Mar. 31).

<sup>5</sup> *Medellín v. Texas*, 552 U.S. 491 (2008).

<sup>6</sup> *See, e.g.*, Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. (2011) (referred to committee but never enacted).

arrested in the United States. In addition, compliance also ensures the U.S. government will be able to rely on these same provisions to provide critical consular assistance to U.S. citizens detained abroad, including the men and women of our Armed Forces and their families, many of whom are residents of the state of Texas. Our consular visits help ensure U.S. citizens detained overseas have access to food and appropriate medical care, if needed, as well as access to legal representation. . . .

. . . .

The setting of an execution date for Mr. Tamayo would be extremely detrimental to the interests of the United States.<sup>7</sup>

In short, Kerry warned that the refusal by Texas to respect Tamayo's consular rights might cause serious problems for U.S. interests abroad, particularly if it leads some foreign governments to adopt similar limitations on the consular rights of U.S. citizens.<sup>8</sup> Kerry further expressed concern that executing Tamayo would strain U.S.-Mexico relations, citing a letter that he received from Mexico's Ambassador to the United States Eduardo Medina Mora, which stated that "this issue has become and could continue to be a significant irritant in the relations between our two countries."<sup>9</sup>

On December 11, 2013, Tamayo's lawyers asked Perry for a thirty-day reprieve and petitioned the Texas Board of Pardons and Paroles to commute his death sentence to life in prison.<sup>10</sup> Texas officials responded by citing the *Medellin* decision and by pointing out that the state of Texas is not directly bound by the ICJ decision until Congress passes legislation expressly directing the state to comply.<sup>11</sup> Perry's office issued a direct response to Kerry's letter, stating, "It doesn't matter where you're from—if you commit a despicable crime like this in Texas, you are subject to our state laws, including a fair trial by jury and the ultimate penalty."<sup>12</sup> Accordingly, the Texas Board of Pardons and Paroles denied Tamayo's petition for clemency.

Tamayo's legal challenges to his conviction likewise failed. Judge Lee Yeakel of the United States District Court for the Western District of Texas ruled against him, stating that Tamayo had received adequate due process and denying his request for a stay of execution.<sup>13</sup> An earlier ruling in 2011 by the U.S. Court of Appeals for the Fifth Circuit had determined that Tamayo had procedurally defaulted on his VCCR claim by waiting too long to raise it.<sup>14</sup> That view is

<sup>7</sup> Letter from John F. Kerry, Secretary of State, to Rick Perry, Governor of Texas (Sept. 16, 2013) [hereinafter Kerry Letter]; see also U.S. Dep't of State Press Statement, Execution of Mexican National Edgar Arias Tamayo, Statement of Marie Harf, Deputy Department Spokesperson (Jan. 23, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/01/220546.htm>.

<sup>8</sup> See, e.g., Andrew Jacobs, *U.S. Businessman Accused of Being Crime Boss Stands Trial in China*, N.Y. TIMES, Feb. 13, 2014, at A11 (describing China's apparent denial of consular access to a U.S. citizen standing trial in China).

<sup>9</sup> Kerry Letter, *supra* note 7; Letter from Eduardo Medina Mora, Ambassador of Mexico, to John Kerry, Secretary of State (Aug. 28, 2013).

<sup>10</sup> Fernandez, *supra* note 1, at A27.

<sup>11</sup> See *id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Tamayo v. Perry*, No. A-14-CV-031-LY, 2014 U.S. Dist. LEXIS 8972, at \*4 (Jan. 21, 2014), *aff'd*, No. 14-70003, 2014 U.S. App. LEXIS 1187 (5th Cir. Jan. 22, 2014) (per curiam); *Tamayo v. Stephens*, 134 S.Ct. 1021 (Jan. 22, 2014) (final denial of stay of execution); see also Manny Fernandez, *Texas Prepares to Execute Mexican Despite Concerns That His Arrest Violated Law*, N.Y. TIMES, Jan. 22, 2014, at A12.

<sup>14</sup> *Tamayo v. Thayer*, No. 11-70005, 2011 U.S. App. LEXIS 26671, at \*24–25 (Jan. 21, 2011).

in line with Texas precedent.<sup>15</sup> But it squarely contradicts the United States' international obligations as articulated in *Avena*, which held that courts should not apply the ordinary doctrine of procedural default to VCCR claims because a prisoner's failure to raise his VCCR rights may well have been caused by the very fact of their violation.<sup>16</sup> The ICJ specifically stated:

[T]he Court simply notes that the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial. . . . In such cases, application of the procedural default rule would have the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended," and thus violate paragraph 2 of Article 36 [of the VCCR].<sup>17</sup>

While Tamayo's legal challenges in U.S. courts were pending, Sandra L. Babcock from Northwestern University School of Law filed a petition against the United States with the Inter-American Commission on Human Rights (IACHR) on behalf of Tamayo on January 6, 2012.<sup>18</sup> The IACHR reviewed Tamayo's case in late 2013 and adopted a report on January 15, 2014, ultimately finding that the United States'

failure to respect its obligation under Article 36.1 of the Vienna Convention on Consular Relations to inform Mr. Tamayo of his right to consular notification and assistance deprived him of a criminal process that satisfied the minimum standards of due process and a fair trial required under the American Declaration.<sup>19</sup> Accordingly, the Commission recommended that the United States review Mr. Tamayo's trial and sentence in accordance with the guarantees recognized in the American Declaration.<sup>20</sup>

In the days leading up to Tamayo's scheduled execution, Mexico's ambassador to the United States asserted, "This has nothing to do with the behavior and the consequences that that behavior had . . . . A court has to examine the consequences of that violation, a violation that has been conceded by both the United States and the State of Texas."<sup>21</sup>

Following an eleventh-hour appeal, which was rejected by the Supreme Court,<sup>22</sup> the Texas government proceeded with his execution on January 22, 2014.<sup>23</sup> The IACHR issued a press release condemning the action:

The Inter-American Commission deplores the failure on the part of the United States and the state of Texas to comply with the recommendations issued by the IACHR . . . . The

<sup>15</sup> *E.g.*, *Ex parte* Tamayo, No. WR-55,690-03, 2008 Tex. Crim. App. Unpub. LEXIS 488 (July 2, 2008) (per curiam); *Ex parte* Medellín, 223 S.W.3d 315 (Tex. Crim. App. 2006).

<sup>16</sup> *Avena*, *supra* note 4, paras. 112–13.

<sup>17</sup> *Id.*, para. 113.

<sup>18</sup> Tamayo v. United States, Inter-Am. Comm'n H.R., Report No. 73/12, Admissibility Petition 15-12, para. 1 (2012), at <https://www.oas.org/en/iachr/decisions/2012/USAD15-12EN.doc>.

<sup>19</sup> [Editors' note: The American Declaration codifies the rights and duties of human beings, as agreed to by the members of the Organization of American States (OAS). American Declaration on the Rights and Duties of Man, May 2, 1948, 43 AJIL SUPP. 133 (1949).]

<sup>20</sup> OAS Press Release No. 6/14, IACHR Condemns Execution of Edgar Tamayo Arias in the United States (Jan. 27, 2014), at [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/006.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/006.asp).

<sup>21</sup> Fernandez, *supra* note 13, at A12.

<sup>22</sup> Tamayo v. Stephens, 134 S.Ct. 1021 (Jan. 22, 2014).

<sup>23</sup> Manny Fernandez, *Texas Executes Mexican Man for Murder*, N.Y. TIMES, Jan. 23, 2014, at A17.

failure of the United States to preserve Mr. Tamayo's life pending a recommendation by the IACHR to review his trial and sentence contravenes its international legal obligations derived from the Charter of the Organization of the American States and the American Declaration which are in force since the United States joined the OAS in 1951. This failure to comply with the Commission's recommendations resulted in serious and irreparable harm to Mr. Tamayo's most fundamental right, the right to life.<sup>24</sup>

The U.S. Department of State also expressed concern for the Texas government's ultimate decision to execute Tamayo and advocated for legislation that would incorporate the consular notification requirement into domestic law:

The Department regrets Texas' decision to proceed with Mr. Tamayo's execution without that review and reconsideration, but remains committed to working to uphold our international obligations under the *Avena* judgment. This case illustrates the critical importance of Congress passing the Consular Notification Compliance Act, which would provide an additional mechanism for the United States to meet our international obligations.<sup>25</sup>

The international community has also expressed dismay at Texas's refusal to comply with the United States' international obligations. Tamayo's lawyers characterized his execution as reflecting a troubling trend in Texas: "The international outcry about this, Texas' third illegal execution of a Mexican national and the first without any review whatsoever of the consular assistance claim, is unprecedented."<sup>26</sup> UK Ambassador to the United States Peter Westmacott responded to Tamayo's execution by stating:

I am saddened to learn that Edgar Tamayo, a Mexican national, has been executed in Texas. The British Government opposes the death penalty in all circumstances. We also take the issue of consular notification very seriously. Like Secretary of State John Kerry, we were concerned that the Mexican authorities were not notified of Mr. Tamayo's arrest, in accordance with the Vienna Conventions on Consular [R]elations.<sup>27</sup>

#### STATE DIPLOMATIC AND CONSULAR RELATIONS

##### *Manhattan Arrest of Indian Consular Official Sparks Public Dispute Between the United States and India*

In December 2013, an Indian consular official was arrested in New York City, provoking ongoing outrage and retaliation against the United States by the Indian government. Devyani Khobragade was a seasoned Indian diplomat when she accepted the position of deputy consul general for political, economic, commercial, and women's affairs at the Consulate General of India in New York City. As she prepared to move to New York, Khobragade hired Sangeeta

<sup>24</sup> OAS Press Release No. 6/14, *supra* note 20.

<sup>25</sup> U.S. Dep't of State Press Statement, *supra* note 7.

<sup>26</sup> Fernandez, *supra* note 23, at A17. Jose Ernesto Medellín was executed in 2008, and Humberto Leal Garcia in 2011. Medellín v. Texas, 554 U.S. 759 (2008) (per curiam) (stay of execution denied); Leal Garcia v. Texas, 131 S.Ct. 2866 (2011) (per curiam) (stay of execution denied); see also John R. Crook, Contemporary Practice of the United States, 105 AJIL 784, 784–85 (2011).

<sup>27</sup> UK Foreign & Commonwealth Office Press Release, HMA Westmacott's Statement on the Execution of Edgar Tamayo (Jan. 30, 2014), at <https://www.gov.uk/government/news/hma-westmacotts-statement-on-the-execution-of-edgar-tamayo> (statement by Peter Westmacott, UK ambassador to the United States).

Richard as a nanny and housekeeper to accompany her family.<sup>1</sup> To obtain an employment visa for Richard, Khobragade needed to demonstrate that Richard would receive a “fair wage,” defined in part as “the greater of the prevailing or minimum wage per hour under U.S. Federal and state law.”<sup>2</sup> Yet according to the complaint filed by the U.S. Attorney’s Office, Khobragade intended to pay her much less.<sup>3</sup>

The complaint set out several allegations. Khobragade interviewed and hired “Witness-1” (later identified as Richard) in the fall of 2012. They agreed to a rupee-denominated salary equivalent to \$573.07 per month, an amount equivalent to \$3.31 per hour based on a forty-hour workweek, as calculated by the complaint.<sup>4</sup> When applying for a visa for Richard, however, Khobragade indicated that Richard would be paid \$9.75 per hour—nearly three times more.<sup>5</sup> Richard was granted the visa, but, shortly before she and Khobragade departed for the United States, Khobragade asked Richard to sign a second employment contract listing the lower salary.<sup>6</sup> The complaint accused Khobragade of one count of visa fraud and one count of making false statements, which carry maximum prison sentences of ten years and five years, respectively.<sup>7</sup>

Khobragade was arrested on December 12, 2013.<sup>8</sup> The Indian Embassy initially “conveyed its strong concern” about the arrest.<sup>9</sup> As a consular official, the U.S. Department of State explained, Khobragade was entitled to immunity pursuant to the Vienna Convention on Consular Relations (VCCR) only for those “acts performed in the exercise of consular functions.”<sup>10</sup> The VCCR also provides that “[c]onsular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.”<sup>11</sup> Neither the United States nor India took a public position about whether the crimes with which Khobragade was charged were “grave.”<sup>12</sup>

<sup>1</sup> Annie Gowen & William Branigin, *U.S. Attorney Vows to Pursue Case Against Indian Diplomat at Center of U.S.-India Row*, WASH. POST, Dec. 19, 2013, at [http://www.washingtonpost.com/world/us-attorney-vows-to-pursue-case-against-indian-diplomat-at-center-of-us-india-row/2013/12/19/81764c1c-68c5-11e3-8b5b-a77187b716a3\\_story.html](http://www.washingtonpost.com/world/us-attorney-vows-to-pursue-case-against-indian-diplomat-at-center-of-us-india-row/2013/12/19/81764c1c-68c5-11e3-8b5b-a77187b716a3_story.html).

<sup>2</sup> 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL §41.21 N6.3 (2013), available at <http://www.state.gov/documents/organization/87174.pdf>.

<sup>3</sup> See Sealed Complaint, para. 24, *United States v. Khobragade*, Case No. 14 Cr. 008 (S.D.N.Y. Dec. 11, 2013), available at <http://www.justice.gov/usao/nys/pressreleases/December13/KhobragadeArrestPR/Khobragade,%20Devyani%20Complaint.pdf>.

<sup>4</sup> *Id.*, para. 8.

<sup>5</sup> *Id.*, para. 10(b). According to the complaint, Khobragade separately indicated on Richard’s visa application that Richard would be paid \$4,500 per month. This monthly figure is consistent with an hourly rate of \$9.75 only if the employee logged 462 hours of work per month.

<sup>6</sup> *Id.*, para. 17.

<sup>7</sup> 18 U.S.C. §§1001, 1002, 1546 (2012).

<sup>8</sup> U.S. Atty’s Office (S.D.N.Y.) Press Release, *Manhattan U.S. Attorney Announces Arrest of Indian Consular Officer for Visa Fraud and False Statements in Connection with Household Employee’s Visa Application* (Dec. 12, 2013), at <http://www.justice.gov/usao/nys/pressreleases/December13/KhobragadeArrestPR.php>.

<sup>9</sup> Embassy of India (Washington, D.C.) Press Release, *In Response to a Media Query Relating to Dr. Devyani Khobragade, Deputy Consul General, Consulate General of India, New York* (Dec. 12, 2013), at [https://www.indianembassy.org/archives\\_details.php?nid=1987](https://www.indianembassy.org/archives_details.php?nid=1987).

<sup>10</sup> Vienna Convention on Consular Relations, Art. 43(1), Apr. 24, 1963, 21 UST 77, 596 UNTS 261.

<sup>11</sup> *Id.*, Art. 41(1).

<sup>12</sup> See U.S. Dep’t of State Daily Press Briefing (Dec. 18, 2013), at <http://www.state.gov/t/pa/prs/dpb/2013/12/218895.htm#INDIA>. The briefing reported the following inquiry:

As more details about Khobragade's arrest emerged, India's outrage grew. In an e-mail to friends, Khobragade alleged that she experienced "the indignities of repeated handcuffing, stripping and cavity searches, swabbing, [and] hold up with common criminals and drug addicts" while being processed.<sup>13</sup> The Indian Embassy expressed in a statement that the "Government of India is shocked and appalled at the manner in which [Khobragade] has been humiliated by the U.S. authorities."<sup>14</sup> A U.S. Department of State spokesperson responded that "standard procedure" was followed during the arrest.<sup>15</sup> U.S. Attorney Preet Bharara issued a more detailed response on December 18:

Ms. Khobragade was charged based on conduct, as is alleged in the Complaint, that shows she clearly tried to evade U.S. law designed to protect from exploitation the domestic employees of diplomats and consular officers. . . . Ms. Khobragade was accorded courtesies well beyond what other defendants, most of whom are American citizens, are accorded.<sup>16</sup>

The U.S. Marshal's Office did confirm that Khobragade was strip-searched.<sup>17</sup>

Indignation continued to spread through India, culminating in a group of protestors burning President Barack Obama in effigy in Hyderabad.<sup>18</sup> Meanwhile, the U.S. Department of State appeared to soften its stance on the arrest, noting that "[i]t is . . . particularly important to Secretary [of State John] Kerry that foreign diplomats serving in the United States are accorded respect and dignity just as we expect our own diplomats should receive overseas."<sup>19</sup>

As Kerry attempted to make amends with Indian officials,<sup>20</sup> the Indian government took actions widely believed to be retaliation for the arrest. The *Washington Post* reported that India had revoked the identification cards of U.S. consular personnel and families, rescinded embassy imports of liquor and other goods, and initiated investigations on the salaries paid to

QUESTION: But does consular immunity—not diplomatic immunity but consular immunity—protect someone from detention except in the cases of grave crimes?

MS. [MARIE] HARF [DEPUTY SPOKESPERSON]: Well, and I can check in terms of what this charge, she was charged with, where that falls into that rubric. I'm not familiar with every single part of the State Department diplomatic immunity code.

<sup>13</sup> *Devyani Khobragade Letter to Her Colleagues: The Full Text*, WASH. POST, Dec. 18, 2013, available at [http://www.washingtonpost.com/world/devyani-khobragade-letter-to-her-colleagues-the-full-text/2013/12/18/aaad7018-6804-11e3-ae56-22de072140a2\\_story.html](http://www.washingtonpost.com/world/devyani-khobragade-letter-to-her-colleagues-the-full-text/2013/12/18/aaad7018-6804-11e3-ae56-22de072140a2_story.html).

<sup>14</sup> Embassy of India (Washington, D.C.) Press Statement (Dec. 13, 2013), at <https://www.indianembassy.org/informations.php?id=179>.

<sup>15</sup> U.S. Dep't of State Daily Press Briefing (Dec. 16, 2013), at <http://www.state.gov/r/pa/prs/dpb/2013/12/218802.htm#INDIA>.

<sup>16</sup> U.S. Atty's Office (S.D.N.Y.) Press Release, Statement of Manhattan U.S. Attorney Preet Bharara on U.S. v. Devyani Khobragade (Dec. 18, 2013), at <http://www.justice.gov/usao/nys/pressreleases/December13/KhobragadeStatement.php>.

<sup>17</sup> See *Devyani Khobragade: India-US Diplomat Row Escalates*, BBC NEWS, Dec. 17, 2013, at <http://www.bbc.co.uk/news/world-asia-india-25411876>.

<sup>18</sup> Karen DeYoung & Sari Horwitz, *In Dispute over Indian Envoy, U.S. Officials Split on Response*, WASH. POST, Dec. 20, 2013, at A9.

<sup>19</sup> U.S. Dep't of State Press Release No. 2013/1596, Secretary Kerry Call to Indian National Security Advisor Menon (Dec. 18, 2013), at <http://www.state.gov/r/pa/prs/ps/2013/218890.htm>.

<sup>20</sup> *Id.*

Indian staff members at U.S. consulates.<sup>21</sup> In addition, India removed concrete barriers around the U.S. embassy complex in New Delhi.<sup>22</sup> India's minister of external affairs later officially confirmed some of these actions.<sup>23</sup> The removal of the security barriers was potentially most significant given India's "special duty" under the Vienna Convention on Diplomatic Relations to "take all appropriate steps to protect the premises of the [diplomatic] mission against any intrusion or damage."<sup>24</sup> In response to a question about whether the removal of the security barriers impaired the security of the embassy, a U.S. Department of State spokesperson said, "I don't think I'd go that far. Obviously, we don't comment on our specific security posture. And we take security very seriously, and we will continue to have conversations with the Indian Government to make sure our facilities are properly secured."<sup>25</sup>

On January 8, India reassigned Khobragade to a new post as counselor at the Permanent Mission of India to the United Nations in New York.<sup>26</sup> This post provides Khobragade more comprehensive immunities. Under the Agreement Regarding the Headquarters of the United Nations between the United States and the United Nations, certain named officials as well as "[s]uch resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned . . . [are] entitled in the territory of the United States to the same privileges and immunities . . . [as] diplomatic envoys."<sup>27</sup> Unlike consular officials, diplomatic envoys have comprehensive immunity from criminal jurisdiction.<sup>28</sup> The United States accepted the request to accredit Khobragade, explaining that "we would only refuse accreditation and a request for accreditation like this in rare circumstances such as events related to national security risks."<sup>29</sup>

The United States maintained the position that "[r]eceiving diplomatic immunity does not nullify any previously existing criminal charges."<sup>30</sup> The United States promptly requested that India waive Khobragade's diplomatic immunity "in order that the charges may be adjudicated

<sup>21</sup> In response to a question about media reports that Indian employees of the U.S. embassy in India were being underpaid, a U.S. Department of State spokesperson explained that U.S. policy is "to pay folks that work for us in countries around the world in conjunction with local law, with local practice." U.S. Dep't of State Daily Press Briefing (Dec. 30, 2013), at <http://www.state.gov/r/pa/prs/dpb/2013/12/219160.htm#INDIA>.

<sup>22</sup> Annie Gowen, *Row over Indian Envoy's Arrest Escalates*, WASH. POST, Dec. 18, 2013, at A13.

<sup>23</sup> Indian Ministry of External Affairs Press Statement, External Affairs Minister's Intervention in Rajya Sabha on the Discussion on the Arrest of an Indian Diplomat in USA (Dec. 19, 2013), at <http://www.mea.gov.in/Speeches-Statements.htm?dtl/22680/External+Affairs+Ministers+intervention+in+Rajya+Sabha+on+the+discussion+on+the+arrest+of+an+Indian+Diplomat+in+USA>.

<sup>24</sup> Vienna Convention on Diplomatic Relations, Art. 22(2), Apr. 18, 1961, 23 UST 3227, 500 UNTS 95 [hereinafter VCDR].

<sup>25</sup> U.S. Dep't of State Daily Press Briefing (Dec. 17, 2013), at <http://www.state.gov/r/pa/prs/dpb/2013/12/218861.htm#INDIA>.

<sup>26</sup> *United States v. Khobragade*, Case No. 14 Cr. 008, Opinion and Order, at \*3 & n.6 (S.D.N.Y. Mar. 12, 2014) (citing Letter from Eileen P. Merritt, Minister Counselor at the United States Mission to the United Nations, to Devyani Khobragade (Jan. 8, 2014)); Indian Ministry of External Affairs Press Release, Diplomatic Immunity to Dr. Devayani Khobragade (Jan. 10, 2014), at <http://www.mea.gov.in/press-releases.htm?dtl/22723/Diplomatic+immunity+to+Dr+Devyani+Khobragade> [hereinafter Indian Ministry Press Release].

<sup>27</sup> Agreement Regarding the Headquarters of the United Nations, U.S.-UN, sec. 15, June 26, 1947, 61 Stat. 3416, 11 UNTS 11, available at [http://avalon.law.yale.edu/20th\\_century/decad036.asp](http://avalon.law.yale.edu/20th_century/decad036.asp).

<sup>28</sup> VCDR, *supra* note 24, Art. 31(1).

<sup>29</sup> U.S. Dep't of State Daily Press Briefing (Jan. 10, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/01/219535.htm#INDIA>.

<sup>30</sup> U.S. Dep't of State Daily Press Briefing (Dec. 20, 2013), at <http://www.state.gov/r/pa/prs/dpb/2013/12/219043.htm#INDIA>.

in accordance with the laws of the United States.”<sup>31</sup> When India refused, the U.S. Department of State requested her departure consistent with “our policy as a government . . . when there are serious charges involved.”<sup>32</sup>

The criminal proceedings against Khobragade continued, and a grand jury returned an indictment on both charges alleged in the complaint on January 9, 2014.<sup>33</sup> Khobragade’s attorneys sought dismissal of the case against her on the grounds of her immunity. Khobragade herself departed for India in the evening that same day. On January 10, 2014, the Indian government confirmed that Khobragade had returned to India to work at the Ministry of External Affairs in New Delhi.<sup>34</sup>

Even as India arranged Khobragade’s change in diplomatic status, reports of Indian government actions against U.S. diplomats continued. An anonymous Indian Foreign Ministry official told the *Washington Post* that the Indian government would move to shut down a U.S. embassy club after finding that nondiplomats had accessed the club’s services and duty-free imports.<sup>35</sup> Indian officials questioned whether teachers at the American Embassy School in New Delhi had complied with Indian tax and visa requirements.<sup>36</sup> In a final act of retaliation, India expelled a U.S. diplomat involved in arranging Richard’s family’s departure from India before Khobragade’s arrest.<sup>37</sup>

As for the implications of the incident for U.S.-India diplomatic relations, India’s minister of external affairs commented: “I think you learn from any experience that is unwholesome or unpleasant or unbecoming of two very good friends. . . . I hope that both of us appreciate how important our relationship is.”<sup>38</sup> To that end, Kerry met with India’s External Affairs Minister Salman Khurshid in late January and discussed, among other topics, the need to develop “institutional arrangements” to address privileges and immunities of diplomats in both countries.<sup>39</sup>

On March 12, 2014, the federal district court granted Khobragade’s motion to dismiss the case against her. The court held that it lacked jurisdiction because Khobragade had diplomatic immunity when the indictment against her was returned.<sup>40</sup> The court observed that “[i]t is

<sup>31</sup> U.S. Dep’t of State Daily Press Briefing (Jan. 10, 2014), *supra* note 29.

<sup>32</sup> *Id.*

<sup>33</sup> Indictment, *United States v. Khobragade*, Case No. 14 Cr. 008 (S.D.N.Y. Jan. 9, 2014), *available at* <http://www.justice.gov/usao/nys/pressreleases/January14/KhobragadeIndictment/Khobragade,%20Devyani%20Indictment.pdf>.

<sup>34</sup> Indian Ministry Press Release, *supra* note 26.

<sup>35</sup> Rama Lakshmi & Karen DeYoung, *American Oasis Is Latest Casualty of Row with India*, WASH. POST, Jan. 9, 2014, at A1.

<sup>36</sup> Gardiner Harris & Benjamin Weiser, *School in India Ensnared in U.S. Diplomatic Spat*, N.Y. TIMES, Jan. 16, 2014, at A10.

<sup>37</sup> Rama Lakshmi & Karen DeYoung, *U.S. Envoy Expelled from India; Officials Seek Spat’s ‘Closure’*, WASH. POST, Jan. 10, 2014, at A9; Indian Ministry of External Affairs Press Release, Transcript of Media Briefing by Official Spokesperson and Joint Secretary (East Asia) (Jan. 13, 2014), *at* <http://www.mea.gov.in/media-briefings.htm?dtl/22738/Transcript+of+media+briefing+by+Official+Spokesperson+and+Joint+SecretaryEast+Asia+January+13+2014>.

<sup>38</sup> Indian Ministry of External Affairs Press Release, External Affairs Minister’s Interview to AIR FM Gold (Jan. 23, 2014), *at* <http://www.mea.gov.in/interviews.htm?dtl/22783/External+Affairs+Ministers+interview+to+AIR+FM+Gold>.

<sup>39</sup> Embassy of India (Washington, D.C.) Press Release, External Affairs Minister Mr. Salman Khurshid Meets US Secretary of State Mr. John F. Kerry in Montreux (Jan. 22, 2014), *at* [https://www.indianembassy.org/press\\_detail.php?nid=1995](https://www.indianembassy.org/press_detail.php?nid=1995).

<sup>40</sup> *United States v. Khobragade*, Case No. 14 Cr. 008, Opinion and Order, at \*13 (S.D.N.Y. Mar. 12, 2014).

undisputed that Khobragade acquired full diplomatic immunity at 5:47 PM on January 8, 2014, and did not lose that immunity until her departure from the country on the evening of January 9, 2014.<sup>41</sup> The U.S. government argued that Khobragade's immunity at the time the indictment was returned was irrelevant. What mattered, according to the United States' brief, is that "Dr. Khobragade did not enjoy immunity from arrest or detention at the time of her arrest in this case, and she does not presently enjoy immunity from prosecution for the crimes charged in the Indictment."<sup>42</sup> The district court disagreed:

[T]he case must be dismissed based on Khobragade's conceded immunity on January 9, 2014. The fact that Khobragade lost full diplomatic immunity when she left the country does not cure the lack of jurisdiction when she was indicted. Courts in civil cases have dismissed claims against individuals who had diplomatic immunity at an earlier stage of proceedings, even if they no longer possessed immunity at the time dismissal was sought. These courts reasoned that the lack of jurisdiction at the time of the relevant procedural acts, such as service of process, rendered those acts void. Because Khobragade moved to dismiss on January 9, 2014, the motion must be decided in reference to her diplomatic status on that date.

Similarly, Khobragade's status at the time of her *arrest* is not determinative. The State Department has explained that "criminal immunity precludes the exercise of jurisdiction by the courts over an individual whether the incident occurred *prior to* or during the period in which such immunity exists." Furthermore, several courts have held that diplomatic immunity acquired during the pendency of proceedings destroys jurisdiction even if the suit was validly commenced before immunity applied. . . .

. . . Furthermore, because immunity is a jurisdictional bar, it is logical to dismiss proceedings the moment immunity is acquired. Even if Khobragade had no immunity at the time of her arrest and has none now, her acquisition of immunity during the pendency of proceedings mandates dismissal.<sup>43</sup>

The opinion also noted that "if the acts charged in the Indictment were not 'performed in the exercise of official functions,' then there is currently no bar to a new indictment against Khobragade."<sup>44</sup>

Two days later, the U.S. Attorney's Office refiled the charges against Khobragade, and a grand jury returned a new indictment.<sup>45</sup> A spokesperson for the Indian Ministry of External Affairs expressed the Indian government's stance over the second indictment: "As far as India is concerned, we reiterate that the case has no merit. Therefore this second indictment has no impact on our stated position. Now that Dr. Khobragade has returned to India, the Court in the United States has no jurisdiction in India over her."<sup>46</sup>

<sup>41</sup> *Id.* at \*7–8 (footnote omitted).

<sup>42</sup> *Id.* at \*9 (footnote omitted).

<sup>43</sup> *Id.* at \*9–12 (footnotes omitted).

<sup>44</sup> *Id.* at \*12 (footnote omitted).

<sup>45</sup> *Devyani Khobragade: Indian Diplomat Re-indicted in US*, BBC NEWS, Mar. 15, 2014, at <http://www.bbc.com/news/world-us-canada-26587333>.

<sup>46</sup> Indian Ministry of External Affairs Press Release, Official Spokesperson's Response to a Media Question on Second Indictment Against Dr. Devyani Khobragade (Mar. 15, 2014), at <http://www.mea.gov.in/media-briefings.htm?dtl/23088/Official+Spokespersons+response+to+a+media+question+on+second+indictment+against+Dr+Devyani+Khobragade>.

## INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

*United States Questions Claims Based on China's "Nine-Dash Line" in the South China Sea*

The South China Sea has been the subject of competing territorial and maritime claims for decades. In February, the United States questioned—for the first time publicly—whether China's regional claims under the “nine-dash line” are consistent with international law.<sup>1</sup> The “nine-dash line” refers to a discontinuous U-shaped line made up of nine segments that encloses most of the South China Sea as well as the islands found within it.<sup>2</sup> Brunei, Indonesia, Malaysia, the Philippines, and Vietnam have all made competing claims that overlap with those made by China.<sup>3</sup>

Chinese atlases have depicted the nine-dash-line since the 1950s, and China's expansive territorial and maritime claims related to the South China Sea date back still further.<sup>4</sup> It was only in 2009 that China relied on a map depicting the nine-dash line to describe its claims in an international forum. That year, China submitted two *notes verbales* to the UN secretary-general responding to a joint submission by Malaysia and Vietnam to the UN Commission on the Limits of the Continental Shelf. Both *notes verbales* stated:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community.<sup>5</sup>

As commentators have pointed out, the nature and scope of the maritime claims that China is making regarding the area inside the nine-dash line are uncertain.<sup>6</sup> China has invoked the UN Convention on the Law of the Sea (UNCLOS) to support some of its claims inside the

<sup>1</sup> U.S. Dep't of State Press Release, Daniel R. Russel, Assistant Secretary, Bureau of East Asian and Pacific Affairs, Testimony Before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific (Feb. 5, 2014), at <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm>.

<sup>2</sup> For a map depicting the nine-dash line, see Lori Fisler Damrosch & Bernard H. Oxman, *Editors' Introduction to Agora: The South China Sea*, 107 AJIL 95, 96 (2013).

<sup>3</sup> U.S. Dep't of Defense, Annual Report to Congress, Military and Security Developments Involving the People's Republic of China 2013, at 22 (2013), at [http://www.defense.gov/pubs/2013\\_china\\_report\\_final.pdf](http://www.defense.gov/pubs/2013_china_report_final.pdf).

<sup>4</sup> Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AJIL 98, 102–06 (2013).

<sup>5</sup> Note Verbale No. CML/17/2009 from the Permanent Mission of the People's Republic of China to the UN Secretary-General (May 7, 2009), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf); Note Verbale No. CML/18/2009 from the Permanent Mission of the People's Republic of China to the UN Secretary-General (May 7, 2009), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf).

<sup>6</sup> Gao & Jia, *supra* note 4, at 108 (arguing that the nine-dash line has “become synonymous with a claim of sovereignty over the island groups that always belonged to China and with an additional Chinese claim of historical rights of fishing, navigation, and other marine activities (including the exploration and exploitation of resources, mineral or otherwise) on the islands and in the adjacent waters”); Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 AJIL 124, 132 (2013) (“China has never provided any explanation as to the meaning of the nine-dash line—and, in particular, as to whether it is meant to delimit China's waters or to encircle insular features belonging to China.”); Robert Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AJIL 142, 155 (2013) (suggesting that the *notes verbales* could be interpreted as a Chinese claim to sovereignty over the islands and their “adjacent waters” or as a Chinese claim to sovereign rights and jurisdiction over all the maritime space within the nine-dash line); *see also id.* at 156 (suggesting that “China is maintaining a policy of ‘strategic ambiguity’ with respect to its maritime claims in the South China Sea”).

nine-dash line.<sup>7</sup> Under UNCLOS (to which all of the states that border on the South China Sea are parties), entitlement to maritime rights depends on land territory.<sup>8</sup> But the consistency of China's claims with respect to UNCLOS has been contested by the Philippines, among others.<sup>9</sup> China has also suggested at various points that its maritime claims are based on historical practice, but whether historical practice supports such claims under international law is controversial.<sup>10</sup>

Legal questions aside, the U.S. Department of Defense reports that "Senior Chinese officials have identified protecting China's sovereignty and territorial integrity as a 'core interest' and all officials repeatedly state China's opposition to and willingness to respond to actions it perceives as challenging this core interest."<sup>11</sup> In recent testimony before the Subcommittee on Asia and the Pacific of the House Committee on Foreign Affairs, Assistant Secretary of State Daniel Russel explained that the United States likewise has direct national interests in the resolution of claims related to the South China Sea:

Mr. Chairman, we have a deep and long-standing stake in the maintenance of prosperity and stability in the Asia-Pacific [region] and an equally deep and abiding long-term interest in the continuance of freedom of the seas based on the rule of law—one that guarantees, among other things, freedom of navigation and overflight and other internationally lawful uses of the sea related to those freedoms. International law makes clear the legal basis on which states can legitimately assert their rights in the maritime domain or exploit marine resources. By promoting order in the seas, international law is instrumental in safeguarding the rights and freedoms of all countries regardless of size or military strength.<sup>12</sup>

Russel went on to challenge the consistency of China's claims with international law, at least to the extent that China's maritime assertions in the region do not directly derive from land features:

I think it is imperative that we be clear about what we mean when the United States says that we take no position on competing claims to sovereignty over disputed land features in the East China and South China Seas. First of all, we do take a strong position with regard to behavior in connection with any claims: we firmly oppose the use of intimidation, coercion or force to assert a territorial claim. Second, we do take a strong position that maritime claims must accord with customary international law. This means that all maritime claims must be derived from land features and otherwise comport with the international law of the sea. So while we are not siding with one claimant against another, we certainly believe that claims in the South China Sea that are not derived from land features are fundamentally flawed. In support of these principles and in keeping with the long-standing U.S. Freedom of Navigation Program, the United States continues to oppose

<sup>7</sup> Note Verbale No. CML/8/2011 from the Permanent Mission of the People's Republic of China to the UN Secretary-General (Apr. 14, 2011), at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2011_re_phl_e.pdf).

<sup>8</sup> See generally Beckman, *supra* note 6.

<sup>9</sup> See, e.g., Note Verbale No. 000228 from the Permanent Mission of the Republic of the Philippines to the UN Secretary-General (Apr. 5, 2011), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/phl_re_chn_2011.pdf).

<sup>10</sup> Compare, e.g., Gao & Jia, *supra* note 4, with Dupuy & Dupuy, *supra* note 6.

<sup>11</sup> U.S. Dep't of Defense, *supra* note 3, at 3.

<sup>12</sup> U.S. Dep't of State Press Release, *supra* note 1.

claims that impinge on the rights, freedoms, and lawful uses of the sea that belong to all nations.

....

We are also candid with all the claimants when we have concerns regarding their claims or the ways that they pursue them. Deputy Secretary Burns and I were in Beijing earlier this month to hold regular consultations with the Chinese government on Asia-Pacific issues, and we held extensive discussions regarding our concerns. These include continued restrictions on access to Scarborough Reef; pressure on the long-standing Philippine presence at the Second Thomas Shoal; putting hydrocarbon blocks up for bid in an area close to another country's mainland and far away even from the islands that China is claiming; announcing administrative and even military districts in contested areas in the South China Sea; an unprecedented spike in risky activity by China's maritime agencies near the Senkaku Islands; the sudden, uncoordinated and unilateral imposition of regulations over contested airspace in the case of the East China Sea Air Defense Identification Zone; and the recent updating of fishing regulations covering disputed areas in the South China Sea. These actions have raised tensions in the region and concerns about China's objectives in both the South China and the East China Seas.

There is a growing concern that this pattern of behavior in the South China Sea reflects an incremental effort by China to assert control over the area contained in the so-called "nine-dash line," despite the objections of its neighbors and despite the lack of any explanation or apparent basis under international law regarding the scope of the claim itself. China's lack of clarity with regard to its South China Sea claims has created uncertainty, insecurity and instability in the region. It limits the prospect for achieving a mutually agreeable resolution or equitable joint development arrangements among the claimants. I want to reinforce the point that under international law, maritime claims in the South China Sea must be derived from land features. Any use of the "nine dash line" by China to claim maritime rights not based on claimed land features would be inconsistent with international law. The international community would welcome China to clarify or adjust its nine-dash line claim to bring it in accordance with the international law of the sea.<sup>13</sup>

Russel's testimony followed an earlier general statement by former secretary of state Hillary Clinton that "claimants should pursue their territorial claims and accompanying rights to maritime space in accordance with UNCLOS. Consistent with customary international law, legitimate claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features."<sup>14</sup>

Responding to Russel's comments, China's Foreign Ministry spokesperson Hong Lei accused the United States of stirring up tensions in the region:

China's rights and interests in the South China Sea are formed in history and protected by international law. China stays committed to resolving maritime disputes with countries directly-concerned through negotiation and consultation. . . . China's position is clear-cut and consistent. To deliberately create an issue and play up tension will do no good to peace and stability of Southeast Asia. Relevant comments made by the US official in congressional testimony are not constructive. We urge the US to be rational and fair and play

<sup>13</sup> *See id.*

<sup>14</sup> U.S. Dep't of State Press Release No. 210/T32-21, U.S. Secretary of State Hillary Clinton, Remarks at Press Availability in Hanoi, Vietnam (July 23, 2010), at <http://www.state.gov/secretary/20092013clinton/rm/2010/07/145095.htm>.

a constructive role for peace, stability, prosperity and development of the region, rather than the opposite.<sup>15</sup>

### *United States Takes Steps to Combat Illegal Trade in Wildlife*

Illegal trade in wildlife has surged in recent years, generating profits of more than \$19 billion per year according to a conservative estimate cited by U.S. government officials.<sup>1</sup> As President Barack Obama explained in an executive order issued in July 2013, “Poaching operations have expanded beyond small-scale, opportunistic actions to coordinated slaughter commissioned by armed and organized criminal syndicates.”<sup>2</sup> The situation represents “an international crisis that continues to escalate”<sup>3</sup> and implicates the national interests of the United States as well as those of other countries. As set forth in the executive order,

The survival of protected wildlife species such as elephants, rhinos, great apes, tigers, sharks, tuna, and turtles has beneficial economic, social, and environmental impacts that are important to all nations. Wildlife trafficking reduces those benefits while generating billions of dollars in illicit revenues each year, contributing to the illegal economy, fueling instability, and undermining security. Also, the prevention of trafficking of live animals helps us control the spread of emerging infectious diseases.<sup>4</sup>

Through the executive order, Obama sought “to enhance domestic efforts to combat wildlife trafficking, to assist foreign nations in building capacity to combat wildlife trafficking, and to assist in combating transnational organized crime.”<sup>5</sup> He directed executive departments and agencies to take “all appropriate actions within their authority” to reach the following objectives:

- (a) in appropriate cases, the United States shall seek to assist [foreign] governments in anti-wildlife trafficking activities when requested by foreign nations experiencing trafficking of protected wildlife;
- (b) the United States shall promote and encourage the development and enforcement by foreign nations of effective laws to prohibit the illegal taking of, and trade in, these species and to prosecute those who engage in wildlife trafficking, including by building capacity;
- (c) in concert with the international community and partner organizations, the United States shall seek to combat wildlife trafficking; and

<sup>15</sup> Ministry of Foreign Affairs of the People’s Republic of China, Foreign Ministry Spokesperson Hong Lei’s Remarks on Comments by the US State Department Official on the South China Sea (Feb. 8, 2014), at <http://www.fmprc.gov.cn/eng/xwfw/s2510/t1127014.shtml>.

<sup>1</sup> John Kerry, Eric Holder & Sally Jewel, *Opinion: End Illegal Wildlife Trafficking on World Wildlife Day*, NAT’L GEOGRAPHIC, Mar. 3, 2014, at <http://news.nationalgeographic.com/news/2014/03/140303-opinion-kerry-jewel-world-wildlife-day>; Kharunya Paramaguru, *A Landmark International Agreement to Halt Wildlife Trafficking Is Just the Beginning*, TIME, Feb. 14, 2014, at <http://science.time.com/2014/02/14/a-landmark-international-agreement-to-halt-wildlife-trafficking-is-just-the-beginning>.

<sup>2</sup> Exec. Order No. 13,648, 78 Fed. Reg. 40,621 (July 5, 2013), at <http://www.whitehouse.gov/the-press-office/2013/07/01/executive-order-combating-wildlife-trafficking>; see also John D. Sutter, *The Most Trafficked Mammal You’ve Never Heard of*, CNN, Apr. 2, 2014, at [http://www.cnn.com/interactive/2014/04/opinion/sutter-change-the-list-pangolin-trafficking/index.html?hpt=hp\\_c2](http://www.cnn.com/interactive/2014/04/opinion/sutter-change-the-list-pangolin-trafficking/index.html?hpt=hp_c2).

<sup>3</sup> Exec. Order No. 13,648, *supra* note 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

- (d) the United States shall seek to reduce the demand for illegally traded wildlife, both at home and abroad, while allowing legal and legitimate commerce involving wildlife.<sup>6</sup>

The executive order also established an interagency Presidential Task Force on Wildlife Trafficking to develop and implement a national strategy for combating wildlife trafficking.<sup>7</sup> On February 11, 2014, the task force announced three strategic priorities: “(1) Strengthen enforcement; (2) Reduce demand for illegally traded wildlife; and (3) Build international cooperation, commitment, and public-private partnerships.”<sup>8</sup>

That same day, the White House also announced a ban on the commercial trade of elephant ivory, declaring that “[t]he ban is the best way to help ensure that U.S. markets do not contribute to the further decline of African elephants in the wild.”<sup>9</sup> The U.S. Department of the Interior consequently publicized the specific steps that the U.S. Fish and Wildlife Service would take to implement a U.S. ban on commercial trade of elephant ivory.<sup>10</sup> The White House expressed hope that “other countries will join us in taking ambitious action to combat wildlife trafficking.”<sup>11</sup>

These announcements immediately preceded the opening of a high-level conference on illegal trade in wildlife hosted by the United Kingdom on February 12–13, 2014. Forty-six nations, including the United States, participated.<sup>12</sup> At the conclusion of the conference, the participants adopted a declaration in which they announced their political commitment to take specific steps to address illegal trafficking in wildlife.<sup>13</sup> Excerpts follow:

[W]e commit ourselves and call upon the international community to providing the political leadership and practical support needed to take the following essential actions. . . .

- I. *Support, and where appropriate undertake, effectively targeted actions to eradicate demand and supply for illegal wildlife products*, including but not limited to, raising awareness and changing behaviour. . . .
- II. *Endorse the action of Governments which have destroyed seized wildlife products being traded illegally*; and encourage those Governments that have stockpiles of illegal products, particularly of high value items such as rhino horn or elephant ivory, to

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING WILDLIFE TRAFFICKING 5 (Feb. 2014), at <http://www.fws.gov/home/feature/2014/trafficking/national-strategy-wildlife-trafficking.pdf>.

<sup>9</sup> White House Press Release, Fact Sheet: National Strategy for Combating Wildlife Trafficking & Commercial Ban on Trade in Elephant Ivory (Feb. 11, 2014), at <http://www.whitehouse.gov/the-press-office/2014/02/11/fact-sheet-national-strategy-combating-wildlife-trafficking-commercial-b>.

<sup>10</sup> U.S. Dep’t of Interior Press Release, Interior Announces Ban on Commercial Trade of Ivory as Part of Overall Effort to Combat Poaching, Wildlife Trafficking (Feb. 11, 2014), at <http://www.doi.gov/news/pressreleases/interior-announces-ban-on-commercial-trade-of-ivory-as-part-of-overall-effort-to-combat-poaching-wildlife-trafficking.cfm>.

<sup>11</sup> White House Press Release, *supra* note 9.

<sup>12</sup> Adam Vaughan, *Global Accord on Combatting Illegal Wildlife Trade Agreed by 46 Nations*, GUARDIAN, Feb. 13, 2014, at <http://www.theguardian.com/environment/2014/feb/13/global-accord-illegal-wildlife-trade-london-46-nations>.

<sup>13</sup> London Conference on the Illegal Wildlife Trade, Declaration (Feb. 13, 2014), at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/281289/london-wildlife-conference-declaration-140213.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/281289/london-wildlife-conference-declaration-140213.pdf).

destroy them and to carry out policy research on measures which will benefit conservation. . . .

- III. *Renounce, as part of any Government procurement or related activity, the use of products from species threatened with extinction, except for the purposes of bona fide scientific research, law enforcement, public education and other non-commercial purposes in line with national approaches and legislation.*
- IV. *Take measures to ensure that the private sector acts responsibly, to source legally any wildlife products used within their sectors; and urge the private sector to adopt zero tolerance policies on corporate gifting or accepting of species threatened with extinction or products made from them.*
- . . . .
- VIII. *Address the problem of the illegal wildlife trade by adopting or amending legislation, as necessary, to criminalise poaching and wildlife trafficking, and related crimes including by ensuring such criminal offences are "serious crimes" within the UN Convention against Transnational Organized Crime . . . .*
- . . . .
- X. *Strengthen the legal framework and facilitate law enforcement to combat the illegal wildlife trade and assist prosecution and the imposition of penalties that are an effective deterrent. As part of this, support the use of the full range of existing legislation and law enforcement deployed against other forms of organised crime. This should include, but not be limited to, the enforcement of legislation on money laundering, tax offences and asset recovery, corruption and illicit trafficking in other commodities such as narcotic drugs and firearms. Effective multidisciplinary enforcement should be used to ensure effective investigations and prosecutions, and to secure sentences that act as an effective deterrent.*
- . . . .
- XVI. *Strengthen cross-border and regional co-operation, through better co-ordination, and through full support for regional wildlife law enforcement networks. This should include the sharing of operational intelligence and information, sharing information on forensic research and collaborating with relevant forensic research institutions, collaboration on enforcement activity (such as joint operations) and joint capacity building initiatives (such as training activities, trans-border communication equipment and sharing of enforcement expertise and resources).*
- . . . .
- XVII. *Recognise the negative impact of illegal wildlife trade on sustainable livelihoods and economic development. . . .*
- XVIII. *Increase capacity of local communities to pursue sustainable livelihood opportunities and eradicate poverty. This includes promoting innovative partnerships for conserving wildlife through shared management responsibilities such as community conservancies, public-private partnerships, sustainable tourism, revenue-sharing agreements and other income sources such as sustainable agriculture. Governments should integrate measures to address illegal wildlife trade into development policy and planning, and the programming of development cooperation activities.*<sup>14</sup>

<sup>14</sup> *Id.*

Following the London conference, the U.S. Department of State commended the responses of both Togo, for sending “a strong message to the world . . . [by making] multiple seizures of illegal ivory, totaling more than four tons,” and Vietnam, for announcing “a new national directive to combat the illicit trade in wildlife parts.”<sup>15</sup>

#### INTERNATIONAL ECONOMIC LAW

##### *U.S. Compromises Facilitate Agreement on World Trade Organization’s Bali Package; Question Remains Whether Bali Package Requires Congressional Approval*

The Bali Ministerial Conference of the World Trade Organization (WTO) concluded on December 7, 2013, with member states having reached agreement on a package of issues designed to improve trade efficiency, ensure food security in developing countries, and enhance development generally.<sup>1</sup> International observers described the Bali Package—a subset of issues from the Doha Round negotiations launched in 2001<sup>2</sup>—as the WTO’s first trade reform deal since its creation in 1995.<sup>3</sup> During his concluding statements at the conference, WTO Director-General Roberto Azevêdo lauded the agreement, proclaiming that “for the first time in our history, the WTO has truly delivered.”<sup>4</sup> U.S. Trade Representative Michael Froman described the benefits of the agreement this way:

For a long time we have called the [Bali Package] a “win-win” agreement. It is good for both developed and developing Members alike.

The potential cost reduction of the trade facilitation measures in this agreement are estimated to be 10 percent for developed countries and around 15 percent for developing countries. Studies indicate that for every one percent in cost reduction, worldwide income increases by more than \$40 billion, 65 percent accruing to developing countries. Some studies estimate the trade facilitation agreement we’ve reached here tonight will result in global GDP gains of nearly \$1 trillion. That, my friends, is no small package.

Under this new agreement, a small business, including those in the United States, seeking to break into global markets and increase its export opportunities will be able to do so because it has faster, simpler, and less costly access to 159 economies.<sup>5</sup>

To enter into force, the Bali Package must now be adopted by two-thirds of the WTO’s member states sitting as the WTO’s General Council.<sup>6</sup> Because the package received unanimous support of the Bali Ministerial Conference—a body composed of representatives of all

<sup>15</sup> U.S. Dep’t of State Press Release, World Wildlife Day (Mar. 3, 2014), at <http://www.state.gov/secretary/remarks/2014/03/222804.htm>.

<sup>1</sup> World Trade Organization Press Release, Days 3, 4 and 5: Round the Clock Consultations Produce ‘Bali Package’ (Dec. 7, 2013), at [http://www.WTO.org/english/news\\_e/news13\\_e/mc9sum\\_07dec13\\_e.htm](http://www.WTO.org/english/news_e/news13_e/mc9sum_07dec13_e.htm) [hereinafter WTO Press Release].

<sup>2</sup> *Id.*

<sup>3</sup> *W.T.O. Reaches First Global Trade Deal*, N.Y. TIMES, Dec. 8, 2013, at A12; see also WTO Press Release, *supra* note 1.

<sup>4</sup> WTO Press Release, *supra* note 1.

<sup>5</sup> Office of the U.S. Trade Representative Press Release, Statement of U.S. Trade Representative Michael Froman following the 9th Ministerial Conference of the World Trade Organization (Dec. 6, 2013), at <http://www.ustr.gov/about-us/press-office/press-releases/2013/December/Froman-statement-following-Ninth-Ministerial-Conference-WTO>.

<sup>6</sup> See *id.*; see also Marrakesh Agreement Establishing the World Trade Organization, Art. X, Apr. 15, 1994, 1867 UNTS 154, 33 ILM 1144 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) [hereinafter

WTO member states—it seems unlikely that meeting this adoption threshold will pose a problem.<sup>7</sup> The WTO's press release from the conclusion of the Ministerial Conference stated that the Bali Package “will be checked and corrected to ensure the language is legally correct, aiming for the General Council to adopt it by 31 July 2014.”<sup>8</sup> The delay between the conference's approval and the council's final adoption reflects the member states' need to satisfy relevant constitutional requirements and procedures before submitting final acceptances.<sup>9</sup>

The most significant element of the Bali Package is its decision on trade facilitation.<sup>10</sup> This decision involves new commitments by members to “speed up customs procedures; make trade easier, faster and cheaper; provide clarity, efficiency and transparency; reduce bureaucracy and corruption, and use technological advances.”<sup>11</sup> WTO economists estimate the financial benefits of these reforms to be between “\$400 billion and \$1 trillion by reducing costs of trade by between 10% and 15%, increasing trade flows and revenue collection, creating a stable business environment and attracting foreign investment.”<sup>12</sup> Consistent with other components of the Bali Package that promote compliance by developing countries, the trade facilitation decision provides such countries with assistance to update infrastructure and train customs officials.<sup>13</sup>

The United States helped reach compromises with both India<sup>14</sup> and Cuba<sup>15</sup> that were integral to the conference's success. The crux of the dispute between the United States and India focused on India's extensive agricultural subsidies. India had taken the position that its subsidies—a central component of the country's food security programs—are necessary to provide food to its poor and support the country's farmers.<sup>16</sup> Under existing WTO law, such subsidies count towards the WTO's subsidy spending caps. India hoped to change that policy by creating a new exemption for subsidies issued in connection with food security programs.<sup>17</sup> India's proposal was subsequently endorsed by the G33, a group of thirty-three developing countries. At a meeting of the WTO's Trade Negotiations Committee in April 2013, U.S. Ambassador to the WTO Michael Punke expressed concern about this proposal:

Many in Geneva have expressed concerns about [the G33] proposal from the beginning, while also expressing willingness to consider the proposal with an open mind. For four months the United States and others have engaged extensively to learn more, even in the

Marrakesh Agreement]; *see also* *WTO: EU Hails Adoption of Bali Package*, VIEUWS, Dec. 9, 2013, at 1, at <http://www.vieuws.eu/eutradeinsights/wp-content/uploads/2013/12/N01-EU-trade-insights1.pdf>.

<sup>7</sup> World Trade Organization, *Whose WTO Is It Anyway?* (2014), at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm).

<sup>8</sup> WTO Press Release, *supra* note 1.

<sup>9</sup> *See* PETER VANDEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 140 (3d ed. 2013).

<sup>10</sup> WTO Press Release, *supra* note 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Howard Schneider, *A Wobbling WTO Lurches Forward with Trade Deal*, WASH. POST, Dec. 7, 2013, at A12.

<sup>15</sup> *W.T.O. Reaches First Global Trade Deal*, *supra* note 3.

<sup>16</sup> *India to Take Tough Stand on Food Subsidy at WTO Bali Meet*, ECON. TIMES, Nov. 28, 2013, at [http://articles.economictimes.indiatimes.com/2013-11-28/news/44547159\\_1\\_wto-bali-food-subsidy-trade-facilitation-agreement](http://articles.economictimes.indiatimes.com/2013-11-28/news/44547159_1_wto-bali-food-subsidy-trade-facilitation-agreement).

<sup>17</sup> *Id.*

face of incomplete information. But unfortunately these intensive discussions of the proposal have revealed more causes for concern, not fewer.

Frankly, the very essence of this proposal is confusing and concerning. Since the beginning of the Doha Round, developing countries have made clear that they view disciplines for the reduction of trade-distorting agriculture subsidies as one of the fundamental goals of the Round.

Instead of creating new disciplines to reduce agriculture subsidies, the G33 proposal represents a step back from existing Uruguay Round disciplines—creating a new loophole for potentially unlimited trade-distorting subsidies.

This new loophole, moreover, will be available only to a few emerging economies with the cash to use it. Other developing countries will accrue no benefit—and in fact will pay for the consequences.<sup>18</sup>

To overcome an impasse at the Bali Conference, however, the United States ultimately supported an interim solution that it had initially opposed.<sup>19</sup> The solution—a victory for India<sup>20</sup>—protects public stockpiling programs for food security from legal scrutiny in the immediate future but establishes a working group charged with “produc[ing] a permanent solution in four years.”<sup>21</sup>

Negotiations on the Bali Package were nearly complete when Cuba, supported by Bolivia, Nicaragua, and Venezuela, threatened to veto any agreement that did not help to terminate the long-standing U.S. embargo on Cuba.<sup>22</sup> Trade diplomats noted that Cuba had been making this same demand for decades.<sup>23</sup> After the United States agreed to insert a sentence reaffirming the principle of nondiscrimination for goods in transit, Cuba withdrew its veto threat.<sup>24</sup>

With international negotiations completed, one key question is whether congressional approval is required before the United States can take on the new international obligations in the Bali Package. Traditionally, trade agreements are treated as congressional-executive agreements that require a majority vote of each house for approval.<sup>25</sup> Obama may face an uphill battle to smooth the way for trade agreements in Congress at this time.<sup>26</sup> Just one day after Obama referenced the possibility of fast-track legislation in his State of the Union address, Senator Harry Reid voiced his opposition to such legislation.<sup>27</sup>

<sup>18</sup> Office of the U.S. Trade Representative Press Release, Statement by U.S. Ambassador to the WTO Michael Punke at a Meeting of the Trade Negotiations Committee at the World Trade Organization (Apr. 11, 2013), at <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2013/april/amb-punke-statement-wto-tnc>.

<sup>19</sup> See Schneider, *supra* note 14, at A12.

<sup>20</sup> *W.T.O. Reaches First Global Trade Deal*, *supra* note 3.

<sup>21</sup> WTO Press Release, *supra* note 1.

<sup>22</sup> *W.T.O. Reaches First Global Trade Deal*, *supra* note 3; Randy Fabi, *Historic Global Trade Deal on Ice as Cuba Holds Out*, REUTERS, Dec. 7, 2013, at <http://in.reuters.com/article/2013/12/06/trade-wto-idINDEE9B504420131206>.

<sup>23</sup> Fabi, *supra* note 22.

<sup>24</sup> WTO Press Release, *supra* note 1.

<sup>25</sup> JANE M. SMITH, DANIEL T. SHEDD & BRANDON J. MURRILL, CONG. RESEARCH SERV., Rep. No. 97-896, WHY CERTAIN TRADE AGREEMENTS ARE APPROVED AS CONGRESSIONAL-EXECUTIVE AGREEMENTS RATHER THAN TREATIES 1–4 (2013), available at <http://www.fas.org/sgp/crs/misc/97-896.pdf>.

<sup>26</sup> Howard Schneider, *Obama Initiatives Encounter Resistance in Both Parties*, WASH. POST, Jan. 30, 2014, at A6.

<sup>27</sup> See *id.*

Punke had earlier expressed the Obama administration's view that congressional approval of the Bali Package is unnecessary: "That's something that, as always, is part of a conversation that we have domestically with our Congress. . . . Our analysis of the trade facilitation agreement is that it can be effectuated through administrative means and would not require legislation to put it into force."<sup>28</sup> At a minimum, this statement indicates the administration's view that no additional congressional action is necessary to allow the United States to *comply* with the obligations in the Bali package. But it does not clarify whether the administration believes that congressional approval for these new international trade obligations is simply unnecessary or whether the administration believes that *ex ante* congressional approval has already been extended through existing legislation applicable to this case.<sup>29</sup> Some commentators have suggested that Congress's earlier approval of the WTO's Marrakesh Agreement, the organization's founding document, is sufficient. That theory relies on the fact that Article X of the Marrakesh Agreement sets out an amendment procedure requiring unanimity or a two-thirds vote—depending on the subject matter—of the WTO's member states.<sup>30</sup> Because this amendment procedure is part of the Marrakesh Agreement, Congress could be seen as having provided *ex ante* approval for future amendments made pursuant to Article X.<sup>31</sup> Assuming the Bali Package secures the required two-thirds approval of the member states,<sup>32</sup> it could well be characterized as an amendment to the Marrakesh Agreement.<sup>33</sup>

#### USE OF FORCE AND ARMS CONTROL

##### *Destruction of Syrian Chemical Arms Delayed*

Pursuant to Security Council Resolution 2118, the United Nations and the Organisation for the Prohibition of Chemical Weapons (OPCW) continued their efforts to identify and destroy Syria's chemical weapons arsenal.<sup>1</sup> In late December, OPCW Director-General Ahmet Üzümcü reported that plans were underway to transport the chemicals out of Syria for destruction but "cautioned that time schedules have been disrupted by a combination of security concerns, clearance procedures in international transit, and even inclement weather conditions."<sup>2</sup> As the deadline of December 31, 2013, for destruction of the most critical chemicals

<sup>28</sup> U.S. Ambassador to the WTO Michael Punke, Office of the U.S. Trade Representative Press Conference, Meeting of the Trade Negotiations Committee at the World Trade Organization (Dec. 7, 2013), at [http://www.wtomc9.org/mc9\\_webcast\\_pressconf\\_e.php](http://www.wtomc9.org/mc9_webcast_pressconf_e.php) (audio feed at 17:10).

<sup>29</sup> Cf. John R. Crook, Contemporary Practice of the United States, 107 AJIL 208, 210 (2013) (describing the view of former State Department legal adviser Harold Koh that the executive branch had authority to conclude the Anti-Counterfeiting Trade Agreement even though "Congress did not *expressly* pre-authorize this particular agreement"); see also Marrakesh Agreement, *supra* note 6, Art. X.

<sup>30</sup> Marrakesh Agreement, *supra* note 6, Art. X.

<sup>31</sup> Julian Ku, *Does the U.S. Congress Have to Approve the New WTO Agreement? Apparently Not.*, OPINIO JURIS (Dec. 9, 2013), at <http://opiniojuris.org/2013/12/09/u-s-congress-approve-new-wto-agreement-apparently>.

<sup>32</sup> WTO: EU Hails Adoption of Bali Package, *supra* note 6, at 1.

<sup>33</sup> Ku, *supra* note 31.

<sup>1</sup> See John R. Crook, Contemporary Practice of the United States, 107 AJIL 900, 905–07 (2013) (quoting SC Res. 2118 (Sept. 27, 2013)).

<sup>2</sup> Organisation for the Prohibition of Chemical Weapons [OPCW] Press Release, Executive Council Receives Destruction Plan for Syrian Chemicals (Dec. 18, 2013), at <http://www.opcw.org/news/article/executive-council-receives-destruction-plan-for-syrian-chemicals>.

approached, the OPCW conceded that it was “unlikely” that Syria would transport the chemicals in time.<sup>3</sup> The U.S. Department of State acknowledged that it was “an ambitious timeline” but cited “significant progress” in reaching the ultimate goal of “complete destruction” by June 30, 2014.<sup>4</sup> The first shipment of chemicals left from the Syrian port of Latakia on a Danish vessel on January 7, 2014.<sup>5</sup>

Despite the delays, international assistance continued apace. Russia sent fifty trucks and twenty-five armored vehicles to Latakia to help with transportation.<sup>6</sup> The United States readied a military ship, the MV *Cape Ray*, to assist in the destruction of the chemicals, with Russia and China providing security in Syrian territorial waters.<sup>7</sup> The United Kingdom prepared to destroy some of the precursor chemicals, and Germany agreed to dispose of 370 metric tons of effluent that would be generated when the Syrian mustard gas undergoes hydrolysis on the *Cape Ray*.<sup>8</sup> In late January, the OPCW confirmed that Italy had agreed to allow the chemicals to be loaded onto the *Cape Ray* at the port of Gioia Tauro.<sup>9</sup> Fourteen private firms from eleven countries—Belgium, China, Finland, France, Germany, Russia, Saudi Arabia, Spain, Switzerland, the United Kingdom, and the United States—submitted tenders to the OPCW for the destruction of 500 metric tons of Syrian commodity chemicals, and contracts were awarded to companies from Finland and the United States.<sup>10</sup>

By the end of January 2014, however, the United States and the OPCW had become impatient with continued Syrian delays. The U.S. Department of State said that it was “deeply concerned about the failure of the Government of Syria to transport to the port of Latakia all of the chemical agents and precursors as mandated by UN Security Council Resolution 2118 and the OPCW Executive Council decisions,” noting that the regime “ha[d] moved less than 5 percent of the chemicals to the port.”<sup>11</sup> Üzümcü said that “[w]ays and means must

<sup>3</sup> OPCW Press Release, Statement by the Director-General (Dec. 28, 2013), at <http://www.opcw.org/news/article/statement-by-the-director-general-6>; OPCW Executive Council, Decision on Detailed Requirements for the Destruction of Syrian Chemical Weapons and Syrian Weapons Production Facilities, OPCW Doc. EC-M-34/DEC.1 (Nov. 15, 2013), at [https://www.opcw.org/index.php?eID=dam\\_frontend\\_push&docID=16875](https://www.opcw.org/index.php?eID=dam_frontend_push&docID=16875) (setting deadline of December 31, 2013).

<sup>4</sup> U.S. Dep’t of State Daily Press Briefing No. 210 (Dec. 30, 2013), at <http://www.state.gov/r/pa/prs/dpb/2013/12/219160.htm#syria>.

<sup>5</sup> OPCW Press Release, First Priority Chemicals in Syria Transported to Latakia and Removed from the Country (Jan. 7, 2014), at <http://www.opcw.org/news/article/first-priority-chemicals-in-syria-transported-to-latakia-and-removed-from-the-country>.

<sup>6</sup> David M. Herszenhorn & Anne Barnard, *Russia Sends Vehicles to Syrian Port to Aid in Removal of Chemical Weapons Stockpile*, N.Y. TIMES, Dec. 24, 2013, at A9.

<sup>7</sup> U.S. Dep’t of State Daily Press Briefing No. 1 (Jan. 2, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/01/219269.htm#syria>.

<sup>8</sup> *Id.*; OPCW Press Release, Germany to Destroy Effluent from Syrian Chemicals (Jan. 9, 2014), at <http://www.opcw.org/news/article/germany-to-destroy-effluent-from-syrian-chemicals>.

<sup>9</sup> OPCW Press Release, Trans-loading of Syrian Chemicals to Be Undertaken at Port of Gioia Tauro in Italy (Jan. 16, 2014), at <http://www.opcw.org/news/article/trans-loading-of-syrian-chemicals-to-be-undertaken-at-port-of-gioia-tuaro-in-italy>.

<sup>10</sup> *See* OPCW Press Release, OPCW Receives Tenders from 14 Private Firms to Destroy Syrian Commodity Chemicals and Effluents (Jan. 20, 2014), at <http://www.opcw.org/news/article/opcw-receives-tenders-from-14-private-firms-to-destroy-syrian-commodity-chemicals-and-effluents>; OPCW Press Release, OPCW Awards Contracts to Two Companies for Destruction of Syrian Chemicals and Effluents (Feb. 14, 2014), at <http://www.opcw.org/news/article/opcw-awards-contracts-to-two-companies-for-destruction-of-syrian-chemicals-and-effluents>.

<sup>11</sup> U.S. Dep’t of State Daily Press Briefing No. 19 (Jan. 30, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/01/221045.htm#DEPARTMENT>.

be found to establish continuity and predictability of shipments to assure . . . that the programme, while delayed, is not deferred.”<sup>12</sup> Despite these criticisms, shipments continued in February and March. Danish and Norwegian cargo vessels left Latakia on January 27 with a second shipment of chemical weapon materials, and a third shipment left on February 10.<sup>13</sup> A major consignment of mustard gas was then removed for destruction on the *Cape Ray* on February 26.<sup>14</sup>

As shipments continued, Syria requested a further postponement of the final deadline to mid-May.<sup>15</sup> U.S. Permanent Representative to the OPCW Robert Mikulak lamented that “the Syrian Government continues to put its energy into excuses, instead of actions,” and stressed the need for compliance with Security Council Resolution 2118.<sup>16</sup> With the support of Russia,<sup>17</sup> Syria eventually proposed to remove all chemicals by the end of April, even as the OPCW estimated that only 26 percent of the total chemicals had been removed by early March.<sup>18</sup> The OPCW Executive Council responded by “request[ing]” that Syria “continue systematic, predictable and substantial movements . . . in order to complete removal in the shortest possible time.”<sup>19</sup> By March 20, eleven consignments of chemicals had been transported, amounting to nearly half of Syria’s stockpile.<sup>20</sup> Secretary of State John Kerry described this milestone as “significant” but noted that the United States was “convinced that if Syria wanted to, they could move faster. And we believe it is imperative to achieve this goal and to move as rapidly as possible because of the challenges on the ground.”<sup>21</sup>

<sup>12</sup> OPCW Press Release, Director-General: Need to “Pick Up Pace” in Removing Chemicals from Syria (Jan. 31, 2014), at <http://www.opcw.org/news/article/director-general-need-to-pick-up-pace-in-removing-chemicals-from-syria-1>.

<sup>13</sup> OPCW-UN Joint Mission Press Release, Further Removal of Chemical Weapons Materials from the Syrian Arab Republic (Jan. 27, 2014), at <http://opcw.unmissions.org/CommunicationsCentre/Newsroom/PressReleasesandBulletins/tabid/193/ctl/Details/mid/635/ItemID/136/Default.aspx>; OPCW Press Release, OPCW-UN Joint Mission: Removal and Elimination of Chemical Weapons Material (Feb. 10, 2014), at <http://www.opcw.org/news/article/opcw-un-joint-mission-statement-removal-and-elimination-of-chemical-weapons-material>.

<sup>14</sup> OPCW Press Release, Consignment of Sulfur Mustard Delivered to Latakia and Removed from Syria (Feb. 26, 2014), at <http://www.opcw.org/news/article/consignment-of-sulfur-mustard-delivered-to-latakia-and-removed-from-syria>.

<sup>15</sup> Rick Gladstone, *Syrians Seek New Delay in Exporting of Chemicals*, N.Y. TIMES, Feb. 22, 2014, at A6.

<sup>16</sup> U.S. Dep’t of State Press Release, Robert Mikulak, U.S. Permanent Representative to the OPCW, Statement to the Thirty-Ninth Meeting of the Executive Council (Feb. 21, 2014), at <http://www.state.gov/t/avc/rls/2014/221891.htm>.

<sup>17</sup> *Syria Chemical Weapons ‘Could Go in a Month,’* AL JAZEERA, Mar. 14, 2014, at <http://www.aljazeera.com/news/middleeast/2014/03/syria-chemical-weapons-could-go-month-201431452653715794.html>.

<sup>18</sup> OPCW Press Release, Syria Submits Revised Proposal to OPCW for Removal of Chemicals and Accelerates Pace of Deliveries to Latakia (Mar. 4, 2014), at <http://www.opcw.org/news/article/syria-submits-revised-proposal-to-opcw-for-removal-of-chemicals-and-accelerates-pace-of-deliveries-t>.

<sup>19</sup> OPCW Executive Council, Report of the Seventy-Fifth Session of the Executive Council, OPCW Doc. EC-75/2 (Mar. 7, 2013), available at [https://www.opcw.org/index.php?eID=dam\\_frontend\\_push&docID=17165](https://www.opcw.org/index.php?eID=dam_frontend_push&docID=17165).

<sup>20</sup> OPCW Press Release, More Movement of Chemicals out of Syria Boosts Removals to Half of Stockpile (Mar. 20, 2014), at <http://www.opcw.org/news/article/more-movement-of-chemicals-out-of-syria-boosts-removals-to-half-of-stockpile>.

<sup>21</sup> U.S. Dep’t of State Press Release, John Kerry, Sec’y of State, Remarks with OPCW Director-General Ahmet Uzumcu Before Their Meeting (Mar. 24, 2014), at <http://www.state.gov/secretary/remarks/2014/03/223845.htm>.

*Iran Nuclear Agreement Is Implemented Notwithstanding Expressions of Distrust by Iran and the U.S. Congress*

On November 23, 2013, the United States and the other permanent members of the UN Security Council plus Germany (P5 + 1) reached an interim agreement with Iran to curb Iran's nuclear enrichment activities in exchange for a temporary suspension of some economic sanctions imposed on Iran.<sup>1</sup> Shortly afterwards, the U.S. Congress began considering legislation that would impose new sanctions on Iran if Iran failed to implement that agreement.<sup>2</sup> President Barack Obama objected to the new legislation and promised to veto it on the ground that it would derail the agreement.<sup>3</sup> On December 25, 2013, Iran's parliament introduced a bill that would require the Iranian government to increase uranium enrichment to 60 percent if the United States imposed new sanctions on Iran.<sup>4</sup>

On January 1, 2014, Iran added two members of Parliament to the supervisory council responsible for monitoring the Iranian nuclear negotiating team in an effort to "prevent misunderstandings by the Americans."<sup>5</sup> The two new members are known as conservative hardliners who are suspicious of the West. Although the precise role of the supervisory council has not been made public, the council now includes one representative from President Hassan Rouhani's government, one from the judiciary, one from the Atomic Energy Organization of Iran, and three members of Parliament. Some analysts believe that the additional parliamentary members were added to the supervisory council to ensure that any ensuing permanent nuclear deal will be able to garner subsequent approval by the Parliament. Other analysts think that the personnel move makes it less clear whether the negotiation team has been fully authorized by Ayatollah Ali Khamenei to make deals with its counterparts.<sup>6</sup>

In a speech on January 9, 2014, Khamenei condemned the United States for human rights abuses and for its threat of economic sanctions even in the face of the impending implementation of the interim nuclear deal. He noted:

[The United States] think[s] that because they imposed sanctions on Iran, it was forced to come to the negotiating table. But this was not the case. Before they said such things, we had announced that the Islamic Republic would negotiate—whenever it thinks it is expedient—with this Satan on specific issues in order to eradicate its evil deeds and solve the problems. This does not mean that the Iranian nation has become desperate. This has never been the case.

One of the blessings of the recent negotiations was that the enmity of the Americans and the officials of the government of the United States of America towards Iran and the Iranians, and towards Islam and Muslims became clear to everyone. Everyone realized this. . . .

<sup>1</sup> See Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 107 AJIL 109, 109 (2014).

<sup>2</sup> See *id.* at 114.

<sup>3</sup> See *id.* at 114–15.

<sup>4</sup> Ali Akbar Dareini, *Iran Lawmakers Introduce Uranium-Enrichment Bill*, ASSOCIATED PRESS, Dec. 25, 2013, at <http://bigstory.ap.org/article/iran-lawmakers-introduce-uranium-enrichment-bill>.

<sup>5</sup> Thomas Erdbrink, *2 Conservatives Join Iran Nuclear Panel*, N.Y. TIMES, Jan. 2, 2014, at A7.

<sup>6</sup> *Id.*

Their enmity and incapability has become clear and they are desperately trying to do this and that in the present time. Their political personalities, their newspapers and their political parties are showing their personal and old grudges, as they have shown it over the last 30 years with different words and statements. The issue of human rights, the issue of Islam and the issue of our commitment to religious principles are issues which they always complain about. Everyone has the right to speak about human rights except for the Americans because they have been the greatest violators of human rights not only in the past, but also in the present time.

....

. . . [The Americans] oppress and attack people, they bring their drones to Afghanistan and Pakistan, they kill innocent people and they commit thousands of crimes against civilians in different areas . . . . This is while they speak about human rights.

It is we who claim the government of the United States of America and many western governments are violating human rights. It is we who claim this and who question them. It is we who make a complaint against these people to public opinion throughout the world. But they will not have any answer for what they have done.<sup>7</sup>

Despite Khamenei's condemnation of the United States, the interim nuclear agreement was implemented on January 20, 2014. Excerpts of the White House statement about implementation follow:

[T]he International Atomic Energy Agency (IAEA) reported that Iran has taken the initial specific steps it committed to on or by January 20th, as part of the Joint Plan of Action between the P5+1 . . . and Iran. As a result, implementation of the Joint Plan of Action will begin today.

Specifically, the IAEA has verified in a written report and subsequent briefing for P5+1 technical experts, that Iran has, among other things, stopped producing 20% enriched uranium, has disabled the configuration of the centrifuge cascades Iran has been using to produce it, has begun diluting its existing stockpile of 20% enriched uranium, and has not installed additional centrifuges at Natanz or Fordow. These actions represent the first time in nearly a decade that Iran has verifiably enacted measures to halt progress on its nuclear program, and roll it back in key respects. Iran has also begun to provide the IAEA with increased transparency into the Iranian nuclear program, through more frequent and intrusive inspections and the expanded provision of information to the IAEA. Taken together, these concrete actions represent an important step forward.

In reciprocation for Iran's concrete actions, the United States and its P5+1 partners . . . will today follow through on our commitment to begin to provide the modest relief agreed to with Iran. At the same time, we will continue our aggressive enforcement of the sanctions measures that will remain in place throughout this six-month period.

Following the actions taken today, the P5+1, EU, and Iran will also begin the process of negotiating a long-term comprehensive solution that seeks to address the international

<sup>7</sup> Sayyid Ali Khamenei, Supreme Leader of Iran, Supreme Leader's Speech in Meeting with People from the Holy City of Qom (Jan. 9, 2014), at <http://www.leader.ir/langs/en/index.php?p=contentShow&cid=11381>.

community's concerns about Iran's nuclear program. The United States remains committed to using strong and disciplined diplomacy to reach a peaceful resolution that will prevent Iran from obtaining a nuclear weapon.<sup>8</sup>

The U.S. Treasury Department issued a statement further detailing the suspension of sanctions based on the implementation of the Joint Plan of Action:

[T]he IAEA verified that Iran has fulfilled its initial nuclear commitments pursuant to the [Joint Plan of Action (JPOA)]. Accordingly, the Administration has taken the necessary steps to pause efforts to further reduce Iranian crude oil exports, allowing the six current customers of Iranian oil to maintain their purchases at current reduced levels for the duration of the JPOA. In addition, the Administration is working with its partners and Iran to establish financial channels to enable Iran to make payments for humanitarian transactions and medical expenses, university tuition payments for Iranian students studying abroad, and the payment of Iran's United Nations obligations.

Further, the Administration took the necessary actions to suspend for the duration of the JPOA sanctions on non-U.S. persons engaged in transactions related to Iran's petrochemical exports, certain trade in gold and precious metals with Iran, and the provision of goods and services to Iran's automotive sector. In addition, the United States government will license transactions for spare parts, inspections, and associated services necessary for safety of flight for certain Iranian aviation. To qualify for relief under the sanctions suspension, these transactions must be initiated and completed during the JPOA period. . . .

The JPOA and associated sanctions suspensions will be in force for six months. This includes allowing Iran access to a limited sum of its funds restricted abroad, allocated in installments over the next six months. All sanctions relief is contingent upon Iran's continuing adherence to the nuclear steps outlined in the initial understanding . . . and detailed in the technical commitments made subsequently. If it is determined that Iran has failed to meet these commitments, the United States Government will revoke this limited sanctions relief.

As the United States and our partners in the P5 + 1 explore the possibility of a long-term, comprehensive agreement that would prevent Iran from obtaining a nuclear weapon and provide confidence that Iran's nuclear program is exclusively peaceful, the Administration will continue to fully enforce all sanctions not explicitly suspended in this first step, including the comprehensive U.S. embargo and sanctions affecting Iran's ability to sell oil and access the international financial system.<sup>9</sup>

While some sanctions on Iran have been suspended, the Obama administration has emphasized that the nuclear agreement did not normalize economic relations with Iran.<sup>10</sup> In a White

<sup>8</sup> White House Press Release, Statement by Press Secretary Jay Carney on the Implementation of the Joint Plan of Action Regarding the Islamic Republic of Iran's Nuclear Program (Jan. 20, 2014), at <http://www.whitehouse.gov/the-press-office/2014/01/20/statement-press-secretary-jay-carney-implementation-joint-plan-action-re>.

<sup>9</sup> Dep't of the Treasury Press Release, Implementation of the Joint Plan of Action from November 24, 2013 in Geneva Between the P5 + 1 and the Islamic Republic of Iran and Provision of Limited, Temporary, and Targeted Sanctions Relief (Jan. 20, 2014), at <http://www.treasury.gov/press-center/press-releases/Pages/jl2260.aspx>; see also U.S. Dep't of the Treasury & U.S. Dep't of State, Guidance Relating to the Provision of Certain Temporary Sanctions Relief in Order to Implement the Joint Plan of Action Reached on November 24, 2013, Between the P5 + 1 and the Islamic Republic of Iran (Jan. 20, 2014), at [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/jpoa\\_guidance.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/jpoa_guidance.pdf).

<sup>10</sup> Rick Gladstone, *U.S. Warns Against Business with Iran*, N.Y. TIMES, Jan. 24, 2014, at A6.

House press briefing, Press Secretary Jay Carney responded to an inquiry about whether American businesses can start engaging with Iran:

The sanctions regime that exists has not changed. And violation of the sanctions that remain in place will be no more acceptable or tolerated than it has in the past. I think we have been clear that the modest sanctions relief that comes as part of the Joint Plan of Action is limited to the very specific aspects that have been detailed in the agreement. . . . And the point that we made again and again is that the sanctions structure and the regime remains in place. We continue to enforce all aspects of it . . . .<sup>11</sup>

The Obama administration also cautioned businesses not to engage in any deals that might still be pending after the accord expires on July 20, 2014.<sup>12</sup>

Rouhani expressed cautious optimism in the wake of the accord's implementation, simultaneously asserting Iran's nuclear rights and intention to "continue its peaceful nuclear activities under the supervision of the [IAEA]."<sup>13</sup> He also emphasized that "Iran has no plans to produce nuclear weapons" and that Iran does not have "a covert plan to produce nuclear weapons," contrary to Western accusations.<sup>14</sup>

In his State of the Union address, Obama sounded a similar theme of guarded optimism but further articulated his opposition to any efforts by U.S. legislators to interfere with the negotiations by imposing new sanctions on Iran:

[I]t is American diplomacy, backed by pressure, that has halted the progress of Iran's nuclear program—and rolled parts of that program back—for the very first time in a decade. As we gather here tonight, Iran has begun to eliminate its stockpile of higher levels of enriched uranium. It is not installing advanced centrifuges. Unprecedented inspections help the world verify, every day, that Iran is not building a bomb. And with our allies and partners, we're engaged in negotiations to see if we can peacefully achieve a goal we all share: preventing Iran from obtaining a nuclear weapon.

These negotiations will be difficult. They may not succeed. We are clear-eyed about Iran's support for terrorist organizations like Hezbollah, which threaten our allies; and the mistrust between our nations cannot be wished away. But these negotiations do not rely on trust; any long-term deal we agree to must be based on the verifiable action that convinces us and the international community that Iran is not building a nuclear bomb . . . .

The sanctions that we put in place helped make the opportunity possible. But let me be clear: if this Congress sends me a new sanctions bill now that threatens to derail these talks, I will veto it. For the sake of our national security, we must give diplomacy a chance to succeed. If Iran's leaders do not seize this opportunity, then I will be the first to call for more sanctions, and stand ready to exercise all options to make sure Iran does not build a nuclear weapon. But if Iran's leaders do seize the chance, then Iran could take an important step to rejoin the community of nations, and we will have resolved one of the leading security challenges of our time without the risks of war.<sup>15</sup>

<sup>11</sup> White House Press Briefing by Press Secretary Jay Carney (Jan. 23, 2014), at <http://www.whitehouse.gov/the-press-office/2014/01/23/press-briefing-press-secretary-jay-carney-1232014>.

<sup>12</sup> Gladstone, *supra* note 10, at A6.

<sup>13</sup> President Hassan Rouhani, President's Speech Addressing the 44th World Economic Forum (Jan. 23, 2014), at <http://www.president.ir/en/74125>.

<sup>14</sup> *Id.*

<sup>15</sup> President Barack Obama, State of the Union Address (Jan. 28, 2014), at <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>.

On January 29, 2014, UN nuclear inspectors visited a uranium mine in southern Iran, a goodwill gesture by Iran to demonstrate peaceful intent.<sup>16</sup> On February 2, 2014, in a meeting with Iranian Foreign Minister Mohammad Javad Zarif, U.S. Secretary of State John Kerry emphasized that the United States will continue to enforce sanctions already in place against Iran during negotiations for a permanent nuclear deal.<sup>17</sup> In mid-February, Iranian and American officials began negotiations aimed at achieving a permanent nuclear agreement that would ideally enter into force once the interim agreement expires on July 20, 2014.<sup>18</sup>

<sup>16</sup> Alan Cowell & Rick Gladstone, *U.N. Inspectors Visit Uranium Mine in Iran, Media Report*, N.Y. TIMES, Jan. 29, 2014, at <http://www.nytimes.com/2014/01/30/world/middleeast/united-nations-inspectors-visit-uranium-mine-in-iran.html>.

<sup>17</sup> Anne Gearan, *Kerry Tells Iran That Existing Sanctions Will Stay in Place as Nuclear Negotiations Continue*, WASH. POST, Feb. 2, 2014, at [http://www.washingtonpost.com/world/national-security/kerry-tells-iran-that-existing-sanctions-will-stay-in-place-as-negotiations-continue/2014/02/02/54a225e0-8c32-11e3-9ed8-259977a48789\\_story.html](http://www.washingtonpost.com/world/national-security/kerry-tells-iran-that-existing-sanctions-will-stay-in-place-as-negotiations-continue/2014/02/02/54a225e0-8c32-11e3-9ed8-259977a48789_story.html).

<sup>18</sup> Cowell & Gladstone, *supra* note 16.