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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

United States Adjusts Aid to Egypt in Light of Legal and Political Developments

Rapidly changing circumstances in the Middle East have complicated the longstanding U.S. policy of sending military and financial aid to Egypt. After the Egyptian military removed the democratically elected government in 2013, Congress legislated new restrictions on foreign assistance. Nevertheless, for a time, the administration continued to send substantial aid by using statutory waiver authority and declining to make the determination that would trigger further cuts. At least partly in response to other developments in the region, Congress later loosened some restrictions on foreign aid. In response, President Barack Obama's administration has restored essentially Egypt's entire package of military and financial assistance.

In 2011, nationwide protests led to the sudden resignation of Egyptian President Hosni Mubarak.¹ Those events prompted a new presidential election in 2012, which resulted in a victory for Mohammed Morsi, leader of the Muslim Brotherhood party.² Morsi remained in office until July 2013, when General Abdul Fattah al-Sisi led a military takeover that deposed the civilian government.³

Morsi's election and subsequent forcible removal complicated the continuation of American aid to Egypt. First, Congress imposed statutory restrictions that conditioned aid to Egypt on democratic reforms.⁴ In order for Egypt to receive military funding, Congress required the U.S. secretary of state to certify that the "Government of Egypt is supporting the transition to civilian government including holding free and fair elections; implementing policies to protect freedom of expression, association, and religion, and due process of law."⁵ Second, a longstanding provision in Congress's annual foreign appropriations act, Section 7008, prohibits the United States from providing assistance "to the government of any country whose duly elected head of government is deposed by military coup d'état or decree or, after the date of enactment of this Act, a coup d'état or decree in which the military plays a decisive role."⁶ Section 7008 applies to the vast majority of economic and military assistance to Egypt.⁷

Despite these restrictions, the Obama administration continued to provide aid to Egypt during Morsi's time in office and immediately after Sisi ascended to power. In doing so, it dealt

¹ Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AJIL 298, 310 (2012).

² David D. Kirkpatrick, *Named Egypt's Winner, Islamist Makes History*, N.Y. TIMES, June 24, 2012, at A1, available at <http://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html>.

³ David D. Kirkpatrick, *Army Ousts Egypt's President; Morsi is Taken Into Military Custody*, N.Y. TIMES, July 3, 2013, at A1, available at <http://www.nytimes.com/2013/07/04/world/middleeast/egypt.html>.

⁴ Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 7041(a)(1)(B), 125 Stat. 786 (2011).

⁵ *Id.* § 7041(a)(1)(B).

⁶ *Id.* § 7008. Since FY1986, Congress has included the coup provision in its annual appropriation laws. JEREMY M. SHARP, CONG. RESEARCH SERV., R43183, EGYPT IN CRISIS: ISSUES FOR CONGRESS 5 (2013). For a discussion of how the Obama administration interpreted Section 7008 in the context of aid to Mali, see John R. Crook, *Contemporary Practice of the United States*, 107 AJIL 431, 466–68 (2013).

⁷ SHARP, *supra* note 6, at 5. The vast majority of U.S. aid to Egypt is financed from three accounts: Foreign Military Financing, Economic Support Funds, and International Military Education and Training. JEREMY M. SHARP, CONG. RESEARCH SERV., RL33003, EGYPT: BACKGROUND AND U.S. RELATIONS 17 (2015). Egypt also receives several million dollars annually from the Nonproliferation, Antiterrorism, Demining, and Related Programs account and the International Narcotics Control and Law Enforcement account. *Id.* at 17 n.57.

with the two statutory provisions in different ways. In March 2012 and June 2013, the administration invoked a provision that waived the Egypt-specific restrictions if the Secretary determined that continued aid was “in the national security interest of the United States.”⁸ Separately, the White House asserted that it could avoid suspending aid to Egypt pursuant to the general “coup” restriction by declining to determine whether Sisi had overthrown a democratically elected government.⁹ Although Section 7008 requires the United States to terminate aid if it determines that a foreign coup has occurred, the administration asserted that the law did not require the president to affirmatively determine whether the Egyptian military had overthrown Morsi’s government.¹⁰ Summarizing the administration’s position on the “coup” restriction, State Department Spokesperson Jen Psaki stated that “[t]he law does not require us to make a formal determination . . . as to whether a coup took place, and it is not in our national interest to make such a determination.”¹¹

The administration revised its foreign aid policy after the Egyptian military killed hundreds of protesters in Cairo in August 2013. Obama stated that “while we want to sustain our relationship with Egypt, our traditional cooperation cannot continue as usual when civilians are being killed in the streets and rights are being rolled back.”¹² On October 9, 2013, the Obama administration thus announced that it would suspend a large portion of its annual military and financial aid to Egypt,¹³ including a delivery of military equipment, a \$300 million loan guarantee, and \$260 million in general funds for the Egyptian budget.¹⁴ The administration stated that it would continue to support Egyptian humanitarian aid programs, counterterrorism operations, border security, and military training. In testimony to Congress explaining the decision to withhold what other officials described as “hundreds of millions of dollars” in aid,¹⁵ Assistant Secretary of State Elizabeth Jones stated that the administration was “disappointed by the actions that [Egypt]

⁸ Secretary of State Hillary Clinton waived the democratization requirement on March 23, 2012 to release FY2012 assistance to Egypt. *U.S. Support for Egypt*, U.S. DEP’T OF STATE (Mar. 23, 2012), at <http://www.state.gov/r/pa/prs/ps/2012/03/186709.htm>. Secretary of State John Kerry waived the democratization requirement on May 10, 2013 to release FY2013 assistance to Egypt. *Daily Press Briefing*, U.S. DEP’T OF STATE (June 7, 2013), at <http://www.state.gov/r/pa/prs/dpb/2013/06/210413.htm#EGYPT>.

⁹ *Daily Press Briefing*, U.S. DEP’T OF STATE (July 26, 2013), at <http://www.state.gov/r/pa/prs/dpb/2013/07/212484.htm#EGYPT>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Remarks by the President on the Situation in Egypt*, THE WHITE HOUSE (Aug. 15, 2013), at <https://www.whitehouse.gov/the-press-office/2013/08/15/remarks-president-situation-egypt>.

¹³ Michael R. Gordon & Mark Landler, *In Crackdown Response, U.S. Temporarily Freezes Some Military Aid to Egypt*, N.Y. TIMES, Oct. 9, 2013, at A11.

¹⁴ *Next Steps on Egypt Policy: Hearing Before the H. Comm. on Foreign Affairs*, 113th Cong. 15–16, 21–22 (2013) [hereinafter *Next Steps on Egypt Policy*] (statement of Derek Chollet, Assistant Secretary of Defense for International Security, U.S. Department of Defense & statement of Alina Romanowski, Deputy Assistant Administrator, Bureau for the Middle East, U.S. Agency for International Development).

¹⁵ *Daily Press Briefing*, U.S. DEP’T OF STATE (Oct. 10, 2013), at <http://www.state.gov/r/pa/prs/dpb/2013/10/215296.htm>; see also *Background Briefing by Senior Administration Officials on U.S. Assistance to Egypt*, U.S. DEP’T OF STATE (Oct. 9, 2013), at <http://www.state.gov/r/pa/prs/ps/2013/10/215262.htm> (“[I]t amounts to—and again, depending on how you do your calculations over what time period—hundreds of millions of dollars and some high-profile military systems that will not be delivered until there’s progress towards the inclusive democracy that we want to see.”).

took that resulted in the violence in August, that we could not pursue business as usual, but that we supported the roadmap that they had outlined.”¹⁶

Despite the administration’s position that Section 7008 did not *require* the suspension of aid, officials stated that the policies embodied by Section 7008 did *inform* the October 2013 decision to halt aid temporarily. Shortly after the administration announced its changed policy, Secretary of State John Kerry stated that the administration’s decision was “a reflection of a policy in the United States under our law. We have a law passed by the United States Congress regarding how certain events unfold with respect to the change of a government in a country, and we’re bound by that.”¹⁷ In a congressional hearing, Jones reiterated Kerry’s suggestion that the coup provision informed the administration’s decision to suspend aid. In response to a question as to whether the suspension of aid was required by law, Jones responded, “[Y]ou’re asking about whether or not a coup took place. We decided we did not have to make a decision on that or make a statement one way or the other.”¹⁸ Nonetheless, Jones stated that the administration “decided that [it] had to act consistent with the law” and could not “continue programs [in which it works] with government and public institutions and public authorities.”¹⁹

In January 2014, Congress adopted new appropriations legislation that removed some of the restrictions on assistance to Egypt.²⁰ In that legislation, Congress permitted military and economic assistance to Egypt through designated funds, “notwithstanding any provision of law restricting assistance for Egypt.”²¹ Second, Congress eliminated the secretary of state’s authority to waive the Egypt-specific democratization requirements. In its place, Congress divided assistance to Egypt into two categories.²² In the first category, Congress allowed funding for existing contracts and for security projects related to counterterrorism, border security, non-proliferation, and Sinai development.²³ In the second category, the United States could allocate additional military and economic assistance to Egypt only if the secretary of state certified that Egypt had met certain goals for democratization.²⁴ Congress permitted up to \$975 million in additional assistance to Egypt if the secretary of state certified that Egypt had “held a constitutional referendum, and is taking steps to support democratic transition in Egypt.”²⁵ Congress then permitted another \$576.8 million in assistance if the secretary of state certified that Egypt had “held parliamentary and presidential elections, and that a newly elected Government of Egypt is taking steps to govern democratically.”²⁶ Total assistance to Egypt, including funding that required the democracy certification and funding that did not, could not exceed approximately \$1.5 billion.²⁷

¹⁶ *Next Steps on Egypt Policy*, *supra* note 14, at 44 (statement of Elizabeth Jones).

¹⁷ *Remarks with Egyptian Foreign Minister Nabil Fahmy*, U.S. DEP’T OF STATE (Nov. 3, 2013), at <http://www.state.gov/secretary/remarks/2013/11/216220.htm>.

¹⁸ *Next Steps on Egypt Policy*, *supra* note 14, at 44 (statement of Elizabeth Jones).

¹⁹ *Id.* at 44–45.

²⁰ Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 7401(a), 128 Stat. 5, 522–24 (2014).

²¹ *Id.* § 7041(a)(6).

²² *Id.* § 7041(a)(1–6).

²³ *Id.* § 7041(a)(5).

²⁴ *Id.* § 7041(a)(6).

²⁵ *Id.* § 7041(a)(6)(A).

²⁶ *Id.* § 7401(a)(6)(B).

²⁷ *Id.* § 7401(a)(2–3).

On April 22, 2014, the administration announced that it would partially reverse its hold on military and financial assistance to Egypt.²⁸ The administration said that it could not certify that Egypt had implemented democratic reforms but that it would continue to “urge Egypt to follow through on its commitment to transition to democracy.”²⁹ Nonetheless, the administration pledged to provide Egypt with \$650 million in military and economic funding and ten Apache helicopters.³⁰ To justify the new deliveries of aid, the administration explained that the 2014 Appropriations Act permitted the United States to provide military assistance to Egypt without certifying that Egypt had met the statute’s goals for democratic transition, so long as Egypt used the assistance for counterterrorism or other essential security functions.³¹ The administration stated that it believed that “these new helicopters will help the Egyptian Government counter extremists who threaten not just Egypt, but Israeli security as well as the United States” and that the \$650 million in funding would support “critical security efforts.”³² An administration spokesperson seemed to suggest that there was no hard cap on aid to Egypt so long as it was designated for essential security functions and existing contracts, including counterterrorism.³³

In 2015, Congress restored the secretary of state’s power to waive the requirement that Egypt pursue democratic policies. Similar to congressional appropriations from 2011 to 2013, Congress’s 2015 Egypt appropriations permitted the secretary of state to waive the requirement that Egypt implement democratic measures if the secretary of state determined “that it is important to the national security interest of the United States to provide such assistance.”³⁴ Although the appropriations measure encouraged Egypt to transition to democratic government, to ensure equal rights for women and minorities, and to protect the freedom of speech, the secretary of state’s waiver authority allowed the administration to prioritize national security over Egypt’s progress towards democracy.³⁵

In March 2015, Obama announced that the administration would restore the remainder of the military assistance to Egypt that it had suspended in 2013.³⁶ The administration emphasized that the United States and Egypt share common interests, including counterterrorism,

²⁸ *Readout of Secretary of Defense Chuck Hagel’s Call with Egyptian Minister of Defense Col. General Sedki Sobhy*, U.S. DEP’T OF DEFENSE (Apr. 22, 2014), at <http://archive.defense.gov/Releases/Release.aspx?ReleaseID=166660>.

²⁹ *Jen Psaki Daily Press Briefing*, U.S. DEP’T OF STATE (Apr. 23, 2014), at <http://www.state.gov/t/pa/prs/dpb/2014/04/225092.htm> [hereinafter *Psaki April 23 Briefing*].

³⁰ *Id.* Although the administration stated in October 2013 that it would continue funding for certain humanitarian programs in Egypt, the April 23 announcement was the first time that the administration released any of the \$1.5 billion that Congress allocated to Egypt in 2014. *U.S. Aid to Egypt*, U.S. DEP’T OF STATE (Apr. 24, 2014), at <http://www.state.gov/t/pa/prs/ps/2014/04/225147.htm>.

³¹ *Psaki April 23 Briefing*, *supra* note 29. In order to partially restore aid, the administration also certified, as required by Congress, that Egypt was sustaining its strategic relationship with the United States and maintaining its obligations under the Israel-Egypt peace accord. *Id.*; see Consolidated Appropriations Act, 2014 § 7401(a)(1).

³² *Psaki April 23 Briefing*, *supra* note 29.

³³ *Id.* (spokesperson answering in the affirmative when asked: “You can release any funds within the amount that has been appropriated, provided that they only go for those accepted purposes that are in the law, which I think includes Sinai security, counterterrorism, et cetera?”).

³⁴ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 7041(a)(6)(C), 128 Stat. 2130, 2632–35 (2014).

³⁵ *Id.* § 7041(a)(6)(A).

³⁶ *Readout of the President’s Call with President al-Sisi of Egypt*, THE WHITE HOUSE (Mar. 31, 2015), at <https://www.whitehouse.gov/the-press-office/2015/03/31/readout-president-s-call-president-al-sisi-egypt> [hereinafter *Readout of the President’s Call*]. The administration announced that it would deliver to Egypt 12 F-16 fighter jets, 20 Harpoon missiles, and the parts necessary to assemble up to 125 M1A1 Abrams tanks. Peter Baker, *Obama Removes Weapons Freeze Against Egypt*, N.Y. TIMES, Mar. 31, 2015, at A1.

regional security, and peace with Israel.³⁷ While restoring military aid, the administration restricted Egypt's flexibility to purchase military equipment by terminating Egypt's ability to purchase weapons through cash-flow financing, which had allowed Egypt to purchase weapons on credit in anticipation of future aid.³⁸

In May 2015, Kerry exercised his authority to waive the requirements for democratization.³⁹ Because of a variety of continued human rights abuses—including arresting peaceful protesters, imprisoning supporters of the Muslim Brotherhood, and arbitrary mass killings—Kerry stated that he could not certify that Egypt had made progress towards democracy.⁴⁰ But Kerry also praised Egypt for providing the U.S. military preferential passage through the Suez Canal, authorizing the United States to fly over Egyptian airspace, and assisting the United States in its campaign against ISIS, and he stated that “it is important to the national security interest of the United States to provide assistance to Egypt.”⁴¹

Human rights advocates have criticized the administration for restoring aid to Egypt, and Senator Patrick Leahy has led opposition in Congress to the administration's policy. Leahy, who is the Ranking Member of the Senate Subcommittee on State, Foreign Operations, and Related Programs, placed a hold on the Obama administration's delivery of ten Apache helicopters to Egypt in 2014, which he later withdrew.⁴² More recently, on July 20, 2015, Leahy wrote a letter to the White House asking whether military aid to Egypt violates the Leahy Law, which Congress incorporates into its annual foreign assistance appropriations.⁴³ According to the Leahy Law, the United States may not provide funding “for any training, equipment, or other assistance for a unit of a foreign security force if the Secretary of Defense has credible information that the unit has committed a gross violation of human rights.”⁴⁴ According to Leahy, Kerry's submission to Congress on May 12, 2015 acknowledged that the Egyptian military has committed humanitarian abuses, which necessitates the suspension of military aid under the Leahy Law.⁴⁵ In contrast to Senator Leahy's broad interpretation of the provision, the State Department has interpreted the word “unit” narrowly to mean “the smallest operational group in the field . . . implicated in the reported violation,”⁴⁶ which would require the

³⁷ *Readout of the President's Call*, *supra* note 36.

³⁸ Peter Baker, *Obama Removes Weapons Freeze Against Egypt*, N.Y. TIMES, Mar. 31, 2015, at A1.

³⁹ Memorandum of Justification for Certification Under Section 7041(a)(6)(c) of the Department of State, Foreign Operations, and Related Program Appropriations Act, 2015 (May 12, 2015), *available at* <http://graphics8.nytimes.com/packages/pdf/international/2015/egyptwaiver.pdf>.

⁴⁰ *Id.* at 2–6.

⁴¹ *Id.* at 1.

⁴² Patricia Zengerle, *Senior U.S. Lawmaker Blocks Aid for Egyptian Military*, REUTERS (Apr. 29, 2014), *at* <http://www.reuters.com/article/2014/04/29/us-usa-egypt-military-idUSBREA3S0NY20140429>; *Comment of Senator Patrick Leahy, Chairman, State Department And Foreign Operations Subcommittee, On Aid To Egypt*, U.S. SENATOR PATRICK LEAHY OF VERMONT (June 24, 2014), *at* <http://www.leahy.senate.gov/press/comment-of-senator-patrick-leahy-chairman-state-department-and-foreign-operations-subcommittee-on-aid-to-egypt->.

⁴³ *The Questionable Legality of Military Aid to Egypt*, N.Y. TIMES, Aug. 19, 2015, at A22 [hereinafter *Questionable Legality*].

⁴⁴ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 8059(a), 128 Stat. 2130, 2267–68 (2014).

⁴⁵ *Questionable Legality*, *supra* note 43.

⁴⁶ U.S. Dep't of State, *Leahy Vetting: Law, Policy, Process*, HUMANRIGHTS.GOV (Apr. 15, 2013), *at* <http://www.humanrights.gov/wp-content/uploads/2011/10/leahy-vetting-law-policy-and-process.pdf>.

secretary of defense to be aware of humanitarian abuses in the Egyptian military at the battalion level or its equivalent.⁴⁷

P5+1 and Iran Reach Agreement on Iranian Nuclear Program; Obama Administration Seeks Congressional Approval

On July 14, 2015, the United States, the other permanent members of the UN Security Council, and Germany (the P5 + 1); the European Union; and Iran reached a nonbinding Joint Comprehensive Plan of Action (JCPOA) concerning the scope and content of Iran's nuclear program.¹ Framed as a political agreement, the deal struck by the JCPOA significantly limits Iran's capacity to enrich uranium for the next fifteen years; eliminates Iran's capacity to produce weapons-grade plutonium for the next fifteen years; eases sanctions imposed by the international community on Iran for its nuclear program; and establishes mechanisms for oversight by the International Atomic Energy Agency (IAEA). With the finalization of the agreement, attention turns to the domestic sphere, where the Iran Nuclear Agreement Review Act (INARA) gives Congress sixty days from the signing of the JCPOA to review the plan before President Barack Obama may waive statutory sanctions by executive action.²

Since 2006, Iran has been subject to UN sanctions for its failure to establish the exclusively peaceful nature of its nuclear program.³ The United States and European Commission have separately imposed additional sanctions.⁴ On November 24, 2013, the P5 + 1 and Iran reached an agreement to limit Iranian nuclear development and alleviate some Western sanctions through a Joint Plan of Action, in the hope that the new agreement would facilitate a "comprehensive solution" that would allow all remaining sanctions to be lifted.⁵ The Joint Plan of Action called for a six-month pause in Iran's nuclear program; a limitation of Iran's enrichment activities; monitoring of Iran's nuclear facilities; and the U.S. and European parties' agreement to lift or suspend certain sanctions, refrain from imposing new ones, and permit the repatriation of an unspecified amount of revenue held abroad.⁶ The parties began implementing the JPOA in early 2014; they extended the deadlines for negotiating a final settlement several times.⁷ In April 2015, the parties announced a breakthrough in negotiations,⁸ and on July 14, 2015, they reached a final settlement in the form of the JCPOA.

⁴⁷ *Id.*

¹ Joint Comprehensive Plan of Action, July 14, 2015, at <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/> [hereinafter JCPOA].

² Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, 129 Stat. 201 (2015). The House and Senate ultimately did not take action to preclude President Obama from waiving those sanctions, and the agreement will be formally adopted on October 15, 2015. Peter Baker & Julie Hirschfeld Davis, *Nuclear Deal Sealed, Obama Must Now Make It Work, and Mend Fences*, N.Y. TIMES, Sept. 11, 2015, at A6. [Editors' note: These developments in Congress occurred after the cut-off date for this edition of the CPUS, but, for completeness, a reference has been added during production.]

³ S.C. Res. 1737 (Dec. 23, 2006); S.C. Res. 1747 (Mar. 24, 2007); S.C. Res. 1803 (Mar. 3, 2008); S.C. Res. 1929 (June 9, 2010). Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 94, 109 (2014).

⁴ U.S. DEP'T OF TREASURY, IRAN: WHAT YOU NEED TO KNOW ABOUT U.S. ECONOMIC SANCTIONS (Jan. 23, 2012), available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran.pdf>; EUROPEAN UNION, RESTRICTIVE MEASURES (SANCTIONS) IN FORCE (July 31, 2013), available at http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.

⁵ Daugirdas & Mortenson, *supra* note 3, at 110.

⁶ *Id.*

⁷ Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 407, 408 (2015).

Chronologically, the JCPOA is structured with reference to five landmark days:

- First, “Finalization Day” is July 14, 2015, the date the JCPOA negotiations were concluded.⁹
- Second, “Adoption Day” occurs ninety days after UN Security Council endorses the JCPOA. On Adoption Day, Iran will inform the IAEA that, effective on Implementation Day, it will provisionally apply the IAEA Additional Protocol, which among other things permits increased inspections by the IAEA; in turn, the European Union and the United States will enact regulations and issue waivers necessary to begin sanctions relief on Implementation Day.¹⁰ On July 20, 2015, the UN Security Council commenced the ninety-day countdown to Adoption Day by unanimously adopting Resolution 2231, which endorsed the JCPOA and established a monitoring process and schedule for modifying UN sanctions during the implementation of the JCPOA.¹¹
- Third, “Implementation Day” will be the day that the IAEA certifies Iran has taken the key nuclear steps described in the JCPOA.¹² The obligations required to trigger Implementation Day include changes to Iran’s heavy water reactor and capping enrichment capacity. On Implementation Day, the UN Security Council will lift certain sanctions. (As discussed below, all UN sanctions may “snap back” if there is non-performance of JCPOA obligations.) The European Union will terminate all of its economic and financial sanctions.¹³ Certain waivers to U.S. statutory sanctions will take effect,¹⁴ although the U.S. embargo will remain in place with limited exceptions.¹⁵

⁸ *Joint Statement by EU High Representative Frederica Mogherini and Iranian Foreign Minister Javad Zarif*, EUROPEAN UNION (Apr. 2, 2015), at http://www.eeas.europa.eu/statements-eeas/2015/150402_03_en.htm (announcing that Iran and the P5+1 had agreed to “key parameters” for the JCPOA, with final details to be negotiated throughout June 2015).

⁹ JCPOA, *supra* note 1, at 16.

¹⁰ *Id.* Furthermore, the IAEA announced that it had signed an agreement with Iran that allows the Agency to resolve any outstanding questions related to the possible military dimension of Iran’s previous nuclear programs. *IAEA Director General’s Statement and Road-Map for the Clarification of Past and Present Outstanding Issues Regarding Iran’s Nuclear Program*, INTERNATIONAL ATOMIC ENERGY AGENCY (July 14, 2015), at <https://www.iaea.org/newscenter/pressreleases/iaea-director-generals-statement-and-road-map-clarification-past-present-outstanding-issues-regarding-irans-nuclear-program>.

¹¹ S.C. Res. 2231 (July 20, 2015).

¹² JCPOA, *supra* note 1, at 16.

¹³ Industries in which EU sanctions will be lifted include Iranian oil, gas, and petrochemicals; shipping, shipbuilding, and transport; financial and banking services; and metal and software. JCPOA, *supra* note 1, at Annex II, 1–7.

¹⁴ U.S. sanctions waivers related to secondary sanctions against Iran, which are designed to target the activities of non-U.S. persons or entities engaging in transactions with Iran, will take effect. Such waivers of statutory sanctions will permit transactions in certain industries, including finance and banking, energy and petrochemicals, automobiles, metals and software, and shipping. Furthermore, the Department of Treasury will license foreign subsidiaries of U.S. companies to engage in transactions with in Iran similar to those that would be permitted to non-U.S. persons. Finally, a number of individuals and entities that were sanctioned for their involvement in Iran’s nuclear program will be removed from the Department of the Treasury’s sanctions lists (though U.S. persons will continue to be prohibited from dealing with such parties unless authorized by Treasury). JCPOA, *supra* note 1, at Annex II, 12–15.

¹⁵ See Iranian Transactions Regulations, 31 C.F.R. Part 560 (2011); Iranian Assets Control Regulations, 31 C.F.R. Part 535 (2012); see also *Iran Sanctions*, U.S. DEP’T OF THE TREASURY, at <http://www.treasury.gov/resource-center/sanctions/Programs/pages/iran.aspx> (last visited July 31, 2015). U.S. statutory sanctions linked to Iran’s “support for terrorism, human rights abuses, and missile activities will remain in effect and continue to be enforced,” such as those imposed as the result of Section 105 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, which targeted individuals determined to be responsible for human rights abuses after

- Fourth, on “Transition Day”—either eight years after Adoption Day or when the IAEA has concluded that Iran’s nuclear program is entirely peaceful—Iran will seek parliamentary ratification of the Additional Protocol. The United States and European Union will seek legislative action terminating nuclear-related economic sanctions and some nonproliferation sanctions. And UN sanctions related to the acquisition of ballistic missiles will terminate.¹⁶
- Fifth, “Termination Day” will occur ten years from Adoption Day. At that time, the UN Security Resolution endorsing the JCPOA will terminate and the European Union will terminate all remaining sanctions.¹⁷

As a substantive matter, the deal limits Iran’s ability to develop either uranium or plutonium at levels sufficient to create an atomic bomb. For fifteen years, Iran can continue producing a small stock of uranium enriched at low levels—up to 3.67 percent, enough for civilian use but insufficient for a bomb without further processing.¹⁸ These levels of enrichment, combined with a two-thirds reduction in Iranian centrifuges, are designed to ensure that Iran would not have enough material, or centrifuges running, to make a bomb’s worth of weapons-grade uranium in less than a year (the “breakout” period). Analysts estimate that Iran currently has a breakout time of two to three months.¹⁹ The stockpile of enriched uranium must remain under 300 kilograms of 3.67 percent, with the excess to be sold. All testing with uranium and uranium enrichment must occur solely within the facility at Natanz.²⁰

In addition, the formerly secret Fordow facility will be converted into a “nuclear, physics and technology centre.”²¹ Iran and international partners will jointly engage in research there. IAEA inspectors will have daily access to the plant for fifteen years. The agreement requires that all nuclear material be removed from Fordow, except for residual amounts of uranium from past enrichment projects that will be subject to IAEA verification. For those fifteen years, no uranium enrichment may take place at Fordow.²² Similarly, the Arak heavy water reactor will be redesigned, with assistance from the P5+1, for industrial and medicinal research without producing weapons-grade plutonium.²³

If the IAEA has concerns that Iran has undeclared nuclear materials or activities, or is engaging in activities inconsistent with the JCPOA, IAEA inspectors can ask to visit relevant locations, after sharing with Iran the basis for their concerns.²⁴ At that point, Iran may suggest alternative means of resolving the IAEA’s concerns. If the IAEA is unable to verify the absence of

the June 2009 presidential election in Iran. DIANNE E. RENNACK, CONG. RESEARCH SERV., R43311, IRAN: U.S. ECONOMIC SANCTIONS AND THE AUTHORITY TO LIFT RESTRICTIONS 2–3 (2015), available at <https://fas.org/sgp/crs/mideast/R43311.pdf>.

¹⁶ JCPOA, *supra* note 1, at 16; S.C. Res. 2231, *supra* note 11, ¶ 20.

¹⁷ JCPOA, *supra* note 1, at 16.

¹⁸ *Id.* at 6–7.

¹⁹ Michael Gordon & David Sanger, *Deal Reached on Iran Nuclear Program; Limits on Fuel Would Lessen with Time*, N.Y. TIMES, July 14, 2015, at A1, available at http://www.nytimes.com/2015/07/15/world/middleeast/iran-nuclear-deal-is-reached-after-long-negotiations.html?_r=0.

²⁰ JCPOA, *supra* note 1, at 7.

²¹ JCPOA, *supra* note 1, at Annex I, 12.

²² *Id.*

²³ *Id.* at 7–8.

²⁴ *Id.* at 23.

undeclared nuclear materials and activities inconsistent with the JCPOA within fourteen days of the IAEA's original request for access, then the Joint Commission may become involved.²⁵

The Joint Commission is made up of the eight members that negotiated the JCPOA. The Joint Commission will have up to seven days to review the dispute and decide what Iran needs to do:

If the absence of undeclared nuclear materials and activities or activities inconsistent with the JCPOA cannot be verified after the implementation of the alternative arrangements agreed by Iran and the IAEA, or if the two sides are unable to reach satisfactory arrangements to verify the absence of undeclared nuclear materials and activities or activities inconsistent with the JCPOA at the specified locations within 14 days of the IAEA's original request for access, Iran, in consultation with the members of the Joint Commission, would resolve the IAEA's concerns through necessary means agreed between Iran and the IAEA. In the absence of an agreement, the members of the Joint Commission, by consensus or by a vote of 5 or more of its 8 members, would advise on the necessary means to resolve the IAEA's concerns. The process of consultation with, and any action by, the members of the Joint Commission would not exceed 7 days, and Iran would implement the necessary means within 3 additional days.²⁶

Since only five of the eight members need to agree on what to do, the provision above effectively ensures that Iran, Russia, and China cannot combine to prevent action without the support of at least one other member of the Joint Commission. Iran then has three days to implement the decision.

The Joint Commission also oversees dispute resolution if any of the JCPOA participant states believes there has been "significant non-performance of commitments."²⁷ In such circumstances, the participant state can refer the issue to the Joint Commission.²⁸ If the Joint Commission does not resolve the issue, any individual Joint Commission member can refer the issue to the Security Council. In the Security Council, the members will vote on a draft resolution to *continue* sanctions relief.²⁹ Unless the resolution to continue sanctions relief is adopted within thirty days of the notification, the sanctions from 2006–15 will "apply in the same manner as they applied before the adoption of this resolution." This is the snapback provision.³⁰

²⁵ *Id.*

²⁶ *Id.*

²⁷ JCPOA, *supra* note 1, at 17.

²⁸ *Id.* Any violation of a Commission decision could trigger re-imposition of international sanctions. If any member believes that JCPOA commitments are not being met, a 35-day dispute resolution process ensues, including referral to the foreign ministers of Iran and the P5 + 1, and the establishment of an Advisory Board to issue a non-binding opinion to the Commission. If these measures do not resolve the issue, any Commission member may refer the issue to the Security Council in a procedure, pursuant to Security Council Resolution 2231, that is described above and could lead to re-imposition of sanctions.

²⁹ S.C. Res. 2231, *supra* note 11, ¶ 11. ("[The Security Council] [d]ecides, acting under Article 41 of the Charter of the United Nations, that, within 30 days of receiving a notification by a JCPOA participant State of an issue that the JCPOA participant State believes constitutes significant non-performance of commitments under the JCPOA, it shall vote on a draft resolution to continue in effect the terminations in paragraph 7 (a) of this resolution, decides further that if, within 10 days of the notification referred to above, no Member of the Security Council has submitted such a draft resolution for a vote, then the President of the Security Council shall submit such a draft resolution and put it to a vote within 30 days of the notification referred to above, and expresses its intention to take into account the views of the States involved in the issue and any opinion on the issue by the Advisory Board established in the JCPOA.").

³⁰ *Id.* ¶ 12 ("[The Security Council] [d]ecides, acting under Article 41 of the Charter of the United Nations, that, if the Security Council does not adopt a resolution under paragraph 11 to continue in effect the terminations

Any individual permanent member of the Security Council (most likely the United States, France, or the United Kingdom) can effectively reimpose UN sanctions on Iran by vetoing the resolution continuing sanctions relief.³¹

The snapback provision is set to expire in ten years' time. However, according to a letter signed by the foreign ministers of the P5 + 1, the countries plan to introduce another Security Council resolution extending the snapback provision for five years after the ten years have elapsed "in the event of Iran's significant nonperformance."³²

Before the passage of Resolution 2231, Obama heralded its anticipated snapback provision as the primary mechanism to ensure that Iran complies with the terms of the agreement, noting:

Over the course of the next decade, Iran must abide by the deal before additional sanctions are lifted. . . . All of this will be memorialized and endorsed in a new United Nations Security Council resolution. And if Iran violates the deal, all of those sanctions will snap back into place. So there's a very clear incentive for Iran to follow through, and there are very real consequences for a violation.³³

Some commentators have argued that the mechanism may not be as effective as the Obama administration claims it will be because of the procedures required before the snapback occurs, or because Iran is effectively permitted to walk away from the JCPOA commitments if a snapback does occur.³⁴

Separately, the JCPOA also provides that both the United States and EU will refrain from reintroducing or reimposing the nuclear-related sanctions they terminated pursuant to the JCPOA. Iran indicated that it will treat such reintroduction or reimposition as grounds for terminating its own commitments under the JCPOA in whole or in part:

The EU will refrain from re-introducing or re-imposing the sanctions that it has terminated implementing under this JCPOA, without prejudice to the dispute resolution process provided for under this JCPOA. There will be no new nuclear related UN Security Council sanctions and no new EU nuclear-related sanctions or restrictive measures. The United States will make best efforts in good faith to sustain this JCPOA and to prevent interference with the realisation of the full benefit by Iran of the sanctions lifting specified in Annex II. The U.S. Administration, acting consistent with the respective roles of the President and the Congress, will refrain from re-introducing or re-imposing the sanctions specified in Annex II that it has ceased applying under this JCPOA, without prejudice to

in paragraph 7 (a), then effective midnight Greenwich Mean Time after the thirtieth day after the notification to the Security Council described in paragraph 11, all of the provisions of resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), and 1929 (2010) that have been terminated pursuant to paragraph 7 (a) shall apply in the same manner as they applied before the adoption of this resolution, and the measures contained in paragraphs 7, 8 and 16 to 20 of this resolution shall be terminated, unless the Security Council decides otherwise.").

³¹ Somini Sengupta, *'Snapback' is an Easy Way to Reimpose Iran Penalties*, N.Y. TIMES, July 16, 2015, at A10, available at http://www.nytimes.com/2015/07/17/world/middleeast/snapback-is-easy-way-to-reimpose-iran-penalties.html?_r=0.

³² *Id.*

³³ *Statement by the President on Iran*, THE WHITE HOUSE (July 14, 2015), at <https://www.whitehouse.gov/the-press-office/2015/07/14/statement-president-iran> [hereinafter *Statement by the President on Iran*]. See also *Background Conference Call on Iran*, THE WHITE HOUSE (July 14, 2015), at <https://www.whitehouse.gov/the-press-office/2015/07/14/background-conference-call-iran>.

³⁴ Peter D. Feaver & Eric Lorber, *Do the Iran Deal's "Snapback" Sanctions Have Teeth?*, FOREIGN POLICY (July 21, 2015), at <http://foreignpolicy.com/2015/07/21/do-the-iran-deals-snapback-sanctions-have-teeth>.

the dispute resolution process provided for under this JCPOA. The U.S. Administration, acting consistent with the respective roles of the President and the Congress, will refrain from imposing new nuclear-related sanctions. Iran has stated that it will treat such a re-introduction or re-imposition of the sanctions specified in Annex II, or such an imposition of new nuclear-related sanctions, as grounds to cease performing its commitments under this JCPOA in whole or in part.³⁵

The JCPOA also provides that the United States will encourage state and local level officials to take into account the changes in U.S. policy and lift their own sanctions regimes:

If a law at the state or local level in the United States is preventing the implementation of the sanctions lifting as specified in this JCPOA, the United States will take appropriate steps, taking into account all available authorities, with a view to achieving such implementation. The United States will actively encourage officials at the state or local level to take into account the changes in the U.S. policy reflected in the lifting of sanctions under this JCPOA and to refrain from actions inconsistent with this change in policy.³⁶

Successful implementation of the deal would ultimately allow the United States and the European Union to approach Iran's nuclear activities in a manner consistent with their approach to other non-nuclear weapon states that are parties to the Non-Proliferation Treaty.³⁷

In the meantime, the Obama administration has taken the position that the deal does not create binding international obligations. At a hearing before the Senate Foreign Relations Committee, Secretary of State John Kerry noted, "We've been clear from the beginning: we're not negotiating a, quote, legally binding plan. We're negotiating a plan that will have in it the capacity for enforcement."³⁸ Department of State spokesperson Jen Psaki reiterated this point to reporters, characterizing the agreement as a political agreement:

[U]nlike a treaty or other types of international agreements in which parties are generally required to take similar actions themselves, this deal will primarily reflect the international community putting strong limits on Iran's nuclear program and Iran making verifiable and enforceable commitments to adhere to those limits. So these are political understandings between a multi—several countries, as you know, through the P5+1.

...

Again, our focus has been on technical details and on trying to reach the content of political commitments—on what the political commitments would be by the participants.

...

[H]istorically, under many administrations, the United States has pursued important international security initiatives through nonbinding arrangements where that has been in our national interest. In the arms control and nonproliferation area alone, some representative examples include the U.S.-Russia deal to remove chemical weapons from Syria, the

³⁵ JCPOA, *supra* note 1, at 13.

³⁶ *Id.*

³⁷ *Id.* at 3 ("Successful implementation of this JCPOA will enable Iran to fully enjoy its right to nuclear energy for peaceful purposes under the relevant articles of the nuclear Non-Proliferation Treaty (NPT) in line with its obligations therein, and the Iranian nuclear programme will be treated in the same manner as that of any other non-nuclear-weapon state party to the NPT.")

³⁸ Bradley Klapper, *Kerry Says Congress Would Not Be Able to Change Terms of Iran Deal*, PBS NEWSHOUR (Mar. 11, 2015), at <http://www.pbs.org/newshour/rundown/kerry-says-congress-able-change-terms-iran-deal>.

Proliferation Security Initiative, the Nuclear Supplier Group Guidelines, the Missile Technology Control Regime. There's a lot of precedent for this being political commitments made by all sides.³⁹

When pressed further about whether the agreement “is somehow politically binding” but “from an international legal perspective . . . not binding,” Psaki again pointed to the deal on Syria’s chemical weapons, noting that “this framework was not legally binding and was not subject to congressional approval. It outlined steps for eliminating Syria’s chemical weapons and helped lay the groundwork for successful multilateral efforts to move forward.”⁴⁰

White House Press Secretary Josh Earnest also used such language to describe the deal, noting that “a congressional vote on a nonbinding instrument is not required by law and could set an unhelpful precedent for other negotiations that result in other nonbinding instruments.”⁴¹ Likewise, Chief of Staff Denis McDonough wrote that “non-binding arrangements—like the deal we are negotiating with Iran, and the United Kingdom, France, Germany, Russia, and China, and the European Union—are an essential element of international diplomacy and do not require congressional approval.”⁴²

Legal commentators have endorsed the administration’s view that congressional approval of political commitments is unnecessary.⁴³

Two weeks after the agreement on key parameters for the JCPOA were announced in April 2015, the U.S. Senate Foreign Relations Committee unanimously approved a bipartisan bill—the Iran Nuclear Agreement Review Act of 2015 (INARA)—that would require congressional review of the eventual deal with Iran and would impose some delays on presidential implementation.⁴⁴ Substantial bipartisan majorities in both the House (400 to 25) and the Senate (99 to 1, with only Senator Tom Cotton voting against it) passed the bill.⁴⁵ Obama had threatened

³⁹ Jen Psaki, *Daily Press Briefing*, U.S. DEP’T OF STATE (Mar. 10, 2015), at <http://www.state.gov/t/pa/prs/dpb/2015/03/238718.htm>.

⁴⁰ *Id.*

⁴¹ *Press Briefing by Press Secretary Josh Earnest*, THE WHITE HOUSE (Jan. 29, 2015), at <https://www.whitehouse.gov/the-press-office/2015/01/29/press-briefing-press-secretary-josh-earnest-12915>.

⁴² *Letter from Chief of Staff Denis McDonough to Senator Bob Corker*, THE WHITE HOUSE (Mar. 14, 2015), at <http://www.pbs.org/newshour/rundown/read-disputed-letters-center-iran-nuclear-pact>.

⁴³ See, e.g., Jack Goldsmith & Marty Lederman, *The Case for the President’s Unilateral Authority to Conclude the Impending Iran Deal is Easy Because It Will (Likely) be a Nonbinding Agreement Under International Law*, LAWFARE (Mar. 11, 2015), at <https://www.lawfareblog.com/case-presidents-unilateral-authority-conclude-impending-iran-deal-easy-because-it-will-likely-be>. But see David Golove, *Congress Just Gave the President Power to Adopt a Binding Legal Agreement with Iran*, JUST SECURITY (May 14, 2015), at <https://www.justsecurity.org/23018/congress-gave-president-power-adopt-binding-legal-agreement-iran> (arguing that “[i]f the ‘non-binding’ character of the agreement is no more than a diplomatic wink and a nod—a distinction of form without substance for the parties to the agreement—then pursuing this course would arguably constitute an abuse of constitutional process, viz., an illegitimate effort to make an end-run around Congress’s core constitutional powers”).

⁴⁴ Iran Nuclear Agreement Review Act of 2015, S. 615, 114th Cong. § 2 (2015) (as reported by S. Comm. on Foreign Rel., Apr. 14, 2015).

⁴⁵ *All Bill Information (Except Text) for H.R. 1191—Iran Nuclear Agreement Review Act of 2015*, CONGRESS.GOV, at <https://www.congress.gov/bill/114th-congress/house-bill/1191/all-info> (last visited July 31, 2015).

to veto the initial version of the bill, citing the risks it posed to continuing negotiations,⁴⁶ but signed the version passed by Congress into law on May 22, 2015.⁴⁷

Under INARA, Obama must give Congress sixty days from the signing of the JCPOA to review the deal before he may waive statutory sanctions, eliminating the possibility of immediate U.S. sanctions relief for Iran.⁴⁸ During this window, Congress has the ability to pass a joint resolution of disapproval. While the text of INARA states that a vote of congressional approval is not required for the “commence[ment]” of the agreement with Iran, it provides that only Congress can “permanently modify or eliminate” any existing “statutory sanctions”⁴⁹ that were enacted as legislation:

(c) EFFECT OF CONGRESSIONAL ACTION WITH RESPECT TO NUCLEAR AGREEMENTS WITH IRAN.—

(1) SENSE OF CONGRESS.—It is the sense of Congress that—

- (A) the sanctions regime imposed on Iran by Congress is primarily responsible for bringing Iran to the table to negotiate on its nuclear program;
- (B) these negotiations are a critically important matter of national security and foreign policy for the United States and its closest allies;
- (C) this section does not require a vote by Congress for the agreement to commence;
- (D) this section provides for congressional review, including, as appropriate, for approval, disapproval, or no action on statutory sanctions relief under an agreement; and
- (E) even though the agreement may commence, because the sanctions regime was imposed by Congress and only Congress can permanently modify or eliminate that regime, it is critically important that Congress have the opportunity, in an orderly and deliberative manner, to consider and, as appropriate, take action affecting the statutory sanctions regime imposed by Congress.

(2) IN GENERAL.—Notwithstanding any other provision of law, action involving any measure of statutory sanctions relief by the United States pursuant to an agreement subject to subsection (a) or the Joint Plan of Action—

⁴⁶ Julia Edwards, *Obama to Veto Bill Letting Congress Weigh in on Iran Deal*, REUTERS (Feb. 28, 2015), at <http://www.reuters.com/article/2015/03/01/us-iran-nuclear-usa-obama-idUSKBN0LX11320150301>.

⁴⁷ *Statement by the Press Secretary on H.R. 606, H.R. 651, H.R. 1075, H.R. 1191, S. 1124*, THE WHITE HOUSE (May 22, 2015), at <https://www.whitehouse.gov/the-press-office/2015/05/22/statement-press-secretary-hr-606-hr-651-hr-1075-hr-1191-s-1124>.

⁴⁸ Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, § 135(b), 129 Stat. 201 (2015).

⁴⁹ *Id.* § 135(b)(6)(C). It is not entirely clear which sanctions are included under “statutory sanctions” as INARA does not define the term. INARA does suggest—with the inclusion of language regarding the “sense of Congress”—that there may be a distinction between sanctions imposed on Iran for nuclear activities and other sanctions imposed on Iran, expressing an expectation from Congress that “United States sanctions on Iran for terrorism, human rights abuses, and ballistic missiles will remain in place under an agreement.” *Id.* § 135(c), (d)(7).

- (A) may be taken, consistent with existing statutory requirements for such action, if, during the period for review provided in subsection (b), there is enacted a joint resolution stating in substance that the Congress does favor the agreement;
- (B) may not be taken if, during the period for review provided in subsection (b), there is enacted a joint resolution stating in substance that the Congress does not favor the agreement; or
- (C) may be taken, consistent with existing statutory requirements for such action, if, following the period for review provided in subsection (b), there is not enacted any such joint resolution.⁵⁰

INARA also summarizes several possible actions that Congress may take during the review period and their potential impact on the enforcement of any nuclear agreement with Iran. If Congress either fails to act or passes a joint resolution approving the agreement, the INARA restrictions on JCPOA implementation terminate. However, if Congress passes a joint resolution of disapproval, the restrictions remain in place for twelve days after the passage of the joint resolution of disapproval. If the president vetoes such a joint resolution, the INARA restrictions remain in place for ten days following this veto, pending congressional reconsideration of the resolution of disapproval.

There is, however, no specific provision in INARA setting forth the consequences of a congressional override of a presidential veto. Thus, in relevant part:

(b) PERIOD FOR REVIEW BY CONGRESS OF NUCLEAR AGREEMENTS WITH IRAN.—

- (1) IN GENERAL.—During the 30-calendar day period following transmittal by the President of an agreement pursuant to subsection (a), the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives shall, as appropriate, hold hearings and briefings and otherwise obtain information in order to fully review such agreement.
- (2) EXCEPTION.—The period for congressional review under paragraph (1) shall be 60 calendar days if an agreement, including all materials required to be transmitted to Congress pursuant to subsection (a)(1), is transmitted pursuant to subsection (a) between July 10, 2015, and September 7, 2015.
- (3) LIMITATION ON ACTIONS DURING INITIAL CONGRESSIONAL REVIEW PERIOD.—Notwithstanding any other provision of law, except as provided in paragraph (6), prior to and during the period for transmission of an agreement in subsection (a)(1) and during the period for congressional review provided in paragraph (1), including any additional period as applicable under the exception provided in paragraph (2), the President may not waive, suspend, reduce, provide relief from, or otherwise limit the application of statutory sanctions with respect to Iran under any provision of law or refrain from applying any such sanctions pursuant to an agreement described in subsection (a).

⁵⁰ *Id.* § 135(c).

- (4) **LIMITATION ON ACTIONS DURING PRESIDENTIAL CONSIDERATION OF A JOINT RESOLUTION OF DISAPPROVAL.**—Notwithstanding any other provision of law, except as provided in paragraph (6), if a joint resolution of disapproval described in subsection (c)(2)(B) passes both Houses of Congress, the President may not waive, suspend, reduce, provide relief from, or otherwise limit the application of statutory sanctions with respect to Iran under any provision of law or refrain from applying any such sanctions pursuant to an agreement described in subsection (a) for a period of 12 calendar days following the date of such passage.
- (5) **LIMITATION ON ACTIONS DURING CONGRESSIONAL RECONSIDERATION OF A JOINT RESOLUTION OF DISAPPROVAL.**—Notwithstanding any other provision of law, except as provided in paragraph (6), if a joint resolution of disapproval described in subsection (c)(2)(B) passes both Houses of Congress, and the President vetoes such joint resolution, the President may not waive, suspend, reduce, provide relief from, or otherwise limit the application of statutory sanctions with respect to Iran under any provision of law or refrain from applying any such sanctions pursuant to an agreement described in subsection (a) for a period of 10 calendar days following the date of the President’s veto.⁵¹

Obama has stated that he “will veto any legislation that prevents the successful implementation of this deal,” should Congress pass a resolution disapproving of the agreement.⁵² Opponents would then need two-thirds of Congress to override the veto. On July 23, 2015, in testimony before the Senate Foreign Relations Committee, Kerry argued that the JCPOA was the most realistic option available to limit Iran’s nuclear program—particularly in light of past attempts to negotiate similar agreements—and urged Congress to support the agreement: “[T]he alternative to the deal that we have reached is not . . . a ‘better deal,’ some sort of unicorn arrangement involving Iran’s complete capitulation. . . . The choice we face is between an agreement that will ensure Iran’s nuclear program is limited, rigorously scrutinized, and wholly peaceful, or no deal at all.”⁵³

United States Authorizes New Sanctions Program Aimed at Foreign Perpetrators of Cyberattacks and Cyberexploits

On April 1, 2015, President Barack Obama issued Executive Order 13,694, which permits the imposition of sanctions on individuals or entities found to have engaged in malicious cyber-enabled activities, including economic espionage, that threaten a significant interest of the United States.¹ The order

would block the property and interests in property [in the United States] of:
any person determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be responsible for or complicit in, or to have engaged in,

⁵¹ *Id.* § 135(b)2.

⁵² *Statement by the President on Iran*, *supra* note 33; *see also supra* note 2.

⁵³ *Sec’y of State John Kerry, Opening Remarks Before the Senate Foreign Relations Committee*, U.S. DEP’T OF STATE (July 23, 2015), at <http://www.state.gov/secretary/remarks/2015/07/245221.htm>.

¹ *Statement by the President on Executive Order “Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities”*, THE WHITE HOUSE (Apr. 1, 2015), at <https://www.whitehouse.gov/the-press-office/2015/04/01/statement-president-executive-order-blocking-property-certain-persons-en>.

directly or indirectly, cyber-enabled activities originating from, or directed by persons located, in whole or in substantial part, outside the United States that are reasonably likely to result in, or have materially contributed to, a significant threat to the national security, foreign policy, or economic health or financial stability of the United States and that have the purpose or effect of:

- harming, or otherwise significantly compromising the provision of services by, a computer or network of computers that support one or more entities in a critical infrastructure sector;
- significantly compromising the provision of services by one or more entities in a critical infrastructure sector;
- causing a significant disruption to the availability of a computer or network of computers; or
- causing a significant misappropriation of funds or economic resources, trade secrets, personal identifiers, or financial information for commercial or competitive advantage or private financial gain.²

The order also authorizes sanctions against any person or entity determined by the secretary of the treasury, in consultation with the attorney general and the secretary of state,

- to be responsible for or complicit in, or to have engaged in, the receipt or use for commercial or competitive advantage or private financial gain, or by a commercial entity, outside the United States of trade secrets misappropriated through cyber-enabled means, knowing they have been misappropriated, where the misappropriation of such trade secrets is reasonably likely to result in, or has materially contributed to, a significant threat to the national security, foreign policy, or economic health or financial stability of the United States;
- to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, certain malicious cyber-enabled activities described in the order or any person whose property and interests in property are blocked pursuant to the order;
- to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the order; or
- to have attempted to engage in any of the malicious activities described in the order.³

In the order, Obama declared a national emergency relating to the “unusual and extraordinary threat” presented by “the increasing prevalence and severity of malicious cyber-enabled activities” by actors located outside the United States.⁴ This declaration activated his authority

² Letter—“*Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities*”, THE WHITE HOUSE (Apr. 1, 2015), at <https://www.whitehouse.gov/the-press-office/2015/04/01/letter-blocking-property-certain-persons-engaging-significant-malicious-> [hereinafter *Letter*]; see also Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 2, 2015).

³ *Letter*, *supra* note 2; see also Exec. Order No. 13,694, 80 Fed. Reg. at 18,077–78.

⁴ Exec. Order No. 13,694, 80 Fed. Reg. at 18,077. For other examples of geographically open-ended states of emergency see Sean D. Murphy, *Contemporary Practice of the United States*, 96 AJIL 237, 241 (2002) (declaration of emergency relating to international terrorism in Executive Order 13,224) and John R. Crook, *Contemporary Practice of the United States*, 105 AJIL 709, 709 (2011) (declaration of emergency relating to transnational organized crime).

to impose sanctions under the International Emergency Economic Powers Act (IEEPA).⁵ The executive order delegates to the secretary of the treasury “all powers granted to the President by IEEPA as may be necessary to carry out the purposes of th[e] order,”⁶ and authorizes the Treasury’s Office of Foreign Assets Control (OFAC) to “work in coordination with other U.S. government agencies to identify individuals and entities whose conduct meets the criteria set forth in [the order] and designate them for sanctions.”⁷ Special Assistant to the President and Cybersecurity Coordinator Michael Daniel noted that the United States was not simultaneously “announcing any designations” pursuant to the order, but was instead “putting in place the framework so that it’s available for [the United States] to respond, if [it] needed to rapidly, to an emerging cyber threat.”⁸

The precise impetus for the order remains unclear. Although the order has been “[i]n the works for two years,”⁹ some have speculated that its recent issuance may have been prompted by growing concerns about the cybertheft of corporate trade secrets by hackers based in Russia and China,¹⁰ including a cyberespionage incident in May 2014 connected to Chinese military hackers.¹¹ Others have cited the cyberattack allegedly perpetrated by North Korean individuals against Sony Pictures as a motivating factor behind the order.¹² But administration officials have declined to comment on the connection, if any, of the order to those particular events.¹³ Indeed, Department of the Treasury Acting Director for OFAC John Smith noted that the order “is not targeted at any one country or region.”¹⁴ In addition, the order was issued without an initial set of designations for sanctions,¹⁵ undermining the implication of a direct link to the China and North Korea incidents.

⁵ See International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1701–02 (2012).

⁶ Exec. Order No. 13,694, 80 Fed. Reg. at 18,079.

⁷ FAQ 444, *OFAC FAQs: Other Sanctions Programs*, U.S. DEP’T OF THE TREASURY, at http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#cyber (last visited July 18, 2015) [hereinafter *OFAC FAQs*].

⁸ *On-the-Record Press Call on the President’s Executive Order, “Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities”*, THE WHITE HOUSE (Apr. 1, 2015), at <https://www.whitehouse.gov/the-press-office/2015/04/01/record-press-call-president-s-executive-order-blocking-property-certain-> [hereinafter *Press Call*].

⁹ Ellen Nakashima, *U.S. Establishes Sanctions Program to Combat Cyberattacks, Cyberspying*, WASH. POST, Apr. 2, 2015, available at https://www.washingtonpost.com/world/national-security/us-to-establish-sanctions-program-to-combat-cyberattacks-cyberspying/2015/03/31/7f563474-d7dc-11e4-ba28-f2a685dc7f89_story.html.

¹⁰ *Obama Signs Order Creating New Cyber Sanctions Program*, N.Y. TIMES, Apr. 1, 2015, available at <http://www.nytimes.com/aponline/2015/04/01/us/politics/ap-us-obama-cyber-sanctions-.html> [hereinafter *Cyber Sanctions Program*].

¹¹ See *id.*; see also Nakashima, *supra* note 9.

¹² See *Cyber Sanctions Program*, *supra* note 10; see also Cassie Spodak, *Obama Announces Executive Order on Sanctions Against Hackers*, CNN (Apr. 1, 2015), at <http://www.cnn.com/2015/04/01/politics/obama-cyber-hackers-executive-order>.

¹³ *Press Call*, *supra* note 8 (“[S]peculating how we would have used this tool in the past is very difficult because the circumstances are going to vary, and we didn’t have the benefit of having this tool when we went through the policy discussions.”).

¹⁴ *Id.*

¹⁵ FAQ 445, *OFAC FAQs*, *supra* note 7.

The sanctions permitted by the order—freezing of assets located in the United States and prohibition of transactions with U.S. parties¹⁶—are consistent with those in other recent executive orders.¹⁷ Yet Daniel acknowledged that the order is “the first of its kind in this space where [the United States] do[es]n’t have to rely on a sanctions regime that is, in fact, targeted at a particular country or group of actors within a country, but is more broad-brushed than that.”¹⁸ Likewise, Smith distinguished previous executive orders authorizing sanctions based on “particular criteria that relate to . . . jurisdictions” like North Korea and Iran from this order, which “allow[s] [the United States] to target activity wherever the attack activity that threatens the U.S. interests may occur”¹⁹ He compared the activity-based focus of the order to similar frameworks for counterterrorist, narcotics, and other international law enforcement programs used by the United States.²⁰

The determination of what constitutes malicious “cyber-enabled activities” subject to sanctions is thus crucial to the scope of the order. The order does not explain the meaning of that phrase. OFAC, however, has indicated that it anticipates promulgating regulations defining “cyber-enabled activities” as “any act[s] that [are] primarily accomplished through or facilitated by computers or other electronic devices.”²¹ OFAC clarified further that

malicious cyber-enabled activities include deliberate activities accomplished through unauthorized access to a computer system, including by remote access; circumventing one or more protection measures, including by bypassing a firewall; or compromising the security of hardware or software in the supply chain. These activities are often the means through which the specific harms enumerated in the [executive order] are achieved, including compromise to critical infrastructure, denial of service attacks, or massive loss of sensitive information, such as trade secrets and personal financial information.²²

In addition, those cyberenabled activities become sanctionable if, among other things, the actions harm a “critical infrastructure sector.”²³ The order defines that term as the “designated critical infrastructure sectors identified in Presidential Policy Directive 21,”²⁴ which identifies a number of economic sectors that “provide[] the essential services that underpin American society.”²⁵ Since sanctions can also be issued for any attack harming an organization supporting

¹⁶ *Press Call*, *supra* note 8.

¹⁷ *See, e.g.*, Exec. Order No. 13,687, 80 Fed. Reg. 819, 819 (Jan. 2, 2015) (imposing sanctions related to North Korean cyberattack on Sony Pictures); Exec. Order No. 13,661, 79 Fed. Reg. 15,535, 15,535 (Mar. 16, 2014) (imposing sanctions related to Russian annexation of Crimea).

¹⁸ *Press Call*, *supra* note 8. Daniel further noted that the sanctions were focused on “the activity and the harm involved” instead of location because “cyber incidents tend to flow very easily across international boundaries, and . . . trying to tie that to particular locations just didn’t make sense” *Id.*

¹⁹ *Id.*

²⁰ *Id.*; *see also* Nakashima, *supra* note 9 (noting that the order “is modeled in part after regimes that have been used . . . for counterterrorism and counterproliferation purposes”).

²¹ *FAQ 447, OFAC FAQs*, *supra* note 7.

²² *Id.*

²³ *See* Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 2, 2015).

²⁴ *Id.* at 18,078; *Presidential Policy Directive—Critical Infrastructure Security and Resilience*, THE WHITE HOUSE (Feb. 12, 2013), at <https://www.whitehouse.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil> [hereinafter *Presidential Policy Directive*]. *See also* John R. Crook, *Contemporary Practice of the United States*, 107 AJIL 447, 447–48 (2013) (discussing executive order on critical infrastructure sectors issued the same day as PDD 21).

²⁵ The sectors specified in the order are: Chemical, Commercial Facilities, Communications, Critical Manufacturing, Dams, Defense Industrial Base, Emergency Services, Energy, Financial Services, Food and Agriculture,

those sectors, Smith acknowledged that the order could, in theory, be used to protect any economic sector affected by a foreign cyberattack.²⁶ Daniel clarified, however, that “it’s not just any malicious activity; it’s specific activity that is of a significant level to affect the national security or the economic health of the United States, and that it is associated with one of those four really important harms” specified in the order.²⁷

Some commentators have questioned how broadly the order will be implemented. A former defense contractor executive said that the order gives the Obama administration “vast new powers” to punish “even routine criminal hacking.”²⁸ Similarly, a professional hacker characterized the order as a “power grab” that was just “another salvo in President Obama’s war on hackers”²⁹ If broadly enforced, sanctions could create a “compliance nightmare for companies” who would have to avoid business relationships with other companies possibly employing or benefiting from cyberattackers.³⁰

Administration officials have responded by asserting that the order will only be used in a narrow, targeted manner. Obama said that “targeted sanctions [will be] used judiciously . . . to go after the worst of the worst [cyber threats].”³¹ Furthermore, although the order authorizes sanctions against companies that assist with or benefit from cyberattacks, sanctions “will in no way target . . . unwitting victims . . . , like people whose computers are hijacked by botnets [or] legitimate cybersecurity research community or professionals who help companies improve their cybersecurity.”³² And according to Smith, the sanctions will be used to “complement,” not replace, other international enforcement mechanisms, while Daniel stated that the sanctions are only intended to “fill in a gap” in reaching cyberattackers in locations that are “difficult for our diplomatic and law enforcement tools to reach” because of the host country’s weak cybersecurity laws or non-cooperation with the United States.³³

Government Facilities, Healthcare and Public Health, Information Technology, Nuclear Reactors, Materials, and Waste, Transportation Systems, and Water and Wastewater Systems. *Presidential Policy Directive*, *supra* note 24.

²⁶ *Press Call*, *supra* note 8.

²⁷ *Id.* Smith asserted that “we have a responsibility to protect the United States from those who exploit our information technologies to threaten our critical infrastructure, our economic health and financial stability, and other core interests.”

²⁸ Jeff Mason & Andrea Shalal, *U.S. Targets Overseas Cyber Attackers with Sanctions Program*, REUTERS (Apr. 2, 2015), at <http://www.reuters.com/article/2015/04/02/us-usa-cybersecurity-idUSKBN0MS4DZ20150402>.

²⁹ Thomas Fox-Brewster, *Obama Emergency Cyber Sanctions “Another Salvo in War on Legitimate Hackers”*, FORBES (Apr. 1, 2015), at <http://www.forbes.com/sites/thomasbrewster/2015/04/01/obama-cyber-sanctions-war-on-legitimate-hackers>.

³⁰ See Mason & Shalal, *supra* note 28. See also *Press Call*, *supra* note 8 (“[W]e don’t want to just deter those that are actually with their fingers on the keyboard, but also those that are behind those groups and that are funding those groups and are enabling those groups to carry out their activity.”).

³¹ Barack Obama, *A New Tool Against Cyber Threats*, MEDIUM (Apr. 1, 2015), at <https://medium.com/@PresidentObama/a-new-tool-against-cyber-threats-1a30c188bc4>; see also Michael Daniel, *Our Latest Tool to Combat Cyber Attacks: What You Need to Know*, THE WHITE HOUSE (Apr. 1, 2015), at <https://www.whitehouse.gov/blog/2015/04/01/our-latest-tool-combat-cyber-attacks-what-you-need-know> (claiming that sanctions will only be levied against “the worst of the worst of malicious cyber actors . . .”).

³² Obama, *supra* note 31; see also Lisa Monaco, *Expanding Our Ability to Combat Cyber Threats*, THE WHITE HOUSE (Apr. 1, 2015), at <https://www.whitehouse.gov/blog/2015/04/01/expanding-our-ability-combat-cyber-threats> (noting that order would not be used to punish “legitimate cybersecurity researchers or innocent victims whose computers are compromised”); *FAQs 448–50*, *OFAC FAQs*, *supra* note 7 (discussing intended targets of sanctions under order).

³³ *Press Call*, *supra* note 8.

The order may also implicate questions about due process. The order provides that an individual who has a “constitutional presence in the United States” can be designated for sanctions without prior notice, since measures taken to freeze a designated person’s assets under the order would be “rendered ineffectual” in light of “the ability to transfer funds or other assets instantaneously” if prior notice was required.³⁴ Any sanctioned person or entity could subsequently challenge their designation, either through an administrative petition with OFAC or a lawsuit in federal district court.³⁵ But as one hacker points out, this option would not be available until after the government, in his words, “arbitrarily seize[s]” a sanctioned person’s assets.³⁶ Nonetheless, Daniel asserted that the administration has improved its ability to properly attribute the source of cyberattacks in the past several years, making the accurate designation of targets for sanctions a “more tenable prospect,” even if it is “not a foregone conclusion”³⁷

An “initial list of sanctioned entities often accompanies an executive order outlining new sanctions,”³⁸ including those orders related to cyberattacks.³⁹ But because no initial designations were issued with this order, the sanctions authorized by the order are still an “empty shell”⁴⁰ But Daniel expressed confidence that when imposed, the sanctions would harm cyberattackers by limiting their access to U.S. infrastructures.⁴¹ Moreover, administration officials are hopeful that other countries will follow the United States and impose similar sanctions programs, creating a coalition” that make sanctions for cyberattacks more effective.⁴²

STATE DIPLOMATIC AND CONSULAR RELATIONS

Normalization of Cuba-U.S. Relations Continues

In December 2014, President Barack Obama announced a major policy shift regarding the relationship between the United States and Cuba, stating that he planned to “reestablish diplomatic relations . . . , review Cuba’s designation as a State Sponsor of Terrorism . . . [and] take[] steps to increase travel, commerce, and the flow of information to and from Cuba.”¹ In

³⁴ Exec. Order 13,649, 80 Fed. Reg. 18,077, 18,078–79 (Apr. 2, 2015).

³⁵ *Press Call*, *supra* note 8.

³⁶ See Fox-Brewster, *supra* note 29.

³⁷ *Press Call*, *supra* note 8.

³⁸ John P. Barker, Ronald D. Lee & Tom McSorley, *New Executive Order Authorizes Sanctions on Yet Unnamed Perpetrators of Malicious Cyber Threats*, ARNOLD & PORTER LLP (Apr. 17, 2015), at <http://www.arnoldporter.com/publications.cfm?action=advisory&u=NewExecutiveOrderAuthorizesSanctionsOnYetUnnamedPerpetratorsofMaliciousCyberThreats&cid=1258>.

³⁹ See, e.g., *Issuance of a New North Korea-related Executive Order; North Korea Designations*, U.S. DEP’T OF THE TREASURY (Jan. 2, 2015), at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20150102.aspx>.

⁴⁰ Stewart Baker, *The President’s Sanctions Program for Hackers*, WASH. POST, Apr. 1, 2015, available at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/01/the-presidents-sanctions-program-for-hackers>.

⁴¹ Daniel, *supra* note 31.

⁴² *Press Call*, *supra* note 8.

¹ *Statement by the President on Cuba Policy Changes*, THE WHITE HOUSE (Dec. 17, 2014), at <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes> [hereinafter *Cuba Policy Changes*]; see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 407, 415 (2015).

the months that followed, the administration took several concrete steps to “end an outdated approach” and “normalize relations” between the two nations.²

Perhaps most significantly, the executive branch rescinded Cuba’s designation as a state sponsor of terror. In December, the president directed Secretary of State John Kerry to review Cuba’s designation, reasoning that “[a]t a time when we are focused on threats from al Qaeda to ISIL, a nation that meets our conditions and renounces the use of terrorism should not face this sanction.”³ Following that review, Kerry recommended rescinding Cuba’s designation as a state sponsor of terror.⁴ The legislatively prescribed rescission process ended in May 2015,⁵ at which time Kerry made the final decision to remove Cuba from the list of countries designated as state sponsors of terror.⁶ That decision immediately lifted a variety of sanctions on Cuba under the Export Administration Act,⁷ the Arms Export Control Act,⁸ and the Foreign Assistance Act,⁹ “including restrictions on U.S. foreign assistance; a ban on defense exports and sales; certain controls over exports of dual use items; and miscellaneous financial and other restrictions.”¹⁰

In July 2015, Obama announced that the United States had agreed to formally re-establish diplomatic relations with Cuba and that the countries were planning to reopen their respective embassies.¹¹ Kerry noted at the time that while “[t]he United States and Cuba continue to have sharp differences over democracy, human rights, and related issues . . . [t]he resumption of full embassy activities will help us engage the Cuban Government more often and at a higher level.”¹² Later that month, Assistant Secretary of State Roberta Jackson led the U.S. delegation

² *Cuba Policy Changes*, *supra* note 1.

³ *Id.*

⁴ *Rescission of Cuba as a State Sponsor of Terror*, U.S. DEP’T OF STATE (May 29, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/05/242986.htm> [hereinafter *Rescission of Cuba*].

⁵ By statute, the President was required to submit a report to Congress forty-five days before the proposed rescission would take effect certifying that the Cuban government has not provided support for any acts of international terrorism in the past six months and has assured the United States that it will not provide support for terrorism in the future. *See* Export Administration Act of 1979 § 6(j), 50 App. U.S.C. § 2405 (2012); Arms Export Control Act § 40, 22 U.S.C. § 2780 (2012); Foreign Assistance Act of 1961 § 620A 22 U.S.C. § 2371 (2012). The State Department noted that “[w]hile the United States has significant concerns and disagreements with a wide range of Cuba’s policies and actions, these fall outside the criteria relevant to the rescission of a State Sponsor of Terrorism designation.” *Rescission of Cuba*, *supra* note 4.

⁶ *Rescission of Cuba*, *supra* note 4.

⁷ Export Administration Act of 1979 § 6(j), 50 App. U.S.C. § 2405 (2012); *see also* Cuba: Implementing Rescission of State Sponsor of Terrorism Designation, 80 Fed. Reg. 43,314 (final rule effective July 22, 2015) (to be codified at 15 C.F.R. pts. 734, 736, 740, 742, 746, 748, 750, 758, 772, 774) (amending the Export Administration Regulations to implement the rescission of Cuba’s designation as a State Sponsor of Terror).

⁸ 22 U.S.C. § 2780.

⁹ *Id.* § 2371.

¹⁰ *State Sponsors of Terrorism*, U.S. DEP’T OF STATE, at <http://www.state.gov/j/ct/list/c14151.htm> (last visited July 20, 2015).

¹¹ *Statement by the President on the Re-Establishment of Diplomatic Relations with Cuba*, THE WHITE HOUSE (July 1, 2015), at <https://www.whitehouse.gov/the-press-office/2015/07/01/statement-president-re-establishment-diplomatic-relations-cuba> [hereinafter *Diplomatic Relations with Cuba*]. The announcement came after the exchange of presidential letters between the U.S. and Cuban Interests Sections declaring mutual intent to re-establish diplomatic relations and re-open embassies on July 20, 2015. *Re-Establishment of Diplomatic Relations with Cuba: Fact Sheet*, U.S. DEP’T OF STATE (July 6, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/07/244623.htm>.

¹² *Statement on Cuba*, U.S. DEP’T OF STATE (July 1, 2015), at <http://www.state.gov/secretary/remarks/2015/07/244542.htm>.

in formally opening the U.S. Embassy in Havana.¹³ On August 14, 2015, Kerry personally presided over the flag-raising at the U.S. Embassy, becoming the first secretary of state to travel to Cuba since 1945.¹⁴ Kerry emphasized that Cuba and the United States are “neighbors” that will always have things to discuss “in such areas as civil aviation, migration policy, disaster preparedness, protecting marine environment, [and] global climate change.”¹⁵

In the meantime, the Departments of Treasury and Commerce have implemented new regulations on travel and remittances to Cuba.¹⁶ The Departments issued licenses to at least four passenger ferry companies,¹⁷ to Carnival Cruise Lines,¹⁸ and to JetBlue Airlines for charter flights from New York to Havana.¹⁹ Kerry stated in his remarks at the flag-raising ceremony in Havana that travel from the United States to Cuba has already increased by 35 percent in 2015 as a result of these measures.²⁰

The administration takes the position that it cannot eliminate the broader trade embargo on Cuba without congressional action. While the president has statutory authority to end the embargo under the Cuban Democracy Act and the Foreign Assistance Act of 1961,²¹ the circumstances under which he can exercise this power are extremely limited. The Cuban Democracy Act allows the president to waive the sanctions if he determines that the Cuban government has held free and fair elections under internationally recognized observers, is moving towards establishing a free market system, and has committed itself to constitutional change, among other things.²² The Cuban Liberty and Democratic Solidarity Act of 1996 prescribes a process by which the president may suspend the entire embargo, including sanctions mandated by both the Cuban Democracy Act as well and the Foreign Assistance Act of 1961, but it requires the president to determine that a transition government is in power in Cuba²³ and provides that Congress can nullify the president’s determination by a joint resolution.²⁴

¹³ *Statement by the Press Secretary on the Opening of the Embassy of the United States in Havana, Cuba and the Opening of the Cuban Embassy in Washington, D.C.*, THE WHITE HOUSE (July 20, 2015), at <https://www.whitehouse.gov/the-press-office/2015/07/20/statement-press-secretary-opening-embassy-united-states-america-havana>. See also *Diplomatic Relations with Cuba*, *supra* note 11 (“The U.S. Embassy will continue to perform the existing functions of the U.S. Interests Section, including consular services, operation of a political and economic section, implementation of a public diplomacy program, and will continue to promote respect for human rights.”).

¹⁴ *Secretary Kerry’s Remarks at Flag Raising Ceremony*, U.S. DEP’T OF STATE (Aug. 14, 2015), at <http://www.state.gov/secretary/remarks/2015/08/246121.htm> [hereinafter *Flag Raising Ceremony*].

¹⁵ *Id.*

¹⁶ See, e.g., U.S. DEP’T OF THE TREASURY, FREQUENTLY ASKED QUESTIONS RELATED TO CUBA (May 5, 2015), available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf.

¹⁷ Doreen Hemlock & Arlene Satchel, *At Least Four Florida Companies Approved for Ferry Service to Cuba*, SUN SENTINEL (May 5, 2015), at <http://www.sun-sentinel.com/business/tourism/fl-havana-ferry-approval-20150505-story.html>.

¹⁸ *Carnival Corporation Granted U.S. Approval for Travel to Cuba*, FATHOM IMPACT TRAVEL (July 7, 2015), at <https://www.fathom.org/carnival-corporation-granted-u-s-approval-for-travel-to-cuba>.

¹⁹ *Governor Cuomo, JetBlue, Cuba Travel Services Announce Direct Charter Flight From New York to Havana*, NEW YORK STATE (May 5, 2015), at <https://www.governor.ny.gov/news/governor-cuomo-jetblue-cuba-travel-services-announce-direct-charter-flight-new-york-havana>.

²⁰ John Kerry, *Why I’m Going to Havana*, U.S. DEP’T OF STATE (Aug. 14, 2015), at <http://www.state.gov/secretary/remarks/2015/08/246124.htm>.

²¹ See 22 U.S.C. §§ 6007, 6063, 6064 (2012).

²² *Id.* § 6007.

²³ *Id.* §§ 6064, 6065.

²⁴ *Id.* § 6064.

Should the president determine that a democratically elected government is actually in power in Cuba, then the Cuban Liberty and Democratic Solidarity Act of 1996 mandates the statutory repeal of the embargo.²⁵

Despite bipartisan support in Congress in favor of removing the embargo entirely,²⁶ influential critics have opposed efforts to enact enabling legislation for that purpose and have threatened to derail the president's efforts to re-establish relations in other respects as well.²⁷ Although executive action has relaxed some trade restrictions, for example, by raising the minimum monetary amount at which trade restrictions apply, the bulk of trade and travel restrictions with Cuba remain intact.²⁸ Having acknowledged in December that removing the embargo would require legislative action, Obama has become increasingly vocal about Congress's failure so far to facilitate this outcome.²⁹

The embargo remains a key obstacle in the ongoing normalization process. In December, Cuban President Raul Castro maintained that "the heart of the matter" remains unresolved.³⁰ He stated that "[t]he economic, commercial, and financial blockade, which causes enormous human and economic damages to our country, must cease."³¹ In the face of congressional inaction, it appears that the executive branch may be considering the use of a bilateral international agreement to ease travel restrictions. As a spokesperson for the Department of State acknowledged, "reaching an agreement . . . would provide more options than we currently have to

²⁵ *Id.* § 6064, 6066.

²⁶ See S. 491, 114th Cong. (2015) (introduced by Democratic Senator Amy Klobuchar); S. 1543, 114th Cong. (2015) (introduced by Republican Senator Jerry Moran).

²⁷ Some of the most outspoken critics are Senators Ted Cruz [R-TX], Bob Menendez [D-NJ], and Marco Rubio [R-FL]. Senator Menendez stated that Secretary Kerry's visit to Cuba is "a validation of the Castro regime's repressive policies." *Menendez Statement on American Embassy Opening in Cuba*, BOB MENENDEZ FOR NEW JERSEY (Aug. 14, 2015), at <http://www.menendez.senate.gov/news-and-events/press/menendez-statement-on-american-embassy-opening-in-cuba>. And referring to the Senate's role in confirmation hearings, Rubio has stated, "I will make sure that the embassy you are opening in Havana will not have a U.S. ambassador unless, at the very least, we see real political reforms and progress on human rights, the return to the U.S. of harbored terrorists and fugitives to face justice, and the resolution of outstanding American property claims and judgments against the Cuban government." Letter from Marco Rubio, United States Senator, to John Kerry, United States Secretary of State (Aug. 10, 2015), available at http://www.rubio.senate.gov/public/index.cfm?a=files.serve&File_id=46755E9E-446D-495D-ADDC-294A6ED2131C.

²⁸ Cuba: Implementing Rescission of State Sponsor of Terrorism Designation, *supra* note 7. Multiple senators and representatives have introduced bills into Congress that try to remove the embargo, but all of the bills have so far stalled in committee. See e.g., S. 491, 114th Congress (2015) (removing all trade restrictions); S. 1543, 114th Congress (2015) (removing all trade restrictions); H.R. 3238, 114th Congress (2015) (removing all trade restrictions).

²⁹ *Diplomatic Relations with Cuba*, *supra* note 11 ("I've called on Congress to take steps to lift the embargo that prevents Americans from travelling or doing business in Cuba. . . . After all, why should Washington stand in the way of our own people?"); see also *Flag Raising Ceremony*, *supra* note 14 ("We are all aware that notwithstanding President Obama's new policy, the overall U.S. embargo on trade with Cuba remains in place and can only be lifted by congressional action—a step that we strongly favor.").

³⁰ *Speech by President Raul Castro on Re-Establishing U.S.-Cuba Relations*, WASH. POST, Dec. 17, 2014, available at https://www.washingtonpost.com/world/full-text-speech-by-cuban-president-raul-castro-on-re-establishing-us-cuba-relations/2014/12/17/45bc2f88-8616-11e4-b9b7-b8632ae73d25_story.html.

³¹ *Id.*

facilitate authorized travel to Cuba.”³² But the spokesperson was careful to note that “discussions are ongoing,” and that the U.S. and Cuban governments have not come to any such agreement yet.³³ Other issues also remain outstanding, including the resolution of American citizens’ ownership claims regarding property in Cuba.³⁴

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

U.S. Navy Continues Freedom of Navigation and Overflight Missions in the South China Sea Despite China’s “Island-Building” Campaign

For decades, China has laid claim to around 80 percent of the South China Sea, publishing atlases with the so-called “nine-dash line” as early as the 1950s.¹ In defending these territorial claims against criticism and competing claims from other states,² China sometimes has cited the UN Convention on the Law of the Sea (UNCLOS) and at other times has invoked “historical practice” for its claims.³ Last year, echoing the rationale of former Secretary of State Hillary Clinton,⁴ Assistant Secretary of State Daniel Russel challenged China’s claims that were not based on “land features.”⁵

Various claimants, including China, Vietnam, Philippines, Malaysia, and Taiwan, have sought to influence the legal dispute by “develop[ing] outposts over the years of differing scope and degree.”⁶ China has recently accelerated what it calls an “island-building” project in the Spratly Islands,⁷ a contested area that contains great fishing resources and potentially large oil and gas reserves.⁸ Specifically, China is conducting massive land reclamation projects, dredging sand and rock from under water and depositing it topside.⁹ Since November 2013, China

³² *Daily Press Briefing*, U.S. DEP’T OF STATE (Aug. 18, 2015), at <http://www.state.gov/r/pa/prs/dpb/2015/08/246175.htm#CUBA>.

³³ *Id.*

³⁴ Julie Hirschfeld Davis, *As U.S. and Cuba Relations Warm, Property Claim Issue is Revived*, N.Y. TIMES, July 19, 2015, at A10, available at <http://www.nytimes.com/2015/07/20/world/americas/as-us-and-cuba-relationships-warm-property-claims-issue-is-revived.html>.

¹ Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 321, 331 (2014). See generally Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AJIL 98 (2013). 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).

² Ashton Carter, Secretary of Defense, Statement at the IISS Shangri-La Dialogue: “A Regional Security Architecture Where Everyone Rises” (May 30, 2015), available at <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1945>.

³ *Id.*

⁴ *Secretary of State Hillary Clinton, Remarks at Press Availability in Hanoi, Vietnam*, U.S. DEP’T OF STATE (July 23, 2010), at <http://www.state.gov/secretary/20092013clinton/rm/2010/07/145095.htm>.

⁵ 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>.

⁶ Carter, *supra* note 2.

⁷ Derek Watkins, *What China Has Been Building in the South China Sea*, N.Y. TIMES, July 31, 2015, at <http://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html>.

⁸ Gao & Jia, *supra* note 1, at 99–100.

⁹ *Id.*

has reclaimed more than 2,000 acres—more than the rest of the other Spratly claimants combined.¹⁰

At the International Institute of Strategic Studies' Shangri-La Dialogue in May 2015, U.S. Defense Secretary Ashton Carter detailed the United States' position:

[W]e want a peaceful resolution of all disputes. To that end, there should be an immediate and lasting halt to land reclamation by all claimants. We also oppose any further militarization of disputed features. We all know there is no military solution to the South China Sea disputes. Right now, at this critical juncture, is the time for renewed diplomacy, focused on a finding a lasting solution that protects the rights and the interests of all. As it is central to the regional security architecture, ASEAN [the Association of South East Asian Nations] must be a part of this effort: the United States encourages ASEAN and China to conclude a Code of Conduct this year. And America will support the right of claimants to pursue international legal arbitration and other peaceful means to resolve these disputes, just as we will oppose coercive tactics. . . .

[W]ith its actions in the South China Sea, China is out of step with both the international rules and norms that underscore the Asia-Pacific's security architecture, and the regional consensus that favors diplomacy and opposes coercion. . . .

The United States will always stand with its allies and partners. It's important for the region to understand that America is go[ing to] remain engaged, continue to stand up for international law and universal principles, and help provide security and stability in the Asia-Pacific for decades to come.¹¹

In July 2015, Russel further elaborated the United States' position on these questions, suggesting that China's land reclamation projects might in themselves violate the 2002 ASEAN Declaration of Conduct in the South China Sea, which obliges all claimants "to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from . . . inhabiting the presently uninhabited . . . features and to handle their differences in a constructive manner."¹²

China responded to Carter's criticism directly:

First, China's sovereignty and relevant claims of rights in the South China Sea have been formed in the long course of history and upheld by successive Chinese governments. This position has adequate historical and legal basis. There is no need to have it reinforced through construction activities on relevant islands and reefs.

Second, China's construction work on some garrisoned islands and reefs of the [Spratly]¹³ Islands is totally within China's sovereignty. It is lawful, reasonable and justified, not affecting or targeting any other countries. Once finished, the construction work will equip the islands and reefs with diversified and integrated functions which are mainly for civilian uses, apart from satisfying necessary military defense needs. . . .

¹⁰ Carter, *supra* note 2.

¹¹ *Id.*

¹² *Remarks at the Fifth Annual South China Sea Conference*, U.S. DEP'T OF STATE (July 21, 2015), at <http://www.state.gov/p/eap/rls/rm/2015/07/245142.htm> (quoting Ass'n of Southeast Asian Nations, Declaration on the Conduct of the Parties in the South China Sea, ¶ 5, Nov. 4, 2002, at <http://www.asean.org/asean/external-relationships/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>).

¹³ Editors' note: China uses the name "Nansha Islands" instead of "Spratly Islands."

Third, as a major country, China shoulders more international responsibilities and obligations. China is conducting construction activities at a pace and with a scale befitting her international responsibilities and obligations in the fields such as maritime search and rescue, disaster prevention and mitigation, meteorological observation, ecological conservation, navigation safety and fishery services in the South China Sea. These activities are designed to serve practical needs and provide better services to the ships of China, her neighbors and other countries passing through the South China Sea.

Fourth, for a long period of time, there has never been any problem concerning the freedom of navigation and overflight in the South China Sea that all countries are entitled to under the international law. Nor will there be any in the future. However, countries must not abuse the freedom of navigation and overflight, still less shall they take the freedom as an excuse to infringe upon the sovereignty, rights and security of coastal countries that are protected by the international law. China's construction activities will not undermine countries' freedom of navigation and overflight in the South China Sea. On the contrary, it will facilitate joint response to challenges on the sea and provide more guarantees for the safety of navigation.

Fifth, China and ASEAN countries have made it clear that the issue of the South China Sea shall be addressed through the "dual-track approach," which means that relevant disputes shall be resolved by countries directly concerned through negotiation and consultation, and peace and stability of the South China Sea shall be jointly upheld by China and ASEAN countries. Under the framework of fully and effectively implementing the Declaration on the Conduct of Parties in the South China Sea (DOC), China and ASEAN countries are pressing ahead with the COC [code of conduct in the South China Sea] consultation, striving to reach an agreement based on consensus at an early date. We have seen important progress. The COC, in essence, is a matter between China and ASEAN countries, and thus should be jointly made by China and ASEAN countries through consultation on an equal footing. It is hoped that the US and other countries outside the region will fully respect efforts by China and ASEAN countries in this regard instead of adding complicated elements to the consultation process.

Sixth, the US is not a party to the South China Sea issue. It is not and shall not become an issue between China and the US. We strongly urge the US to keep the big picture of China-US relationship and regional peace and stability in mind, honor its commitment of not taking sides on issues concerning territorial sovereignty, show earnest respect to regional countries' efforts to safeguard peace and stability in the South China Sea, be discreet with words and deeds and refrain from any of them that are detrimental to peace and stability in the South China Sea and China-US relations.¹⁴

For its part, the United States has made a point of acting in accordance with its views on the territorial status of the disputed territory.¹⁵ As Carter put it in May:

[T]he United States will continue to protect freedom of navigation and overflight—principles that have ensured security and prosperity in this region for decades. There should be no mistake: the United States will fly, sail, and operate wherever international law allows, as U.S. forces do all over the world. America, alongside its allies and partners in the regional architecture, will not be deterred from exercising these rights—the rights of all

¹⁴ *Foreign Ministry Spokesperson Hua Chunying's Remarks on US Defense Secretary Carter's Speech Relating to the Issue of the South China Sea at the Shangri-La Dialogue*, MINISTRY OF FOREIGN AFF. OF CHINA (May 30, 2015), at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1268781.shtml.

¹⁵ See Carter, *supra* note 2.

nations. After all, turning an underwater rock into an airfield simply does not afford the rights of sovereignty or permit restrictions on international air or maritime transit.¹⁶

Secretary of State John Kerry made similar remarks at the recent East Asia Summit.¹⁷ Accordingly—and despite China’s claims of sovereignty over the Spratlys—the U.S. Navy has deployed ships and aircraft to the region, and on at least one occasion this year flew a low-altitude surveillance aircraft over some of China’s land reclamation projects, during which Chinese radio controllers told U.S. Navy pilots they were violating Chinese airspace.¹⁸ U.S. Navy pilots responded that they were lawfully in international airspace over international waters.¹⁹ Though a U.S. Navy admiral characterized the flyover as “routine” and the exchanges between the United States and China as “positive and structured,” China’s Defense Ministry described the flyover as part of the United States’ “frequent, widespread, close-in surveillance of China, seriously harming bilateral mutual trust and China’s security interests, which could easily cause an accident at sea or in the air.”²⁰

The next month, China announced that its island-building projects were nearing completion:

It is learned from relevant Chinese competent departments that, as planned, the land reclamation project of China’s construction on some stationed islands and reefs of the [Spratly] Islands will be completed in the upcoming days.

Apart from satisfying the need of necessary military defense, the main purpose of China’s construction activities is to meet various civilian demands and better perform China’s international obligations and responsibilities in the areas such as maritime search and rescue, disaster prevention and mitigation, marine scientific research, meteorological observation, ecological environment conservation, navigation safety as well as fishery production service. After the land reclamation, we will start the building of facilities to meet relevant functional requirements.²¹

¹⁶ *Id.*

¹⁷ See *Intervention at the East Asia Summit*, U.S. DEP’T OF STATE (Aug. 6, 2015), at <http://www.state.gov/secretary/remarks/2015/08/245758.htm>.

¹⁸ *E.g.*, Simon Denyer, *Chinese Warnings to U.S. Plane Hint of Rising Stakes over Disputed Islands*, WASH. POST, May, 21, 2015, available at https://www.washingtonpost.com/world/asia_pacific/chinese-warnings-to-us-plane-hint-of-rising-stakes-over-disputed-islands/2015/05/21/381fffd6-8671-420b-b863-57d092ccac2d_story.html; see also *South China Sea: China’s Navy Told US Spy Plane Flying over Islands to Leave ‘Eight Times’*, CNN Reports, ABC NEWS (May, 21, 2015), at <http://www.abc.net.au/news/2015-05-22/us-spy-plane-in-south-china-sea-warned-to-leave-by-china/6488690> [hereinafter *China’s Navy*] (“At one stage . . . a Chinese radio operator said with exasperation: ‘This is the Chinese navy . . . you go!’ . . . ‘We were just challenged 30 minutes ago and the challenge came from the Chinese navy,’ said Captain Mike Parker, commander of US surveillance aircraft deployed to Asia. ‘I’m highly confident it came from ashore, this facility here,’ he said, pointing to an early warning radar station on Fiery Cross Reef.” (second ellipsis in original)).

¹⁹ *China’s Navy*, *supra* note 17 (“A spokeswoman for the US state department said US planes operated ‘in accordance with international law in disputed areas of the South China Sea’ and would continue to do so ‘consistent with the rights freedoms and lawful uses of the sea.’”). For an overview of the recently adopted Code for Unplanned Encounters at Sea (CUES), see Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 516, 529 (2014).

²⁰ Michelle FlorCruz, *US Navy South China Sea Surveillance Flyover Harmed Bilateral Relations: Beijing Defense Officials*, INT’L BUS. TIMES (July 20, 2015), at <http://www.ibtimes.com/us-navy-south-china-sea-surveillance-flyover-harmed-bilateral-relations-beijing-2015737>.

²¹ *Foreign Ministry Spokesperson Lu Kang’s Remarks on Issues Relating to China’s Construction Activities on the Nansha Islands and Reefs*, MINISTRY OF FOREIGN AFF. OF CHINA (June 16, 2015), at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1273370.shtml.

At the August ASEAN meeting, in response to questions from Philippines and Japan, China reiterated its position on the Spratlys:

First, the situation in the South China Sea is stable on the whole, and there is no possibility of major conflicts. China therefore objects to any non-constructive words or deeds that attempt to exaggerate the disagreements, hype up confrontation and heat up tensions, which do not conform to reality.

China also has a stake in the freedom of navigation in the South China Sea. The majority of Chinese cargo are shipped through the South China Sea, so freedom of navigation in the South China Sea is equally important to China. China always maintains that countries enjoy freedom of navigation and overflight in the South China Sea in accordance with the international law. Up to now, there has not been a single case in which freedom of navigation in the South China Sea is impeded. China stands ready to work with other parties to continue to ensure freedom of navigation and overflight in the South China Sea.

As for the disputes on [the Spratly] islands and reefs, this is a long-standing issue. The South China Sea Islands are China's territory. There is a history of two thousand years since China discovered and named the islands in the South China Sea. . . . According to international law, China has the right to defend its sovereignty, rights and interests, and China has the right to prevent the repeat of such illegal moves as encroaching upon China's lawful rights and interests.²²

China went on to suggest that its island-building projects found precedent in similar actions by other states in the region:

[I]n 1999, the Philippines illegally "stranded" an old warship on the Ren'ai Reef, which is part of China's Nansha Islands. When China made representations, the Philippines claimed that it could not tow the warship away due to "the lack of spare parts." Later, the Philippine side indicated to the Chinese side that it would not be the first country to violate the Declaration on the Conduct of Parties in the South China Sea (DOC). Now 15 years have passed and the old warship has already become extremely rusty. The Philippines, instead of keeping its promise of removing the warship, has publicly stated that it had stealthily transported cement and other building materials to the warship in order to reinforce the installation. On 14 March, the Department of Foreign Affairs of the Philippines admitted that the very purpose of grounding the warship on the Ren'ai Reef was to occupy it. The Philippines has exposed its own lie of 15 years and failed to fulfill its own commitment. What international credibility is there in the conduct of the Philippines?²³

China then asserted that Japan has engaged in island building and that China is actually the "victim" in the current situation:

Just now, the delegate of Japan also mentioned the South China Sea issue and claimed that all artificial land features cannot generate any legal rights. But let's first have a look at what Japan has done. Over the past years, Japan spent 10 billion yen building the Rock of Okinotori, turning this tiny rock on the sea into a man-made island with steel bars and cement. And on that basis, Japan submitted its claim to the United Nations over the continental shelf beyond the 200-nautical-mile exclusive economic zone. The majority members of the international community found Japan's claim inconceivable and did not accept it. So

²² *Wang Yi on the South China Sea Issue at the ASEAN Regional Forum*, MINISTRY OF FOREIGN AFF. OF CHINA (Aug. 6, 2015), at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1287277.shtml.

²³ *Id.*

before making comments on others, Japan had better first reflect on what itself has said or done. China is different from Japan. Our claim over rights in the South China Sea has long been in existence. We don't need to strengthen our position through land reclamation.²⁴

China concluded by explaining that its land reclamation projects had been completed and that future developments in the Spratlys would be civilian in nature and benefit all claimants:

As for the land reclamation in the South China Sea which is of interest to some countries, it is nothing new and does not start with China. In other words, people have been bringing changes to the "status quo" all these years. It was only recently that China, for the first time, carried out certain construction on some stationed islands and reefs in the [Spratly] Islands in order to improve the working and living conditions of personnel there. In the process, we have enforced strict environmental standards. At the end of June, China announced the completion of land reclamation. Next, we will build facilities mainly for public good purposes, including multi-functional lighthouse, search and rescue facilities for maritime emergencies, meteorological observatory station, maritime scientific and research center, as well as medical and first aid facilities. China stands ready to open these facilities to other countries upon completion. As the largest littoral state in the South China Sea, China has the capability and obligation to provide regional countries with these much needed public goods at sea.²⁵

INTERNATIONAL ECONOMIC LAW AND U.S. REGULATION OF FOREIGN ENTERPRISES

U.S. Department of Justice Charges Leaders of FIFA, Affiliate Soccer Organizations, and Sports Marketing Companies in 47-Count Indictment

On May 27, 2015, the U.S. Department of Justice unsealed a 47-count indictment against high-ranking officials of the Fédération Internationale de Football Association (FIFA) as well as leaders of affiliate soccer organizations and executives of multinational sports companies.¹ "The indictment alleges corruption that is rampant, systemic, and deep-rooted both abroad and here in the United States," said U.S. Attorney General Loretta Lynch.² A grand jury in the Eastern District of New York indicted fourteen defendants on charges that include racketeering, wire fraud, and money laundering conspiracies.³

The indictment details more than a dozen alleged schemes, which span twenty-four years and implicate multiple generations of corporate leadership.⁴ Altogether, leaders of FIFA and affiliate organizations are accused of soliciting and accepting more than \$150 million in bribes and kickbacks in exchange for media and marketing rights to popular soccer tournaments.⁵ The charges also include allegations of bribery related to the selection of the host nation for the

²⁴ *Id.*

²⁵ *Id.*

¹ *Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption*, U.S. DEPT OF JUSTICE (May 27, 2015), at <http://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and> [hereinafter *Racketeering Conspiracy and Corruption*].

² *Id.*

³ Indictment at 113–48, *United States v. Webb et. al.* (E.D.N.Y. May 20, 2015) (No. 1:15-cr-00252-RJD), available at <http://www.justice.gov/opa/file/450211/download> (detailing alleged violations of Title 18, U.S.C., Sections 1343, 1349, 1956, 1957, 1962, 1963, and 3551) [hereinafter *Indictment U.S. v. Webb*].

⁴ *Id.*

⁵ *Id.*

2010 World Cup and the 2011 election of the FIFA president.⁶ As summarized by Lynch, “these individuals and organizations engaged in bribery to decide who would televise games; where the games would be held; and who would run the organization overseeing organized soccer worldwide.”⁷

Since its establishment in 1904, FIFA has expanded to become the governing body of organized soccer worldwide.⁸ Technically an entity registered under Swiss law, FIFA now encompasses six confederations that correspond roughly to the continental divides.⁹ Each continental confederation serves as an umbrella for its constituent regional federations, which in turn consist of national member associations.¹⁰ FIFA describes itself as “an association of associations with a non-commercial, not for profit purpose” of regulating, organizing, and developing the game of soccer.¹¹ FIFA and its affiliates finance this mission in part by commercializing the media and marketing rights to high-profile soccer games within their respective jurisdictions.¹² They contract with sports media and marketing companies, which subsequently sell these rights to radio and television broadcasters, corporate sponsors, and other sublicensees.¹³ According to the indictment, soccer officials have exploited these valuable rights for more than two decades by conditioning their licensing decisions on offers and payments of bribes and kickbacks from sports company executives.¹⁴

Among the schemes alleged in the 161-page indictment is a 2004 plot by Jack Warner, then a member of FIFA’s primary decision making body and president of both the Caribbean Football Union (CFU) and the Confederation of North, Central American and Caribbean Association Football (CONCACAF).¹⁵ According to the prosecution, Warner accepted bribes in exchange for his vote in FIFA’s secret ballot for the 2010 World Cup host nation.¹⁶ At one point, he allegedly directed a co-conspirator to fly to Paris, France and accept a briefcase with stacks of \$10,000 bills from another co-conspirator in a clandestine bid for Warner’s vote.¹⁷ After Warner allegedly accepted an offer by the South African government to pay \$10 million to the CFU, Warner ultimately voted for South Africa, which went on to host the 2010 World Cup.¹⁸ The prosecution also claims that a significant portion of this bribe was wired through

⁶ *Id.* at 133–34.

⁷ *Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing Charges Against Nine FIFA Officials and Five Corporate Executives*, U.S. DEP’T OF JUSTICE (May 27, 2015), at <http://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-charges> [hereinafter *Lynch Delivers Remarks*].

⁸ *About FIFA: Who We Are*, FIFA, at <http://www.fifa.com/about-fifa/who-we-are/index.html> (last visited July 15, 2015); see also *Indictment U.S. v. Webb*, *supra* note 3, at 1–3.

⁹ FIFA STATUTES, APRIL 2015 EDITION 6, 17 (2015), available at http://resources.fifa.com/mm/document/affederation/generic/02/58/14/48/2015fifastatutesen_neutral.pdf.

¹⁰ *Associations*, FIFA, at <http://www.fifa.com/associations/> (last visited July 15, 2015).

¹¹ *FAQ: Setting the Record Straight*, FIFA, at http://www.fifa.com/mm/document/tournament/competition/02/36/32/63/faq_en_neutral.pdf (last visited July 15, 2015).

¹² See *Indictment U.S. v. Webb*, *supra* note 3, at 7 (referencing FIFA’s published income statement for the 2007–2010 and 2011–2014 financial periods, in which FIFA attributed 83% and 70% of its respective \$4.189 billion and \$5.718 billion in revenue to the sale of television and marketing rights for upcoming World Cups).

¹³ *Racketeering Conspiracy and Corruption*, *supra* note 1.

¹⁴ *Indictment U.S. v. Webb*, *supra* note 3, at 31–47.

¹⁵ *Id.* at 80–86.

¹⁶ *Id.*

¹⁷ *Id.* at 81.

¹⁸ *Id.* at 82.

bank accounts in New York and diverted for Warner's personal use.¹⁹ When authorities uncovered one of his subsequent schemes, Warner reportedly said, "[t]here are some people here who think they are more pious than thou. If you're pious, open a church, friends. Our business is our business."²⁰

Thirteen of the fourteen indicted defendants, including Jack Warner, are not U.S. citizens.²¹ Although many of the allegations involve conduct committed by foreign citizens abroad, the U.S. Department of Justice did not rely on statutes that regulate extraterritorial conduct in order to charge the defendants in U.S. federal court. Rather, the prosecution relied on the defendants' use of American banks and meeting locations.²² According to the indictment, the defendants distributed bribe payments using major U.S. financial institutions and wire facilities,²³ and they conducted illicit business meetings at the CONCACAF headquarters in New York and other domestic locations.²⁴ Some defendants are also accused of profiting from the exploitation of illegally obtained media and marketing rights via U.S.-based radio and television networks.²⁵

Russia has criticized the indictment as "yet another example of arbitrary extraterritorial enforcement of U.S. law."²⁶ Immediately after the charges were unsealed, a spokesperson for the Russian foreign ministry called on Washington to "cease its attempts to initiate court proceedings far beyond its borders with its own legal standards, and to follow universally accepted international legal procedures."²⁷ A high-ranking U.S. Justice Department official later told an audience of global fraud examiners that "[f]ar from acting as the world's corruption police, the United States is part of a formidable and growing coalition of international enforcement partners who together combat corruption around the world. . . ."²⁸ After highlighting the FIFA case as "a profound illustration of the success that can be achieved through a truly global coalition," Assistant Attorney General Leslie Caldwell reiterated that "[t]he Department of Justice is never going to serve as the world's global police force."²⁹

In the days and weeks following the unsealing of the indictment, thirteen of the fourteen defendants were arrested by law enforcement authorities in the United States, Switzerland,

¹⁹ *Id.* at 83.

²⁰ *Id.* at 92–93.

²¹ *Id.* at 14–22 (listing the defendants, including executives of sports media and marketing businesses headquartered in the United States and abroad; officials of FIFA, continental soccer confederations, and constituent regional and national associations; and intermediaries who allegedly facilitated the distribution of bribes).

²² *Id.* at 1–14.

²³ *E.g.*, Indictment U.S. v. Webb, *supra* note 3, at 39–41, 54–59, 106–07 (detailing wire communications between U.S. and foreign financial institutions).

²⁴ *Id.* at 85, 98, 101.

²⁵ *Id.* at 61–89.

²⁶ *Comment by Foreign Ministry Spokesman Alexander Lukashovich on the arrest of FIFA officials*, MINISTRY OF FOREIGN AFF. OF THE RUSS. FED'N (May 27, 2015), at http://archive.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/e7d8e10011cedad043257e530039eb92!OpenDocument.

²⁷ *Id.*

²⁸ *Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the 26th Annual Association of Certified Fraud Examiners Global Fraud Conference*, U.S. DEP'T OF JUSTICE (June 15, 2015), at <http://www.justice.gov/opal/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-26th-annual-association>.

²⁹ *Id.*

Trinidad and Tobago, Paraguay, Italy, and Argentina.³⁰ Five of the arrests were effectuated after INTERPOL issued international wanted person alerts (known as “Red Notices”) at the request of U.S. authorities.³¹ Since then, U.S. embassies have requested that the foreign defendants be extradited in order to face their charges in the Eastern District of New York.³² Two defendants voluntarily agreed to be extradited and have since been arraigned in U.S. federal court.³³ The others are fighting extradition to the United States, including five defendants who are currently awaiting decisions from the Swiss Federal Office of Justice.³⁴ According to the bilateral extradition treaty between the United States and Switzerland, Swiss authorities must determine whether any of the alleged offenses are punishable by a year or more in jail under both U.S. and Swiss law.³⁵ Even if this “dual criminality” rule is met, the defendants may not appear in U.S. court for months given their right to appeal extradition rulings in two higher Swiss courts.³⁶ One defendant remains free in Brazil, where the constitution forbids extradition of its citizens unless they are charged with drug trafficking or crimes that predate their naturalization.³⁷

The U.S. Department of Justice “expressed appreciation for the cooperation and assistance we received from our international partners, particularly the Swiss authorities.”³⁸ The Swiss Federal Office of Justice carried out the U.S. arrest requests and complied with additional U.S. requests for legal assistance by blocking accounts at several Swiss banks and seizing related bank

³⁰ Letter Providing Case Update at 1–2, *United States v. Webb et. al.*, (E.D.N.Y. July 16, 2015) (No. 1:15-cr-00252-RJD) [hereinafter Letter Providing Case Update], available at <http://www.plainsite.org/dockets/2lowqz-vyi/new-york-eastern-district-court/usa-v-webb-et-al>; see also Matt Apuzzo et. al., *FIFA Officials Arrested on Corruption Charges; Blatter Isn't Among Them*, N.Y. TIMES, May 26, 2015, at A1, available at <http://www.nytimes.com/2015/05/27/sports/soccer/fifa-officials-face-corruption-charges-in-us.html>.

³¹ Letter Providing Case Update, *supra* note 30, at 2; see also *INTERPOL Issues Red Notices for Former FIFA Officials and Executives Wanted by U.S. Authorities*, U.S. DEP'T OF JUSTICE (June 3, 2015), at <http://www.justice.gov/interpol-washington/pr/interpol-issues-red-notices-former-fifa-officials-and-executives-wanted-us>.

³² See, e.g., *USA Asks Switzerland to Extradite the Seven Detained FIFA Officials*, FED. OFF. OF JUSTICE (SWITZ.) (July 2, 2015), at <https://www.bj.admin.ch/bj/en/home/aktuell/news/2015/2015-07-02.html>.

³³ *FIFA Official Agrees to Extradition to USA*, FED. OFF. OF JUSTICE (SWITZ.) (July 10, 2015), at <https://www.bj.admin.ch/bj/en/home/aktuell/news/2015/2015-07-10.html>; Noah Remnick, *Jeffrey Webb, Top FIFA Official, Pleads Not Guilty in Corruption Case*, N.Y. TIMES, July 18, 2015, at SP5, available at <http://www.nytimes.com/2015/07/19/sports/soccer/jeffrey-webb-top-fifa-official-pleads-not-guilty-in-corruption-case.html>; *Argentine Willing to be Extradited to U.S. in FIFA Case*, ASSOCIATED PRESS (June 10, 2015), at <http://www.nytimes.com/aponline/2015/06/10/world/americas/ap-soc-fifa-investigation-burzaco.html>; Rebecca R. Ruiz, *Argentine Businessman Pleads Not Guilty in FIFA Corruption Case*, N.Y. TIMES, July 31, 2015, at D6, available at <http://www.nytimes.com/2015/08/01/sports/soccer/in-fifa-corruption-case-alejandro-burzaco-of-argentina-pleads-not-guilty.html>.

³⁴ *Majority of Arrested Individuals Contesting Extradition to the USA*, FED. OFF. OF JUSTICE (SWITZ.) (May 27, 2015), at <https://www.bj.admin.ch/bj/en/home/aktuell/news/2015/2015-05-271.html>; *Julio Rocha Agrees to Extradition to Nicaragua*, FED. OFF. OF JUSTICE (SWITZ.) (Aug. 14, 2015), at <https://www.bj.admin.ch/bj/en/home/aktuell/news/2015/2015-08-14.html>; Rebecca R. Ruiz, *How the 14 Indicted FIFA Defendants Currently Stand*, N.Y. TIMES, Aug. 8, 2015, available at <http://www.nytimes.com/2015/08/08/sports/soccer/how-14-indicted-fifa-officials-currently-stand.html>.

³⁵ Stephanie Nebehay, *Swiss Expect to Decide on FIFA Extraditions in September*, REUTERS (Aug. 25, 2015), at <http://www.reuters.com/article/2015/08/25/soccer-fifa-swiss-idUSL5N11033F20150825>.

³⁶ *USA Asks Switzerland to Extradite the Seven Detained FIFA Officials*, FED. OFF. OF JUSTICE (SWITZ.) (July 2, 2015), at <https://www.bj.admin.ch/bj/en/home/aktuell/news/2015/2015-07-02.html>.

³⁷ Brad Haynes, *Executive Charged in FIFA Soccer Probe Now Back in Brazil*, REUTERS (June 16, 2015), at <http://www.reuters.com/article/2015/06/16/us-soccer-fifa-brazil-extradition-idUSKBN0OW2LX20150616>.

³⁸ *Lynch Delivers Remarks*, *supra* note 7.

documents.³⁹ Swiss authorities also seized approximately nine terabytes of electronic evidence during a sweep of FIFA's head office in Zurich, which will provide evidence for criminal proceedings in both Switzerland and abroad.⁴⁰ The Office of the Attorney General of Switzerland is conducting an investigation separate from that of the United States. Swiss authorities are focused on the allocation of the 2018 and 2022 World Cups and have repeatedly emphasized that "Swiss and U.S. law enforcement authorities are not conducting any joint investigations, but are coordinating their respective criminal proceedings."⁴¹

Although Switzerland is the only foreign country that has publicized its cooperation with U.S. evidence requests, the U.S. government has submitted similar requests to numerous other countries pursuant to mutual legal assistance treaties.⁴² Foreign governments have also requested information from the United States, as evidenced by a request from the Argentinian government to the U.S. District Court for the release of information related to the charges against the Argentinian defendants.⁴³ With only three defendants arraigned to date, the U.S. investigation is ongoing through the work of the New York Field Office of the FBI and the Los Angeles Field Office of the IRS's Criminal Investigation Division.⁴⁴ Lynch has made it clear that the Department of Justice plans to expand its prosecution by collaborating with international allies in the campaign against corruption.⁴⁵ "Going forward," she said, "we welcome the opportunity to work with our partners around the world to bring additional co-conspirators and other corrupt individuals to justice."⁴⁶

³⁹ *Names of the Persons Arrested*, FED. OFF. OF JUSTICE (SWITZ.) (May 27, 2015), at <https://www.bj.admin.ch/bj/en/home/aktuell/news/2015/2015-05-270.html>.

⁴⁰ *The Office of the Attorney General of Switzerland Seizes Documents at FIFA*, FED. COUNCIL (SWITZ.) (May 27, 2015), at <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-57391.html>.

⁴¹ *Id.*

⁴² Letter Providing Case Update, *supra* note 30, at 4.

⁴³ See, e.g., Letter dated 6/30/15 from Manuel Garrido, Member of the Argentine House of Representatives, *United States v. Webb et. al.* (E.D.N.Y. July 14, 2015) (No. 1:15-cr-00252-RJD). The letter was directed to the wrong judge, but she wrote back and advised Mr. Garrido to contact the U.S. Attorney for the Eastern District of New York for further information.

⁴⁴ *Lynch Delivers Remarks*, *supra* note 7.

⁴⁵ *Id.*

⁴⁶ *Id.*