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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 Achieves Progress in Iran Relations with Nuclear Agreement Implementation, Prisoner Swap, and Hague Claims Tribunal Resolutions

The United States and Iran have taken a series of steps to implement the 2015 Joint Comprehensive Plan of Action (JCPOA).¹ Alongside this activity, the United States and Iran have jointly addressed other concerns; among other things, they concluded a prisoner exchange and settled some claims at the Iran-U.S. Claims Tribunal.

In July 2015, the “P5+1” (i.e., the United States, the other permanent members of the United Nations Security Council (UNSC), and Germany), the European Union, and Iran reached a political agreement that imposes significant limitations on Iran’s capacity to enrich uranium for the next fifteen years, eases sanctions previously imposed by the international community on Iran for its nuclear program, and establishes mechanisms for oversight by the International Atomic Energy Agency (IAEA).²

The JCPOA framework is structured around a series of landmark days, each of which corresponds to a carefully delineated set of actions.³ The first of these dates, “Finalization Day,” occurred on July 14, 2015, when Iran and the P5+1 agreed on the JCPOA.⁴ Shortly thereafter, the United Nations Security Council adopted Resolution 2231, which endorsed the JCPOA and established “snapback” provisions to reimpose sanctions contained in previous UNSC resolutions in the event of Iran’s noncompliance with the JCPOA.⁵

“Adoption Day” then occurred on October 18, 2015, ninety days after the adoption of Resolution 2231.⁶ On that date, despite significant opposition from Senate and House Republicans,⁷ Secretary of State John Kerry issued contingent waivers of nuclear-related sanctions against Iran; the waivers would go into effect after Iran implemented the nuclear-related measures specified by the JCPOA.⁸ The European Council likewise “adopted the legal acts providing for the lifting of all nuclear-related economic and financial EU sanctions” as soon as Iran

¹ Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 649, 649–63 (2015) [hereinafter *Daugirdas & Mortenson*, July AJIL]; 109 AJIL 874, 874–78 (2015) [hereinafter *Daugirdas & Mortenson*, Oct. AJIL]; *see also* Joint Comprehensive Plan of Action, July 14, 2015, at <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/> [hereinafter *JCPOA*].

² Daugirdas & Mortenson, Oct. AJIL, *supra* note 1, at 874.

³ *See generally* JCPOA, *supra* note 1, Annex V.

⁴ Daugirdas & Mortenson, July AJIL, *supra* note 1, at 650–51.

⁵ *See* S.C. Res. 2231, para. 11 (July 20, 2015). If “snapback” is triggered, the sanctions are automatically reimposed unless the UNSC affirmatively votes to continue sanctions relief. *Id.* As a result, a UNSC member with veto power can effectively ensure that the sanctions are put back into place. *See* Daugirdas & Mortenson, 109 AJIL, *supra* note 1, at 653; *see also* U.S. Ambassador to the United Nations Samantha Power, *Explanation of Vote at a UN Security Council Vote on Resolution 2231 on Iran Non-proliferation*, U.S. MISSION TO THE UNITED NATIONS (July 20, 2015), at <http://usun.state.gov/remarks/6765> (“If the terms of the deal are not followed, all sanctions that have been suspended can be snapped back into place. And if the United States or any other JCPOA participant believes that Iran is violating its commitments, we can trigger a process in the Security Council that will reinstate the UN sanctions.”).

⁶ *See* JCPOA, *supra* note 1, Annex V, para. 6; Memorandum on Preparing for Implementation of the Joint Comprehensive Plan of Action of July 14, 2015 (JCPOA), 2015 DAILY COMP. PRES. DOC. 736 (Oct. 18, 2015), [hereinafter Oct. 18 Presidential Memorandum].

⁷ *See generally* Daugirdas & Mortenson, Oct. AJIL, *supra* note 1.

⁸ *JCPOA Contingent Waivers*, U.S. DEP’T OF STATE (Oct. 18, 2015), at <http://www.state.gov/e/eb/rls/othr/2015/248320.htm>; *see also* Oct. 18 Presidential Memorandum, *supra* note 6 (directing various Cabinet members “to take all necessary steps to give effect to the U.S. commitments with respect to sanctions described in section 17

took the requisite steps under the JCPOA.⁹ Finally, Iran notified the IAEA that it would provisionally apply the Additional Protocol,¹⁰ which provides for, inter alia, increased inspections by the IAEA.¹¹

Thereafter, Iran began the work necessary to reach “Implementation Day,” defined by the JCPOA as the date when the IAEA verifies that Iran has implemented specific nuclear-related measures.¹² As President Barack Obama noted, the required measures include “removing thousands of centrifuges and associated infrastructure, reducing [Iran’s] enriched uranium stockpile from approximately 12,000 kilograms to 300 kilograms, and removing the core of the Arak heavy-water reactor and filling it with concrete so that it cannot be used again.”¹³

On December 28, 2015, Kerry reported that Iran had made some progress on the Implementation Day targets:

One of the most significant steps Iran has taken toward fulfilling its commitments occurred today, when a ship departed Iran for Russia carrying over 25,000 pounds of low-enriched uranium materials. The shipment included the removal of all of Iran’s nuclear material enriched to 20 percent that was not already in the form of fabricated fuel plates for the Tehran Research Reactor.¹⁴ This removal of all this enriched material out of Iran is a significant step toward Iran meeting its commitment to have no more than 300 kg of low-enriched uranium by Implementation Day. The shipment today more than triples our previous 2-3 month breakout timeline for Iran to acquire enough weapons grade uranium for one weapon, and is an important piece of the technical equation that ensures an eventual breakout time of at least one year by Implementation Day.¹⁵

Iran officially characterized this uranium shipment as a “fuel swap,” since Iran received in exchange an unenriched uranium compound from Russia and Kazakhstan, among other places.¹⁶ The unenriched material, however, could not be used for either a nuclear reactor or a weapon without “substantial processing.”¹⁷

of Annex V of the JCPOA, including preparation for the termination of Executive Orders as specified in section 17.4 and the licensing of activities as set forth in section 17.5”).

⁹ European Council Press Release, *Iran Nuclear Deal: Council Adopts the Legal Acts to Prepare for the Lifting of All Nuclear-Related Economic and Financial EU Sanctions* (Oct. 18, 2015), at <http://www.consilium.europa.eu/en/press/press-releases/2015/10/18-iran-nuclear-deal/>.

¹⁰ U.S. Dep’t of State Press Release, *Adoption of the Joint Comprehensive Plan of Action* (Oct. 18, 2015), at <http://www.state.gov/secretary/remarks/2015/10/248311.htm>.

¹¹ Daugirdas & Mortenson, Oct. AJIL, *supra* note 1, at 877.

¹² JCPOA, *supra* note 1, Annex V, para. 15; *see also id.* Annex I (detailing necessary steps).

¹³ Statement on the Adoption of the Joint Comprehensive Plan of Action to Prevent Iran From Obtaining a Nuclear Weapon, 2015 DAILY COMP. PRES. DOC. 734 (Oct. 18, 2015).

¹⁴ Iranian officials said this highly enriched material was for a specialty reactor to make medical isotopes. David E. Sanger & Andrew E. Kramer, *Iran Hands Over Stockpile of Enriched Uranium to Russia*, N.Y. TIMES, Dec. 28, 2015, at A4.

¹⁵ U.S. Dep’t of State Press Release, *An Update on Progress Toward Implementation Day of the JCPOA* (Dec. 28, 2015), at <http://www.state.gov/secretary/remarks/2015/12/250876.htm> [hereinafter Dec. 28 Progress Update].

¹⁶ Sam Wilkin, *Keen to Lift Sanctions, Iran to Ship Enriched Uranium to Russia Within Days*, WASH. POST (Dec. 19, 2015), at https://www.washingtonpost.com/world/iran-will-export-most-of-its-enriched-uranium-to-russia/2015/12/19/9914bc9c-a68e-11e5-9c4e-be37f66848bb_story.html; Sanger & Kramer, *supra* note 14.

¹⁷ Sanger & Kramer, *supra* note 14.

At the time of Kerry's announcement, Iran had not yet completed the centrifuge or the Arak Reactor core removals.¹⁸ The head of Iran's Atomic Energy Organization had stated in early November that the centrifuge removal had begun but would "take some time,"¹⁹ and Kerry noted in his December 28 statement that Iran was "moving quickly" to remove its "uranium enrichment infrastructure," including centrifuges.²⁰ This statement was consistent with the IAEA's November 18 quarterly report, which indicated that a significant number of centrifuges had been removed from multiple fuel enrichment plants since Adoption Day.²¹ As to the Arak Reactor core removal and disabling, reports at the time of Kerry's statement indicated that that process had not yet begun.²²

Some of the delays may have been attributable to Iran's desire to resolve the IAEA's investigation into Iran's past efforts to develop nuclear weapons²³—or what negotiators have sometimes termed the "past possible military dimensions" of Iran's nuclear program.²⁴ Iranian Supreme Leader Ayatollah Ali Khamenei said in October that Iran would not take steps to remove the core of the Arak Reactor or to ship the stockpile of enriched uranium until the IAEA "announces [the conclusion of] the past and future issues (including the so-called Possible Military Dimensions or PMD of Iran's nuclear program)."²⁵ That investigation was resolved in a "Final Assessment" issued in early December by the Director General of the IAEA, detailing the agency's "overall assessment" that

a range of activities relevant to the development of a nuclear explosive device were conducted in Iran prior to the end of 2003 as a coordinated effort, and [that] some activities took place after 2003. The Agency also assesses that these activities did not advance beyond feasibility and scientific studies, and the acquisition of certain relevant technical competences and capabilities. The Agency has no credible indications of activities in Iran relevant to the development of a nuclear explosive device after 2009.²⁶

¹⁸ See Dec. 28 Progress Update, *supra* note 15; Sanger & Kramer, *supra* note 14.

¹⁹ Thomas Erdbrink, *Iran Begins Deactivating Centrifuges Under Nuclear Deal's Terms*, N.Y. TIMES, Nov. 2, 2015, at A9.

²⁰ Dec. 28 Progress Update, *supra* note 15.

²¹ See Kelsey Davenport, *Iran Dismantling Centrifuges*, IAEA Reports, ARMS CONTROL ASS'N (Nov. 19, 2015), at <https://www.armscontrol.org/blog/ArmsControlNow/2015-11-19/Iran-Dismantling-Centrifuges-IAEA-Reports>.

²² Peter Kenyon, *As Iran Moves Swiftly on Nuclear Deal, Sanctions Could Go Soon*, NPR (Jan. 1, 2016), at <http://www.npr.org/sections/parallels/2016/01/01/461610337/as-iran-moves-swiftly-on-nuclear-deal-sanctions-could-go-soon>.

²³ See JCPOA, *supra* note 1, para. 14 (requiring that Iran "fully implement the 'Roadmap for Clarification of Past and Present Outstanding Issues' agreed with the IAEA, containing arrangements to address past and present issues of concern relating to [Iran's] nuclear programme").

²⁴ Davenport, *supra* note 21.

²⁵ *Ayatollah Khamenei: Sanctions Snapback Means JCPOA Violation*, OFFICE OF THE SUPREME LEADER, GRAND AYATOLLAH SAYYID ALI HOSSEINI KHAMENEI (Oct. 21, 2015), at <http://www.leader.ir/en/content/13791/Ayatollah-Khamenei-sends-a-letter-to-President-Hassan-Rouhani-about-the-JCPOA>.

²⁶ Int'l Atomic Energy Agency [IAEA], Final Assessment on Past and Present Outstanding Issues Regarding Iran's Nuclear Programme, at 14, para. 5, IAEA Doc. GOV/2015/68 (Dec. 2, 2015) [hereinafter Final Assessment]. Notably, the report addressed the Parchin military installation, which has been a particular concern among members of Congress. See Daugirdas & Mortenson, Oct. AJIL, *supra* note 1, at 878. The report described the Agency's visual examination and environmental sampling at Parchin and concluded that no explosives firing chamber currently exists on the site. But it also noted that "extensive activities" at the site in recent years had "seriously undermined the Agency's ability to conduct effective verification" there. Final Assessment, *supra* note 26, at 10–11, paras. 48–57.

On December 15, 2015, the IAEA Board of Governors adopted the Director General's report²⁷ and passed a resolution closing the investigation into Iran's past nuclear-related activities.²⁸

Despite congressional criticism,²⁹ the IAEA Director General then released a report on January 16, 2016, confirming that Iran had completed all the necessary preparatory steps to begin implementation of the JCPOA.³⁰ Specifically, the IAEA had verified that Iran

had removed the existing [core] from the [Arak] Reactor, . . . had rendered the [core] inoperable by filling the openings in it with concrete, . . . had removed and stored . . . , under [IAEA] continuous monitoring, all excess centrifuges and infrastructure not associated with [specific centrifuges permitted by the JCPOA for certain testing uses,] . . . had a stockpile of no more than 300 kg of [uranium] enriched up to 3.67%, . . . [and] had fabricated into fuel plates for the Tehran Research Reactor, transferred out of Iran or diluted to an enrichment level of 3.67% . . . or less, all uranium oxide enriched to between 5% and 20%.³¹

This report triggered the occurrence of Implementation Day under the terms of the JCPOA, as well as the sanctions relief described below.³² Kerry hailed the development: "Today marks the moment that the Iran nuclear agreement transitions from an ambitious set of promises on paper to measurable action in progress Today we can confidently say that each of the pathways that Iran had toward enough fissile material for a nuclear weapon has been verifiably closed down."³³ In the words of the IAEA Director General, the day "paves the way for the IAEA to begin verifying and monitoring Iran's nuclear-related commitments under the [JCPOA]."³⁴

Implementation Day also triggered the lifting of considerable sanctions imposed on Iran by the UN Security Council, the European Union, and the United States. Pursuant to Resolution 2231, the IAEA's report triggered the termination of sanctions previously imposed by the Security Council.³⁵ The European Council "lifted all nuclear-related economic and financial EU

²⁷ Rodolfo Quevenco, *IAEA Board Adopts Landmark Resolution on Iran PMD Case*, IAEA (Dec. 15, 2015), at <https://www.iaea.org/newscenter/news/iaea-board-adopts-landmark-resolution-iran-pmd-case>.

²⁸ See IAEA, Bd. Of Governors Res., *Joint Comprehensive Plan of Action Implementation and Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231(2015)*, IAEA Doc. GOV/2015/72 (Dec. 15, 2015).

²⁹ Karen DeYoung, *IAEA Closes Its Investigation of Iran's Past Nuclear Weapons Activities*, WASH. POST (Dec. 15, 2015), at https://www.washingtonpost.com/world/national-security/iaea-closes-its-investigation-of-irans-past-nuclear-weapons-activities/2015/12/15/15987ad0-a37c-11e5-9c4e-be37f66848bb_story.html (quoting Senate Committee on Foreign Relations Chairman Bob Corker's claim that the "IAEA process . . . was not conducted with integrity, [and] the nuclear deal is getting off to a terrible start").

³⁰ IAEA Press Release, *IAEA Director General's Statement on Iran* (Jan. 16, 2016), at <https://www.iaea.org/newscenter/news/iaea-director-general%E2%80%99s-statement-iran> [hereinafter IAEA Statement].

³¹ IAEA, *Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (2015)*, at 1–4, IAEA Doc. GOV/INF/2016/1 (Jan. 16, 2016).

³² See JCPOA, *supra* note 1, Annex V, para. 14; see also U.S. Dep't of State Press Release, *Remarks on Implementation Day* (Jan. 16, 2016), at <http://www.state.gov/secretary/remarks/2016/01/251336.htm> [hereinafter *Remarks on Implementation Day*] ("In the words of the [JCPOA] itself, today . . . we have reached implementation day.").

³³ *Remarks on Implementation Day*, *supra* note 32.

³⁴ IAEA Statement, *supra* note 30.

³⁵ S.C. Res. 2231, para. 7(a) (July 20, 2015).

sanctions against Iran” on January 16.³⁶ That same day, the United States took three steps to effectuate sanctions relief.³⁷ First, Kerry confirmed that Iran’s compliance with Implementation Day requirements put into effect the contingent waivers of U.S. sanctions that had been issued on Adoption Day.³⁸ Second, Obama issued an executive order revoking sanctions on persons connected to the development of Iranian petroleum resources.³⁹ Third, the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC) lifted sanctions on certain other individuals and entities.⁴⁰

Notably, the JCPOA does not require the United States to lift all sanctions on Iran.⁴¹ That said, the relief triggered by Implementation Day does mean that the United States will no longer sanction foreign individuals or entities who purchase oil and gas from Iranian individuals or businesses.⁴² Most trade between U.S. persons and Iran remains prohibited, but some limited business activities, such as selling or purchasing Iranian food and carpets and American commercial aircraft and parts, are now permitted.⁴³ In describing the effects of sanctions relief, State Department Spokesperson John Kirby said that the United States is not “turning a blind eye to the fact that this is still a regime that bears significant watching,” and has “multilateral mechanisms and tools, including sanctions” to guard against Iran’s support for terrorism.⁴⁴ Obama likewise emphasized that the United States “still ha[s] sanctions on Iran for its violations of human rights, for its support of terrorism, and

³⁶ European Council Press Release, Iran: Council Lifts All Nuclear-Related Economic and Financial EU Sanctions (Jan. 16, 2016), at <http://www.consilium.europa.eu/en/press/press-releases/2016/01/16-iran-council-lifts-all-nuclear-related-eu-sanctions/>; see also EUROPEAN COUNCIL, INFORMATION NOTE ON EU SANCTIONS TO BE LIFTED UNDER THE JOINT COMPREHENSIVE PLAN OF ACTION (JCPOA) (Jan. 23, 2016), available at http://eeas.europa.eu/top_stories/pdf/iran_implementation/information_note_eu_sanctions_jcpoa_en.pdf.

³⁷ See U.S. Dep’t of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day, at A.6 (Jan. 16, 2016), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_faqs.pdf [hereinafter OFAC FAQs].

³⁸ U.S. Dep’t of State Press Release, Confirmation of Verification of Iranian Actions Pursuant to the Joint Comprehensive Plan of Action (Jan. 16, 2016), at <http://www.state.gov/secretary/remarks/2016/01/251332.htm>. For a description of the Adoption Day waivers, see *supra* note 8 and accompanying text.

³⁹ See Exec. Order No. 13,716, 81 Fed. Reg. 3693 (2016) [hereinafter Exec. Order No. 13716]; see also Exec. Order No. 13,574, 3 C.F.R. § 245 (2012); Exec. Order No. 13,590, 3 C.F.R. § 284 (2012); Exec. Order No. 13,622, 3 C.F.R. § 290 (2013); Exec. Order No. 13,645, 3 C.F.R. § 298 (2014). Obama also amended Executive Order 13628 to remove specific sections that provided for similar petrochemical and energy-sector-related sanctions.

⁴⁰ See JCPOA-related Designation Removals, JCPOA Designation Updates, Foreign Sanctions Evaders Removals, NS-ISA List Removals; 13599 List Changes, U.S. DEP’T OF THE TREASURY (Jan. 16, 2016), at https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/updated_names.aspx.

⁴¹ See generally Exec. Order No. 13,716, *supra* note 39; U.S. DEP’T OF THE TREASURY & U.S. DEP’T OF STATE, GUIDANCE RELATING TO THE LIFTING OF CERTAIN U.S. SANCTIONS PURSUANT TO THE JOINT COMPREHENSIVE PLAN OF ACTION ON IMPLEMENTATION DAY 33 & n.85 (Jan. 16, 2016), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement_guide_jcpoa.pdf [hereinafter SANCTIONS GUIDANCE]. The order provides that implementation authorities for sanctions under Sections 1244(c)(1)(A), 1244(d)(1)(A), 1245(a)(1), and 1246(a) of the Iran Freedom and Counter-Proliferation Act of 2012 apply only to the extent that sanctions are imposed with respect to transactions or activities that are outside the scope of the JCPOA. *Id.* at 33 n.85.

⁴² David E. Sanger, *Iran Complies with Nuclear Deal; Sanctions Are Lifted*, N.Y. TIMES, Jan. 16, 2016, at A1; see also OFAC FAQs, *supra* note 37, at A.2.

⁴³ Sanger, *supra* note 42; see also OFAC FAQs, *supra* note 37, at A.3.i.

⁴⁴ U.S. Dep’t of State Press Release, Daily Press Briefing (Jan. 15, 2016), at <http://www.state.gov/t/pal/pr/dpb/2016/01/251318.htm>.

for its ballistic missile program, [a]nd . . . will continue to enforce these sanctions, vigorously.”⁴⁵

Even though the United States and Iran ultimately reached some important JCPOA milestones more quickly than anticipated,⁴⁶ the countries have also encountered a number of obstacles threatening the ongoing implementation of the nuclear agreement.

The first such issue concerned two ballistic missile tests conducted by Iran before Implementation Day. The first test occurred on October 11, 2015, when Iran launched a guided long-range ballistic Emad missile.⁴⁷ This prompted Senators Kelly Ayotte and Mark Kirk to write a letter to Obama suggesting that the launch had violated a 2010 UNSC resolution that requires Iran not to “undertake any activity related to ballistic missiles capable of delivering nuclear weapons, including launches using ballistic missile technology.”⁴⁸ A group of eight senators from the Senate Committee on Foreign Relations also wrote to Kerry asking him to “provide [his] determination on whether the . . . launch violates UNSCR 1929 and what the administration, both unilaterally and through the UN[SC], plans to do in response.”⁴⁹

Before Kerry responded, Ambassador to the UN Samantha Power separately asserted that the launch was a “clear violation of UN sanctions.”⁵⁰ The State Department’s subsequent response to the senators’ inquiries reiterated Power’s characterization of the launch as a “clear violation” of Resolution 1929, and indicated that the United States had submitted a joint report regarding the launch to the UN’s Iran Sanctions Committee.⁵¹ As to unilateral penalties, the letter stated that the State Department was “reviewing the facts . . . to determine whether such action is warranted in this case.”⁵² On December 11, the UNSC’s Panel of Experts on Iran concluded that the test violated Resolution 1929, since the Emad missile was capable of delivering a nuclear weapon.⁵³

⁴⁵ Remarks on Iran, 2015 DAILY COMP. PRES. DOC. 22 (Jan. 17, 2016) [hereinafter Remarks on Iran]; see also OFAC FAQs, *supra* note 37, at A.3.ii–A.3.iii (outlining sanctions retained by United States).

⁴⁶ See Sanger, *supra* note 42 (“The Iranians beat, by months, the C.I.A. and Energy Department estimates of how long it would take them to dismantle [their nuclear program].”).

⁴⁷ Thomas Erdbrink, *Iran Tests Long-Range Missile, Possibly Violating Nuclear Accord*, N.Y. TIMES, Oct. 11, 2016, at A7.

⁴⁸ See Letter from Sen. Kelly Ayotte & Sen. Mark Kirk to Barack Obama, President of the United States (Oct. 14, 2015), available at https://www.ayotte.senate.gov/?p=press_release&id=2260 (suggesting that the missile launch violated UNSC Resolution 1929, which had been adopted in 2010); S.C. Res. 1929, para. 9 (June 9, 2010).

⁴⁹ Letter from Sen. Bob Corker, et al. to John Kerry, U.S. Sec’y of State (Oct. 14, 2015), available at <http://www.foreign.senate.gov/imo/media/doc/Iran%20Missile%20Test%20Letter%20to%20Sec%20Kerry%20101415.pdf>.

⁵⁰ U.S. Mission to the UN Press Release, Statement on Activities in the Security Council Responding to Iran’s Recent Ballistic Missile Test (Oct. 21, 2015), at <http://usun.state.gov/remarks/6909>.

⁵¹ Letter from Julia Frifield, Assistant Sec’y, Legislative Affairs, U.S. Dep’t of State to Sen. Bob Corker, Chairman, Comm. on Foreign Relations 1 (Nov. 13, 2015), available at <http://www.foreign.senate.gov/imo/media/doc/111315%20State%20Department%20Response%20to%20Letter%20on%20Iranian%20Ballistic%20Missile%20Test.pdf> [hereinafter Frifield Letter].

⁵² *Id.* at 2.

⁵³ Louis Charbonneau, *Iran’s October Missile Test Violated U.N. Ban: Expert Panel*, REUTERS (Dec. 16, 2015), at <http://www.reuters.com/article/us-iran-missiles-un-exclusive-idUSKBN0TY1T920151216>; see also *Iran’s Attempt to Procure Titanium Alloy Was Violation of Anti-Proliferation Resolution 1737 (2006), Sanctions Committee Tells Security Council*, UNITED NATIONS (Dec. 15, 2015), at <http://www.un.org/press/en/2015/sc12163.doc.htm> (noting Panel’s conclusion and submission of the report to the 1737 Iran Sanctions Committee).

The larger question is whether Iran's launch also violated the JCPOA and its implementing instruments. The JCPOA itself does not include any provisions related to ballistic missiles.⁵⁴ And Resolution 2231 "called upon" Iran not to undertake any activity related to ballistic missiles—but did not "decide" that Iran must refrain from doing so.⁵⁵ The State Department's November 13 letter therefore stated that such tests "would be *inconsistent* with Resolution 2231,"⁵⁶ and another administration official stated that the administration "ha[s] been clear all along that [the JCPOA] was an agreement about the nuclear program, and . . . [that] the test was not a *violation* of the Iran deal, period."⁵⁷ According to one press report, Kerry had explained this position in "private disclosures" made to Senator Marco Rubio before the missile test, in response to Rubio's inquiry about the effect of any future ballistic missile launches:

It would not be a violation of the JCPOA if Iran tested a conventional ballistic missile. . . . The issue of ballistic missiles is addressed by the provisions of [Resolution 2231], which do not constitute provisions of the [JCPOA]. . . . Since the Security Council has called upon Iran not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology, any such activity would be inconsistent with the UNSCR and a serious matter for the Security Council to review.⁵⁸

Iran then conducted a second test on November 21, launching a guided medium-range ballistic Ghadr-110 missile.⁵⁹ When members of Congress sent a new round of letters urging a U.S. response,⁶⁰ Power responded by noting that the Security Council was scheduled to discuss both launches,⁶¹ that "the United States [was] conducting a serious review of the [second launch]," and that the United States would "seek appropriate action" with the Security Council if any violation occurred.⁶² On December 15, White House Press Secretary Josh Earnest said that he "wouldn't rule out additional steps if . . . national security officials determine that additional sanctions would be useful in countering this activity."⁶³ He also pointed out that the

⁵⁴ See JCPOA, *supra* note 1.

⁵⁵ S.C. Res. 2231, para. 7(b) (July 20, 2015) (emphasis added); *id.*, Annex B, para. 3. The relevant provision was not to take effect until Implementation Day, at which point Resolution 1929 would be terminated and replaced in effect by Resolution 2231. See *id.* (noting that certain provisions, including the ballistic missile provision, will only apply "on the date on which the IAEA Director General submits a report verifying that Iran has taken the actions specified in paragraph 15.1-15.11 of Annex V of the JCPOA"); see also *id.*, para. 7(a) (specifying that Resolution 1929, among others, would be terminated on Implementation Day).

⁵⁶ Frifield Letter, *supra* note 1, at 2 (emphasis added).

⁵⁷ U.S. Dep't of State Press Release, Background Briefing on the JCPOA Adoption Day (Oct. 17, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/10/248310.htm> (emphasis added).

⁵⁸ Adam Kredo, *Obama Admin: Iranian Ballistic Missile Tests Not a Nuke Deal Violation*, WASH. FREE BEACON (Sept. 16, 2015), at <http://freebeacon.com/national-security/obama-admin-iranian-ballistic-missile-tests-not-a-nuke-deal-violation/>.

⁵⁹ David E. Sanger, *U.S. Cautious on Iran Missile Test Claim*, N.Y. TIMES, Dec. 8, 2015, at A19.

⁶⁰ Letter from Sen. Kelly Ayotte & Sen. Mark Kirk to Barack Obama, President of the United States (Dec. 8, 2015), available at https://www.ayotte.senate.gov/?p=press_release&id=2367; Letter from Rep. Ted Deutch & Rep. Joseph F. Kennedy III to Barack Obama, President of the United States (Dec. 8, 2015), available at <https://kennedy.house.gov/sites/kennedy.house.gov/files/Kennedy%20Deutch%20Iran%20Missile%20Letter.pdf>.

⁶¹ U.S. Mission to the UN Press Release, Remarks at the Security Council Stakeout Following Consultations on the United Nations Regional Office for Central Africa (UNOCA) and the Lord's Resistance Army (LRA) (Dec. 8, 2015), at <http://usun.state.gov/remarks/7026>.

⁶² *Id.*

⁶³ White House Press Release, Press Briefing by Press Secretary Josh Earnest (Dec. 15, 2015), at <https://www.whitehouse.gov/the-press-office/2015/12/15/press-briefing-press-secretary-josh-earnest-12152015>.

nuclear deal negotiations were “separate from the wide range of other concerns that [the United States] had with Iran’s behavior, including their ballistic missile program.”⁶⁴ Nonetheless, he expressed his confidence that “the President wouldn’t stand in the way of . . . sanctions moving forward,” regardless of the JCPOA, if sanctions experts determined that additional sanctions would help counter Iran’s ballistic missile capabilities.⁶⁵

Following more calls by both Republicans⁶⁶ and Democrats⁶⁷ for the administration to respond, reports on December 30 indicated that the administration was preparing to issue sanctions regarding the ballistic missile test violations.⁶⁸ Iranian officials immediately denounced the prospect of such sanctions. Ali Akbar Velayati, an advisor to Iranian President Hassan Rouhani on international affairs, stated that “[s]uch measures are against the spirit ruling the Joint Comprehensive Plan of Action.”⁶⁹ Likewise, a Foreign Ministry spokesperson said that the sanctions would be “unilateral, arbitrary and illegal,” to the extent they affected Iran’s legitimate right to national defense.⁷⁰ In response to what he characterized as the U.S. “illegal intervention in Iran’s right to boost its defence capabilities,” Rouhani sent a letter to Iran’s defense minister directing him to “accelerate . . . production” of “the armed forces’ needed missiles . . . more seriously.”⁷¹ He further stated that Iran “ha[s] never negotiated regarding [its] defense capabilities including [its] missile program [and] will not accept any restrictions in this regard.”⁷²

On January 17, 2016—the day after Implementation Day and the prisoner swap⁷³—the United States finally imposed sanctions related to Iran’s ballistic missile program.⁷⁴ The sanctions were imposed on eleven entities and individuals who were “involved in procurement on behalf of Iran’s ballistic missile program.”⁷⁵ Obama said that the United States would “remain

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Letter from Sen. Kelly Ayotte et al. to Barack Obama, President of the United States (Dec. 16, 2015), *available at* http://www.ayotte.senate.gov/?p=press_release&cid=2393 (urging Obama to not lift sanctions against Iran as required by JCPOA).

⁶⁷ See Letter from Sen. Benjamin L. Cardin et al. to Barack Obama, President of the United States (Dec. 17, 2015), *available at* <http://www.foreign.senate.gov/press/ranking/release/twenty-one-democratic-senators-express-profound-concern-over-second-iranian-ballistic-missile-test-in-letter-to-president-obama> (requesting that United States take action unilaterally or in coordination with European allies to punish violations of Resolution 1929).

⁶⁸ Helene Cooper & David E. Sanger, *Iran’s Missile Tests Remind the U.S. That Tensions Have Not Ended*, N.Y. TIMES, Dec. 30, 2015, at A4.

⁶⁹ *Leader’s Top Aide: Iran to Reciprocate US Sanctions*, FARS NEWS AGENCY (Dec. 31, 2015), *at* <http://en.farsnews.com/newstext.aspx?nn=13941010000615>.

⁷⁰ *Tehran Slams US Interventionist Policies Towards Iran*, ISLAMIC REPUBLIC OF IRAN MINISTRY OF FOREIGN AFFAIRS (Dec. 31, 2015), *at* <http://prague.mfa.ir/index.aspx?fkeyid=&siteid=3&pageid=2021&newsview=373727>.

⁷¹ *President’s Order to Defence Minister Following American Hostile Practices*, OFFICIAL WEBSITE OF THE PRESIDENT OF THE ISLAMIC REPUBLIC OF IRAN (Dec. 31, 2015), *at* <http://www.president.ir/en/91109>.

⁷² Hassan Rouhani (@HassanRouhani), TWITTER (Dec. 31, 2015, 8:47 AM), *at* <https://twitter.com/HassanRouhani/status/682603880383954946>.

⁷³ The prisoner swap is discussed in further detail below.

⁷⁴ U.S. Dep’t of the Treasury Press Release, *Treasury Sanctions Those Involved in Ballistic Missile Procurement for Iran* (Jan. 17, 2016), *at* <https://www.treasury.gov/press-center/press-releases/Pages/jl0322.aspx> [hereinafter Jan. 17 Treasury Sanctions].

⁷⁵ *Id.*; see also Office of Foreign Assets Control, *Non-proliferation Designations – January 17, 2016*, U.S. DEP’T OF THE TREASURY (Jan. 17, 2016), *at* <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20160117.aspx>. OFAC designated these persons for sanctions pursuant to Executive Order 13382. See Jan. 17 Treasury Sanctions, *supra* note 74. That order automatically blocks, following OFAC’s designation, the use or

vigilant” about enforcing sanctions against Iran for its international violations, including with its ballistic missile program.⁷⁶

The administration did not further clarify its view on whether further tests like those conducted in October or November 2015 would constitute a violation of Resolution 2231. On March 8 and 9, 2016, however, Iran reportedly conducted additional ballistic missile tests.⁷⁷ In response to these reports, Kirby initially said on March 8 that such tests were “not a violation of the Iran deal itself[,] [but] very clearly a violation of [Resolution] 2231.”⁷⁸ On March 14, in response to a question regarding the non-compulsory language of Resolution 2231 as to Iran’s ballistic missile program,⁷⁹ Kirby revised his initial formulation, noting that:

[the March tests] are . . . , at the very least, inconsistent with but more practically in defiance of the UN[SC] Resolution 2231 So we could have an interesting discussion about the degree to which it’s technically a violation. It doesn’t mean, though, that it’s okay, and it doesn’t mean that the [UNSC] should look the other way, and it doesn’t mean . . . that their actions are still not inconsistent with the obligations in that resolution, which calls on them to refrain from that activity. So we’re still going to bring it up with the [UNSC].⁸⁰

That same day, Power reiterated that the tests were “in defiance of” Resolution 2231, and indicated that the United States would “continue to push in the [UNSC] in the 2231 format” for punitive measures.⁸¹ Nonetheless, a subsequent news report suggested that the UN was unlikely to impose any sanctions, given the ambiguity of the resolution’s language about the ballistic missile program.⁸²

Both Democrats and Republicans continued to push for the United States to impose additional unilateral sanctions.⁸³ In addition, on March 17, Ayotte introduced a bill that would institute stricter sanctions against any sector of Iran’s economy or foreign person that supports

transfer of any property and interests in property in the United States belonging to “any foreign person determined . . . to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons)[.] . . . [and] any person determined . . . to have provided, or attempted to provide, financial, material, technological or other support for [those foreign persons].” Exec. Order No. 13,382 § 1(a), 3 C.F.R. § 170 (2005). Exercising the power delegated to it to by Executive Order 13,382, *see id.* at 172, OFAC sanctioned those eleven persons “for having provided, or attempting to provide, financial, material, technological, or other support” to previously-sanctioned companies. *See* Jan. 17 Treasury Sanctions, *supra* note 74.

⁷⁶ Remarks on Iran, *supra* note 45.

⁷⁷ *See* Thomas Erdbrink, *Iran Tests More Missiles in Message to Israel and Biden*, N.Y. TIMES, Mar. 9, 2016, at A7.

⁷⁸ U.S. Dep’t of State Press Release, Daily Press Briefing (Mar. 8, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/03/254101.htm>.

⁷⁹ *See supra* note 57 and accompanying text.

⁸⁰ U.S. Dep’t of State Press Release, Daily Press Briefing (Mar. 14, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/03/254684.htm>.

⁸¹ U.S. Mission to the UN Press Release, Remarks at the Security Council Stakeout Following Consultations on Iran (Mar. 14, 2016), at <http://usun.state.gov/remarks/7187>.

⁸² Louis Charbonneau & Michelle Nichols, *Iran Seen Escaping U.N. Sanctions Over Missiles Due to Ambiguous Resolution*, REUTERS (Mar. 17, 2016), at <http://www.reuters.com/article/us-iran-missiles-un-idUSKCN0WJ2XY>.

⁸³ *See, e.g.*, Sam Wilkin & Bozorgmehr Sharafedin, *Clinton Calls for Sanctions on Iran after More Missile Tests*, REUTERS (Mar. 9, 2016), at <http://www.reuters.com/article/us-iran-missiles-idUSKCN0WB019>.

Iran's ballistic missile program.⁸⁴ Earnest indicated that he “certainly wouldn't rule out additional sanctions being imposed on Iran either by the international community or by the United States.”⁸⁵

A second problem confronting the ongoing JCPOA implementation emerged from a new U.S. visa measure that could affect travel to Iran. On December 18, 2015, Obama signed into law the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015.⁸⁶ The law requires visitors to the United States to obtain a visa before entering the country if they have visited Iran recently, even if they are citizens of participating visa-free travel countries.⁸⁷ Zarif initially criticized the law as a likely “obstacle” to trade⁸⁸ and asserted that “[i]f the . . . law is implemented as it is, it would definitely be a breach [of the JCPOA].”⁸⁹

In a letter responding to Foreign Minister Zarif's concerns, Kerry wrote:

I am also confident that the recent changes in visa requirements passed in Congress, which the Administration has the authority to waive, will not in any way prevent us from meeting our JCPOA commitments, and that we will implement them so as not to interfere with legitimate business interests of Iran. To this end, we have a number of potential tools available to us, including multiple entry ten-year business visas, programs for expediting business visas, and the waiver authority provided under the new legislation.⁹⁰

A group of five House Republicans wrote to Kerry and Secretary of Homeland Security Jeh Johnson expressing “deep[] concern[] that the narrowly-intended use of the waiver authority will be ignored in favor of applying the waiver authority to those who have traveled to Iran for business purposes”—a possibility that Congress considered and rejected during bill negotiations.⁹¹ State Department Spokesperson Elizabeth Trudeau responded that although “[t]he new legislation includes waiver authority for the Department of Homeland Security, . . . it would be too early to say what and if [and] when that authority will be used.”⁹²

A third controversy related to the White House's Iran policy came in the form of domestic allegations that some related U.S. actions reflected tacit side deals that went beyond the scope of the original JCPOA agreement. One such arrangement was an Iran-U.S. prisoner exchange

⁸⁴ See Iran Ballistic Missile Sanctions Act of 2016, S. 2725, 114th Cong. (2016).

⁸⁵ White House Press Release, Press Briefing by the Press Secretary Josh Earnest (Mar. 14, 2016), at <https://www.whitehouse.gov/the-press-office/2016/03/14/press-briefing-press-secretary-josh-earnest-3142016>.

⁸⁶ White House Press Release, Statement by the Press Secretary on H.R. 2029 (Dec. 18, 2015), at <https://www.whitehouse.gov/the-press-office/2015/12/18/statement-press-secretary-hr-2029>; H.R. Res. 2029, Div. O, Title II, 114th Cong. (2015) (enacted).

⁸⁷ See H.R. Res. 2029, Div. O § 203.

⁸⁸ Thomas Erdbrink, *Iran Says New U.S. Visa Rule May Violate Nuclear Pact*, N.Y. TIMES, Dec. 21, 2015, at A4.

⁸⁹ *Zarif Calls New US Visa Law Breach of Nuclear Deal*, IRAN DAILY (Dec. 23, 2015), at <http://www.iran-daily.com/News/133552.html>.

⁹⁰ Letter from John Kerry, Sec'y of State, to Mohammad Javad Zarif, Minister of Foreign Affairs of the Islamic Republic of Iran (Dec. 19, 2015), available at <http://www.niacouncil.org/text-sec-kerry-letter-to-zarif-regarding-visa-waiver-reform/>.

⁹¹ Letter from Rep. Kevin McCarthy et al. to John Kerry, Sec'y of State, and Jeh Johnson, Sec'y of Homeland Sec. 1 (Dec. 22, 2015), available at <http://foreignaffairs.house.gov/sites/republicans.foreignaffairs.house.gov/files/12-22-15%20Letter%20to%20Secretaries%20Kerry%20and%20Johnson.pdf>.

⁹² U.S. Dep't of State Press Release, Daily Press Briefing (Dec. 22, 2015), at <http://www.state.gov/r/pa/prs/dpb/2015/12/250824.htm>.

that was announced simultaneously with the Implementation Day announcements that various JCPOA benchmarks had been satisfied.⁹³ In exchange for Iran's release of five American citizens subject to Iranian detention,⁹⁴ the United States released seven Iranians held for violating sanctions and agreed to stop seeking the arrest of fourteen others.⁹⁵ According to Obama and Kerry, the United States and Iran had negotiated the prisoner swap on the sidelines of the negotiations over Iran's nuclear program, but not as a condition of the JCPOA.⁹⁶ In his remarks regarding Implementation Day, Kerry stated,

While the two tracks of negotiations were not directly related—and they were not—there is no question that the pace and the progress of the humanitarian talks accelerated in light of the relationships forged and the diplomatic channels unlocked over the course of the nuclear talks. And certainly in the time since we reached an agreement last July, there was a significant pickup in that dialogue.⁹⁷

Obama emphasized that the prisoners released by the United States had been charged, not with terrorism or any violent offenses,⁹⁸ but with violating sanctions by providing Iran with different forms of technological assistance.⁹⁹

On January 17, in the context of speculation that the timing of the ballistic missile-related sanctions was intended to avoid disrupting the JCPOA implementation and prisoner swap,¹⁰⁰ a senior administration official denied that the nuclear deal had affected the nature and timing of the sanctions, but acknowledged that the United States “did not want to complicate what was a very sensitive and delicate effort to bring Americans home.”¹⁰¹ He indicated, however, “that this [wa]s a one-time, unprecedented situation with the release of prisoners, and [the United States is] going to enforce [its] sanctions as necessary going forward with respect to issues like ballistic missiles and terrorism.”¹⁰²

Some controversy also arose around the January 17 announcement that the United States and Iran had resolved an outstanding claim against the United States at the Iran-U.S. Claims Tribunal.¹⁰³ The claim concerned a trust fund containing \$400 million that Iran had used to purchase military equipment from the United States before 1981 when the countries severed

⁹³ Remarks on Iran, *supra* note 45.

⁹⁴ *Id.* The individuals were Saeed Abedini, Amir Hekmati, Nosratollah Khosravi-Roodsari, Matthew Trevithick, and Jason Rezaian.

⁹⁵ Nicholas Fandos, *Details of 7 Iranians Granted Clemency in Prisoner Swap*, N.Y. TIMES, Jan. 17, 2016, at A7.

⁹⁶ Remarks on Iran, *supra* note 45; Remarks on Implementation Day, *supra* note 32.

⁹⁷ Remarks on Implementation Day, *supra* note 32.

⁹⁸ Remarks on Iran, *supra* note 45.

⁹⁹ White House Press Release, Press Call by Senior Administration Officials on Iran (Jan. 17, 2016), at <https://www.whitehouse.gov/the-press-office/2016/01/17/press-call-senior-administration-officials-iran> [hereinafter Jan. 17 Press Call]; Fandos, *supra* note 95.

¹⁰⁰ Sanger, *supra* note 42; see also Carol Morello, *Iran's Missile Tests Are Spurring Calls from Congress for More Sanctions*, WASH. POST (Jan. 7, 2016), at https://www.washingtonpost.com/world/national-security/irans-missile-tests-are-spurring-calls-from-congress-for-more-sanctions/2016/01/07/ce8582d8-b54a-11e5-a76a-0b5145e8679a_story.html (quoting an Iran analyst with the Carnegie Endowment for International Peace as saying: “There are no risk-free options. . . . Sanctioning Iran now could unravel the nuclear deal. Yet acquiescing in the face of Iranian provocations could embolden Iran”).

¹⁰¹ Jan. 17 Press Call, *supra* note 99.

¹⁰² *Id.*

¹⁰³ Remarks on Iran, *supra* note 45.

diplomatic relations.¹⁰⁴ In addition to agreeing to return the \$400 million contained in the trust fund, the United States agreed to compensate Iran with \$1.3 billion in interest, which U.S. officials claimed represented a significant reduction from the \$6–8 billion that Iran had initially indicated it would seek through tribunal proceedings.¹⁰⁵

Partly as a result of a statement by an Iranian military official, there was some speculation that the settlement of the Hague Tribunal claim was causally related to Iran's agreement to the prisoner exchange. Referring to the \$1.7 billion settlement, Iranian Brig. Gen. Mohammad Reza Nadqi told the Iranian Fars news service that “[t]his money was returned for the freedom of the U.S. spy, and it was not related to the [nuclear] exchange.”¹⁰⁶ Based partly on Nadqi's remarks, the Chairman of the House Foreign Affairs Committee sent a letter to Kerry expressing “concern that the [Hague Tribunal] payment represents a de facto ‘ransom’ for the release of American hostages.”¹⁰⁷ Similarly, a spokesperson for Congressman Paul Ryan stated that Ryan anticipated that the administration would provide further information on “the ransom paid for [the Americans'] freedom.”¹⁰⁸

The administration denied that the settlement agreement constituted a ransom payment. On January 19, Earnest stated that Ryan was “wrong” that the United States had paid a ransom to Iran in exchange for the prisoners.¹⁰⁹ Instead, Earnest stated that the “the successful resolution of our concerns about Iran's nuclear program created a series of diplomatic opportunities for the United States that we've capitalized on.”¹¹⁰ Another senior administration official went further, noting that “the sanctions relief under the nuclear deal was not related to the prisoner release at all.”¹¹¹ Earnest described Iran's release of prisoners as a “humanitarian gesture,” and suggested that the United States “made a reciprocal humanitarian gesture by releasing seven individuals.”¹¹²

Two other longstanding disagreements between the United States and Iran were also settled in December 2015. First, in late 2015, the United States turned over fourteen American architectural drawings that the Tehran Museum of Contemporary Art had originally purchased in

¹⁰⁴ U.S. Dep't of State Press Statement, John Kerry, Hague Claims Tribunal Settlement (Jan. 17, 2016), *at* <http://www.state.gov/secretary/remarks/2016/01/251338.htm>.

¹⁰⁵ White House Press Release, Press Briefing by Press Secretary Josh Earnest (Jan. 19, 2016), *at* <https://www.whitehouse.gov/the-press-office/2016/01/19/press-briefing-press-secretary-josh-earnest-1192016> [hereinafter Jan. 19 Press Briefing].

¹⁰⁶ *Basij Commander: US Bought Freedom of Spies by Releasing \$1.7 bln of Iran's Frozen Assets*, FARS NEWS AGENCY (Jan. 20, 2016), *at* <http://en.farsnews.com/newstext.aspx?nn=13941030001016>; Karoun Demirjian, *Republicans Call for Inquiry into Whether Obama Paid 'Ransom' to Iran*, WASH. POST (Jan. 22, 2016), *at* https://www.washingtonpost.com/world/national-security/republicans-calling-for-inquiry-into-whether-obama-paid-ransom-to-free-american-prisoners/2016/01/22/ce45a1e6-a806-4134-9327-88657731e6c5_story.html.

¹⁰⁷ Letter from Edward R. Royce, Chairman, U.S. House of Representatives Committee on Foreign Affairs, to John Kerry, U.S. Secretary of State (Feb. 3, 2016), *available at* <http://foreignaffairs.house.gov/sites/republicans.foreignaffairs.house.gov/files/02.03.16%20-%20DOS%2C%20Secretary%2C%20John%20F%20Kerry%2C%20Concerns%20re%20%241.7%20Billion%20Payout%20to%20Iran.pdf>.

¹⁰⁸ Demirjian, *supra* note 106.

¹⁰⁹ Jan. 19 Press Briefing, *supra* note 105; U.S. Dep't of State Press Release, Daily Press Briefing (Jan. 20, 2016), *at* <http://www.state.gov/r/pa/prs/dpb/2016/01/251537.htm> (“There was no bribe, there was no ransom, there was nothing paid to secure the return of these Americans who were, by the way, not spies.”).

¹¹⁰ Jan. 19 Press Briefing, *supra* note 105.

¹¹¹ Jan. 17 Press Call, *supra* note 99.

¹¹² Jan. 19 Press Briefing, *supra* note 105.

1978.¹¹³ The United States had blocked the export of the art after the countries severed diplomatic relations in the wake of the 1979 Revolution.¹¹⁴ U.S. and Iranian officials said that the delivery was the result of a claim filed by Iran at the Hague Tribunal in 1982.¹¹⁵ The second development emerged from a spending bill signed into law on December 18, in which money was set aside for victims of state-sponsored terrorism, including the fifty-three Americans taken hostage at the U.S. Embassy in Tehran in 1979.¹¹⁶ The bill provides that each hostage or their estates will receive up to \$4.4 million¹¹⁷ out of funds that became available when the Paris-based bank BNP Paribas paid a \$9 billion penalty for violating sanctions against Iran, Sudan, and Cuba.¹¹⁸ The attorney for the Iran hostages suggested that their inclusion in the bill was a direct result of the nuclear deal: “Those negotiations resulted in an understanding that an inevitable next step in securing a relationship was to address the reason for the rupture, which was [the hostages’] kidnapping and torture.”¹¹⁹

While the events described above indicate some important changes in U.S. relations with Iran, administration officials have suggested that that broader progress may not be forthcoming, noting in particular that the nuclear deal should be regarded as separate from the U.S.’s broader relationship with Iran.¹²⁰ Obama said that

even as we implement the nuclear deal and welcome our Americans home, we recognize that there remain profound differences between the United States and Iran. We remain steadfast in opposing Iran’s destabilizing behavior elsewhere, including its threats against Israel and our Gulf partners, and its support for violent proxies in places like Syria and Yemen. We still have sanctions on Iran for its violations of human rights, for its support of terrorism, and for its ballistic missile program. And we will continue to enforce these sanctions, vigorously.¹²¹

A senior administration official echoed those statements: “If Iran does act in a more constructive fashion, it would be a positive development in resolving difficult issues. If they don’t, we will continue to enforce our sanctions and continue to have very strong differences.”¹²² A somewhat more optimistic statement came from State Department Spokesperson Mark C. Toner:

I don’t want to oversell it by saying that . . . all is forgotten or forgiven and we’re ready to move on and make progress by leaps and bounds. But this is a long game and I think that

¹¹³ Rick Gladstone, *U.S. Delivers Art to Iran That Had Been Impounded Since 1979*, N.Y. TIMES, Dec. 18, 2015, at A6. The exact date of the transfer is unclear; a State Department official stated only that the delivery occurred “in the last couple of months.” *Id.*

¹¹⁴ *See id.*

¹¹⁵ *See id.*; *Iran Takes Back Part of Its Blocked Interests from US After 37 Years*, ISLAMIC REPUBLIC NEWS AGENCY (Dec. 18, 2015), at <http://www.irna.ir/en/News/81883904/>.

¹¹⁶ David M. Herszenhorn, *Americans Held Hostage in Iran Win Compensation 36 Years Later*, N.Y. TIMES, Dec. 24, 2015, at A1.

¹¹⁷ *See* H.R. Res. 2029, Div. O § 404(c)(2)(B)–(C), 114th Cong. (2015) (enacted).

¹¹⁸ Herszenhorn, *supra* note 116. The exact amount that each hostage will receive depends on the number of victims who file claims, as well as the success of judgment enforcement in earlier cases involving victims of terrorist attacks.

¹¹⁹ *Id.*

¹²⁰ *See supra* note 66 and accompanying text.

¹²¹ Remarks on Iran, *supra* note 45.

¹²² Jan. 17 Press Call, *supra* note 99.

these kinds of lines of communication and ability to talk beyond the scope of the nuclear agreement are promising.¹²³

European Union and United States Conclude Agreement to Regulate Transatlantic Personal Data Transfers

On February 2, 2016, the European Union and United States concluded the EU-U.S. Privacy Shield, a political agreement that “was designed by the U.S. Department of Commerce and European Commission to provide companies on both sides of the Atlantic with a mechanism to comply with EU data protection requirements when transferring personal data from the European Union to the United States in support of transatlantic commerce.”¹ Personal data covered by the agreement includes “online search queries, financial information, and employee records”² that facilitate targeted advertising, customer tracking, and employee management.³ The Privacy Shield replaces the Safe Harbor framework, the agreement that had previously applied to such transfers.⁴

The European Union and United States had started negotiating a replacement for the Safe Harbor framework in 2013.⁵ Concluding those negotiations became more urgent after the Court of Justice of the European Union (CJEU) identified shortcomings in the European Commission’s implementation of the Safe Harbor Framework in a ruling published in October 2015.⁶ The ruling required more robust protections for the transfer of personal data from EU member states to the United States in order to conform to fundamental guarantees under EU law.⁷ EU and U.S. officials have stated that the new framework establishes “stronger

¹²³ U.S. Dep’t of State Press Release, Daily Press Briefing (Jan. 13, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/01/251198.htm>.

¹ Privacy Shield Agreement, EU-U.S., Feb. 2, 2016, at https://www.commerce.gov/sites/commerce.gov/files/media/files/2016/eu_us_privacy_shield_full_text.pdf.pdf [hereinafter Privacy Shield]; *Fact Sheet: Overview of the EU-U.S. Privacy Shield Framework*, DEP’T OF COMMERCE (Feb. 29, 2016), at <https://www.commerce.gov/news/fact-sheets/2016/02/fact-sheet-overview-eu-us-privacy-shield-framework> [hereinafter Dep’t of Commerce Fact Sheet]. See also *European Commission Unveils EU-U.S. Privacy Shield*, EUROPEAN COMMISSION (Feb. 29, 2016), at http://ec.europa.eu/justice/newsroom/data-protection/news/160229_en.htm; European Commission Press Release, EU Commission and United States Agree on New Framework for Transatlantic Data Flows: EU-U.S. Privacy Shield (Feb. 2, 2016), at http://europa.eu/rapid/press-release_IP-16-216_en.htm [hereinafter EC Feb. 2 Press Release] (describing the Privacy Shield as a political agreement).

² Mark Scott, *European Privacy Regulators Want Details on “Safe Harbor” Data Deal*, N.Y. TIMES, Feb. 3, 2016, at B3.

³ Andrea Peterson, *The Massive New Privacy Deal Between U.S. and Europe, Explained*, WASH. POST (Feb. 2, 2016), at <https://www.washingtonpost.com/news/the-switch/wp/2016/02/02/the-massive-new-privacy-deal-between-u-s-and-europe-explained/>.

⁴ *Safe Harbor Privacy Principles*, U.S. DEP’T OF COMMERCE (July 21, 2000), at http://web.archive.org/web/20150908060809/http://export.gov/safeharbor/eu/eg_main_018475.asp. See also DEP’T OF COMMERCE, U.S.-EU SAFE HARBOR FRAMEWORK: A GUIDE TO SELF-CERTIFICATION (2009) [hereinafter SAFE HARBOR FRAMEWORK], available at <http://trade.gov/media/publications/pdf/safeharbor-selfcert2009.pdf>.

⁵ European Commission Press Release, European Commission Calls on the U.S. to Restore Trust in EU-U.S. Data Flows (Nov. 27, 2013), at http://europa.eu/rapid/press-release_IP-13-1166_en.htm.

⁶ Case C-362/14, Maximilian Schrems v. Data Protection Comm’r (June 25, 2013), at <http://curia.europa.eu/juris/celex.jsf?celex=62001CJ0286&lang1=en&type=TXT&ancre=> [hereinafter Schrems]. See also Megan Graham, *Adding Some Nuance to the European Court’s Safe Harbor Decision*, JUST SECURITY (Oct. 7, 2015), at <https://www.justsecurity.org/26651/adding-nuance-ecj-safe-harbor-decision/>.

⁷ See Article 29 Working Party, Statement of the Article 29 Working Party (Oct. 16, 2015), at http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2015/20151016_wp29_statement_on_schrems_judgement.pdf [hereinafter Article 29 Working Party Statement]. See also Zoya Sheftalovich, *The Phone Call that Saved Safe Harbor*, POLITICO (Feb. 5, 2016), at <http://www.politico.eu/article/the-phone-call-that-saved-safe-harbor-john-kerry-frans-timmermans/>.

obligations on companies in the U.S.,⁸ including stricter conditions for transfer of data to third parties for processing;⁹ more robust redress mechanisms, including the possibility of cost-free, binding arbitration;¹⁰ a new procedure to address complaints stemming from government access to personal data for national security purposes;¹¹ and stronger oversight by and cooperation between EU and U.S. agencies, including a joint annual review of compliance with the framework.¹²

The impetus for negotiating the Privacy Shield and its predecessor, the Safe Harbor framework, is a Data Protection Directive that the EU legislature issued in 1995.¹³ That Directive regulates data flow within and from the EU; it requires EU member states to prohibit transfers of personal data to third countries outside the EU unless the third country to which data is transferred “ensures an adequate level of protection.”¹⁴ The Directive provides that “[t]he adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations.”¹⁵ The Directive also provides that that the European Commission may find “that a third country ensures an adequate level of protection . . . by reason of its domestic law or of the international commitments it has entered into . . . for the protection of the private lives and basic freedoms and rights of individuals.”¹⁶

Following consultation with the European Union, industry, and public, the U.S. Department of Commerce issued Safe Harbor Privacy Principles for use by private U.S. firms “for the purpose of qualifying for the safe harbor and presumption of ‘adequacy’ [under European law] it creates.”¹⁷ Participating companies self-certified that they adhered to Safe Harbor’s principles relating to notice, choice, data transfer to third parties, access, security, data integrity, and enforcement.¹⁸ Participation in Safe Harbor was voluntary.¹⁹ (Companies that chose not to

⁸ European Commission Press Release, EU-U.S. Privacy Shield: Frequently Asked Questions (Feb. 29, 2016), at http://europa.eu/rapid/press-release_MEMO-16-434_en.htm; Privacy Shield, *supra* note 1, at 5 (Letter from Under Secretary for Trade Stefan Steliga to EU Commissioner Vera Jourova (Feb. 23, 2016)).

⁹ See *infra* notes 48–50.

¹⁰ See *infra* notes 60–61.

¹¹ See *infra* notes 66–68.

¹² See *infra* note 43.

¹³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L. 281) [hereinafter Data Protection Directive]. The Directive will be replaced by the General Data Protection Regulation, which will create a “single set of rules” regarding the transfer of personal data while increasing mechanisms for individuals’ access to information on how their data is processed. European Commission Press Release, Agreement on Commission’s EU Data Protection Reform will Boost Digital Single Market (Dec. 15, 2015), at http://europa.eu/rapid/press-release_IP-15-6321_en.htm.

¹⁴ Data Protection Directive, *supra* note 13, Art. 25(1).

¹⁵ *Id.* Art. 25(2). This provision continues: “[P]articular consideration shall be given to the nature of the data, the purposes and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rule of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.” *Id.*

¹⁶ *Id.* Art. 25(6).

¹⁷ SAFE HARBOR FRAMEWORK, *supra* note 4, at 10.

¹⁸ *Id.* at 4–6.

¹⁹ *Id.* at 4 (“The decision by U.S. organizations to enter the Safe Harbor is entirely voluntary. Organizations that decide to participate in the Safe Harbor must comply with the Safe Harbor’s requirements and publicly declare that they do so. To be assured of Safe Harbor benefits, an organization needs to self-certify annually in writing to the Department of Commerce that it agrees to adhere to the Safe Harbor’s requirements, which include elements such

participate in the Safe Harbor framework but wished to transfer data from the European Union to the United States had to find another legal basis for the transfer of data and remained subject to enforcement action by European data protection authorities.²⁰)

In 2000, the European Commission determined that the Safe Harbor principles for the transfer of data to the United States “are considered to ensure an adequate level of protection for personal data.”²¹

In 2013, Austrian national Maximillian Schrems filed a complaint with the Irish Data Protection Commissioner seeking to enjoin Facebook’s Irish subsidiary (and headquarters for Facebook’s European operations) from transferring his personal data to Facebook’s servers in the United States. Citing Edward Snowden’s revelations regarding the National Security Agency’s mass surveillance programs,²² Schrems argued that the “law and practice in force in [the United States] did not ensure adequate protection of the personal data held in its territory against the surveillance activities that were engaged in there by the public authorities.”²³

The Irish Data Protection Commissioner denied Schrems’s request, citing the Commission’s 2000 adequacy decision.²⁴ Schrems then brought an action before the Irish High Court.²⁵ Recognizing that Schrems’s suit challenged the European Commission’s 2000 adequacy decision, the Irish High Court asked the CJEU for a ruling on whether national-level supervisory authorities, such as the Irish Data Protection Commissioner, were “absolutely bound” by the 2000 decision—or whether such supervisory authorities could independently investigate challenges to the adequacy of protections provided by third states.²⁶

In its ruling in *Maximillian Schrems v. Irish Data Protection Commissioner*, the CJEU ultimately concluded that the Commission’s 2000 adequacy decision regarding the Safe Harbor

as notice, choice, access, and enforcement. It must also state in its published privacy policy statement complies with the U.S.-EU Safe Harbor Framework and that it has certified its adherence to the Safe Harbor Privacy Principles.”). See also Mark Scott, *U.S. and Europe in “Safe Harbor” Data Deal, but Legal Fight May Await*, N.Y. TIMES, Feb. 2, 2016, at B1.

²⁰ For example, as an alternative, parties might use Standard Contractual Clauses. See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS & COUNCIL OF EUROPE, HANDBOOK ON EUROPEAN DATA PROTECTION LAW 137 (2014), available at http://www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf. Both the data-exporting controller and third-party recipient (the American company) would sign the clause, which had been developed by the European Commission. This, in turn, would “provide the supervisory authority with sufficient proof that adequate safeguards are in place.” *Id.* at 137. See also *Model Contracts for the Transfer of Personal Data to Third Countries*, EUROPEAN COMMISSION (Feb. 12, 2015), at http://ec.europa.eu/justice/data-protection/international-transfers/transfer/index_en.htm.

²¹ Commission Decision 2000/520/EC, 2000 O.J. (L 215) 8.

²² Schrems, *supra* note 6, para 28. See also Barton Gellman, Julie Tate & Ashkan Soltani, *In NSA-Intercepted Data, Those not Targeted far Outnumber the Foreigners Who Are*, WASH. POST (July 5, 2014), at https://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322_story.html; Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), at https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html. See also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 783, 816 (2014).

²³ Schrems, *supra* note 6, para. 28.

²⁴ *Id.*, para. 29.

²⁵ *Id.*, para. 30.

²⁶ *Id.*, para. 36.

framework was invalid.²⁷ The CJEU stated that the phrase “adequate level of protection” found in the 1995 Directive “must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by virtue of [the 1995 Directive] read in light of the Charter [on Fundamental Rights].”²⁸ The CJEU also emphasized that, in examining the level of protection afforded by a third country, the 1995 Directive required it to “take account of all the circumstances surrounding a transfer of personal data to a third country.”²⁹

The CJEU focused in particular on a provision in the Safe Harbor Principles that stated: “Adherence to these Principles may be limited: (a) to the extent necessary to meet national security, public interest, or law enforcement requirements; [or] (b) by statute, government regulation, or case-law that create conflicting obligations or explicit authorisations.”³⁰ In the view of the CJEU, this provision significantly limited the protections provided by the Safe Harbor Principles by giving primacy to “national security, public interest, or law enforcement requirements” over those principles.³¹ By approving the Safe Harbor Principles even though they included this provision, the Commission’s 2000 Decision “enable[d] interference . . . with the fundamental rights of the persons whose personal data is or could be transferred from the European Union to the United States.”³²

Such interference with fundamental rights required safeguards, according to the CJEU, and the Commission failed to establish that the United States had put such safeguards in place:

90. [T]he Commission found that the United States authorities were able to access the personal data transferred from the Member States to the United States and process it in a way incompatible, in particular, with the purposes for which it was transferred, beyond what was strictly necessary and proportionate to the protection of national security. Also, the Commission noted that the data subjects had no administrative or judicial means of redress enabling, in particular, the data relating to them to be accessed and, as the case may be, rectified or erased.

91. . . . EU legislation involving interference with . . . fundamental rights . . . must . . . lay down clear and precise rules governing the scope and application of a measure and imposing minimum safeguards, so that the persons whose personal data is concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use of that data. . . .

²⁷ *Id.*, paras. 98, 104–05. See also European Commission, Communication from the Commission to the European Parliament and Council on the Transfer of Personal Data from the EU to the United State of America under Directive 95/46/EC following the Judgment by the Court of Justice in Case C-362/14 (Schrems), COM(2015) 566 final (Nov. 6, 2015).

²⁸ Schrems, *supra* note 6, para. 73.

²⁹ *Id.*, para. 75. See also Case C-362/14, Maximilian Schrems v. Data Protection Comm’r, Opinion of Advocate General Bot, para. 82 (Sept. 23, 2015), at <http://curia.europa.eu/juris/document/document.jsf?docid=168421&doclang=EN> (“It is undisputed, as set out in Article 25(2) of Directive 95/46, that the adequacy of the level of protection afforded by a third country is to be assessed in the light of a range of circumstances, both factual and legal. If one of those circumstances changes and appears to be such as to call into question the adequacy of the level of protection afforded by a third country, the national supervisory authority to which a complaint has been submitted must be able to draw the appropriate conclusions in relation to the contested transfer.”).

³⁰ Schrems, *supra* note 6, para. 8.

³¹ *Id.*, para. 86.

³² *Id.*, para. 87.

92. Furthermore and above all, protection of the fundamental right to respect for private life at EU level requires derogations and limitations in relation to the protection of personal data to apply only in so far as is strictly necessary. . . .

94. In particular, legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life. . . .

95. Likewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection. . . .

96. . . . [I]n order for the Commission to adopt a decision [that a third country ensures an adequate level of protection], it must find, duly stating reasons, that the third country concerned in fact ensures, by reason of its domestic law or its international commitments, a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order. . . .³³

Without such findings, the Commission could not conclude that the United States provided adequate protection, and the CJEU held the Commission's 2000 decision invalid.³⁴ The CJEU directed the Irish Data Protection Commissioner to investigate Schrems's complaint and decide independently whether the transfer of data from Facebook's Irish subsidiary to the U.S. should be suspended on the "ground that the country does not afford an adequate level of protection of personal data."³⁵

Industry groups, data protection advocates, and commentators reacted strongly to the CJEU's language about fundamental rights—especially the CJEU's assertion that "legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life."³⁶ Commentators emphasized that the ruling's consequences extended beyond the Safe Harbor agreement—and implicated data gathering and mass surveillance programs more broadly.³⁷

The United States and European Union had already been working on a new framework for regulating data flow before this decision; the Court's ruling added an element of urgency to the negotiations.³⁸ According to media reports, negotiations stalled until U.S. Secretary of State John Kerry was able to guarantee an independent ombudsperson in the Department of State

³³ *Id.*, paras. 90–96.

³⁴ *Id.*, para. 98.

³⁵ CJEU Press Release, The Court of Justice Declares that the Commission's U.S. Safe Harbour Decision is Invalid (Oct. 6, 2015), at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117en.pdf>.

³⁶ Schrems, *supra* note 6, para. 94.

³⁷ Christopher Kuner, *Reality and Illusion in EU Data Transfer Regulation Post Schrems*, UNIVERSITY OF CAMBRIDGE LEGAL STUDIES RESEARCH 14/2016, March 2016, at 29; Martin Scheinin, *Mass Surveillance and the Right to Privacy: Adding Nuance to the Schrems Case*, JUST SECURITY (Oct. 13, 2015), at <https://www.justsecurity.org/26781/adding-nuance-context-max-schrems-case-safe-harbor/>; Mark Scott, *Data Transfer Pact Between U.S. and Europe is Ruled Invalid*, N.Y. TIMES, Oct. 6, 2015, at B1.

³⁸ Scott, *supra* note 20. Article 29 Working Party Statement, *supra* note 7 (noting that unless an agreement is reached by the end of January 2016, "EU data protection authorities are committed to take all necessary and appropriate actions, which may include coordinated enforcement actions").

to oversee the complaints regarding American security agencies' access to Europeans' data.³⁹ On February 2, 2016, the United States and European Union announced a new political agreement to create the Privacy Shield as a replacement for the Safe Harbor framework.⁴⁰ The Privacy Shield retains some key features of the Safe Harbor framework. Participation remains voluntary and participating companies continue to self-certify compliance with the Privacy Shield Framework's requirements.⁴¹ Moreover, the Privacy Shield Framework Principles provide that "[a]dherence to these Principles may be limited: (a) to the extent necessary to meet national security, public interest, or law enforcement requirements," and "(b) by statute, government regulation, or case law that creates conflicting obligations or explicit authorizations, provided that, in exercising any such authorization, an organization can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorization."⁴²

In a press release, European officials have highlighted four aspects of the deal:

- *Strong obligations on companies and robust enforcement*: the new arrangement will be transparent and contain effective supervision mechanisms to ensure that companies respect their obligations, including sanctions or exclusion if they do not comply. The new rules also include tightened conditions for onward transfers to other partners by the companies participating in the scheme.
- *Clear safeguards and transparency obligations on U.S. government access*: for the first time, the U.S. government has given the EU written assurance from the Office of the Director of National Intelligence that any access of public authorities for national security purposes will be subject to clear limitations, safeguards and oversight mechanisms, preventing generalised access to personal data. U.S. Secretary of State John Kerry committed to establishing a redress possibility in the area of national intelligence for Europeans through an Ombudsperson mechanism within the Department of State, who will be independent from national security services. The Ombudsperson will follow-up complaints and enquiries by individuals and inform them whether the relevant laws have been complied with. These written commitments will be published in the U.S. federal register.
- *Effective protection of EU citizens' rights with several redress possibilities*: Complaints have to be resolved by companies within 45 days. A free of charge Alternative Dispute Resolution solution will be available. EU citizens can also go to their national Data Protection Authorities, who will work with the Federal Trade Commission to ensure that unresolved complaints by EU citizens are investigated and resolved. If a case is not resolved by any of the other means, as a last resort there will be an arbitration mechanism ensuring an enforceable remedy. Moreover, companies can commit to comply with advice from European [Data Protection Authorities]. This is obligatory for companies handling human resource data.
- *Annual joint review mechanism*: the mechanism will monitor the functioning of the Privacy Shield, including the commitments and assurance as regards access to data for law enforcement and national security purposes. The European Commission and the

³⁹ Sheftalovich, *supra* note 7.

⁴⁰ See *supra* note 1.

⁴¹ Dep't of Commerce Fact Sheet, *supra* note 1.

⁴² Privacy Shield, *supra* note 1, at 19.

U.S. Department of Commerce will conduct the review and associate national intelligence experts from the U.S. and European Data Protection Authorities. The Commission will draw on all other sources of information available, including transparency reports by companies on the extent of government access requests. The Commission will also hold an annual privacy summit with interested NGOs and stakeholders to discuss broader developments in the area of U.S. privacy law and their impact on Europeans. On the basis of the annual review, the Commission will issue a public report to the European Parliament and the Council.⁴³

On the U.S. side, the Department of Commerce explained that it was issuing the Privacy Shield Principles “under its statutory authority to foster, promote, and develop international commerce.”⁴⁴ Pursuant to those principles, participating companies may make a commitment to comply with them and self-certify their adherence to the Commerce Department; such commitments then become enforceable under U.S. law.⁴⁵ (In addition, the company must re-certify annually.⁴⁶) Participating companies must inform individuals of their rights to access their personal data.⁴⁷ Such companies must also offer individuals “the opportunity to choose . . . whether their personal information is (i) to be disclosed to a third party or (ii) to be used for a purpose that is materially different from the purpose(s) for which it was originally collected or subsequently authorized by the individuals.”⁴⁸ When a participating company transfers information to a third party, that company must enter into a contract providing that such data may only be processed for limited purposes consistent with the consent of the individual and that the data will continue to be protected according to the Privacy Shield’s standards.⁴⁹

Turning to enforcement, the Department of Commerce will monitor whether companies publish their privacy commitments and will conduct periodic compliance reviews.⁵⁰ The Department of Commerce has also committed to creating a point of contact for the European Data Protection Authorities (DPAs); this contact will assist the DPAs in uncovering information related to particular companies.⁵¹ The Federal Trade Commission will, in turn, enforce companies’ commitments.⁵² U.S. companies may also choose to resolve any complaints

⁴³ European Commission Press Release, Restoring Trust in Transatlantic Data Flows through Strong Safeguards: European Commission Presents EU-U.S. Privacy Shield (Feb. 29, 2016), at http://europa.eu/rapid/press-release_IP-16-433_en.htm. See also *Fact Sheet, EU-U.S. Privacy Shield*, EUROPEAN COMMISSION (Feb. 2016), at http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_eu-us_privacy_shield_en.pdf.

⁴⁴ Privacy Shield, *supra* note 1, at 18 (EU-U.S. Privacy Shield Principles) (citing 15 U.S.C. § 1512, which provides: “It shall be the province and duty of said Department to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, and fishery industries of the United States; and to this end it shall be vested with jurisdiction and control of the departments, bureaus, offices, and branches of the public service hereinafter specified, and with such other powers and duties as may be prescribed by law”).

⁴⁵ Privacy Shield, *supra* note 1, at 18 (EU-U.S. Privacy Shield Principles); *id.* at 4 (Letter from Under Secretary for Trade Stefan Stelig to EU Commissioner Vera Jourova).

⁴⁶ *Id.* at 19 (EU-U.S. Privacy Shield Principles).

⁴⁷ *Id.* at 21 (including “the type or identity of third parties to which it discloses personal information”). See also *Id.* at 5 (Letter from Under Secretary for Trade Stefan Stelig to EU Commissioner Vera Jourova).

⁴⁸ *Id.* at 22 (EU-U.S. Privacy Shield Principles).

⁴⁹ *Id.* at 20.

⁵⁰ *Id.* at 6–9 (Letter from Under Secretary for Trade Stefan Stelig to EU Commissioner Vera Jourova).

⁵¹ *Id.* at 9.

⁵² *Id.* at 68–73 (Letter from FTC Chairwoman Edith Ramirez to EU Commissioner Vera Jourova (Feb. 23, 2016)). The FTC has cited its authority under the Federal Trade Commission Act “to protect consumers worldwide

through the DPAs.⁵³ As under the Safe Harbor agreement, DPAs may refer any complaints they receive to the FTC for enforcement assistance.⁵⁴ Finally, the FTC, Department of Commerce, Department of State, and EU DPAs together will review the agreement annually.⁵⁵

European individuals will have several routes available to challenge the transfer of their personal data to U.S. servers in violation of the Privacy Shield. Among these, EU citizens can complain directly to U.S. companies that they believe are violating the Privacy Shield.⁵⁶ U.S. companies participating in the Privacy Shield must also provide an independent recourse mechanism to EU citizens at no cost;⁵⁷ possible sanctions “include both publicity for findings of non-compliance and the requirement to delete data in certain circumstances.”⁵⁸ If such mechanisms do not work, companies have committed to participating in binding arbitration;⁵⁹ the EU and U.S. have designed such arbitration as a last resort.⁶⁰ The arbitration panel “has the authority to impose individual-specific, non-monetary equitable relief (such as access, correction, deletion, or return of the individual’s data in question) necessary to remedy the violation of the Principles only with respect to the individual.”⁶¹

In regard to the U.S. surveillance program, the General Counsel for the Director of National Intelligence provided written assurances of the constitutional, statutory, and policy limitations that apply to its operations.⁶² Similarly, the Department of Justice provided a written overview of the limitations on the U.S. government’s ability to access commercial data.⁶³

Finally, the U.S. government has established the Privacy Shield Ombudsperson at the U.S. Department of State to investigate and respond to European citizens’ complaints about surveillance and access to personal data by U.S. national security agencies.⁶⁴ Kerry has appointed Under Secretary of State Catherine Novelli—who currently serves as a point

from practices taking place in the United States” as the basis for its authority to undertake enforcement actions outlined in the Privacy Shield. Privacy Shield, *supra* note 1, at 75–76 (The EU-U.S. Privacy Shield Framework in Context). *See also* 15 U.S.C. § 45(a)(4); Federal Trade Commission Press Release, Statement of FTC Chairwoman Edith Ramirez on EU-U.S. Privacy Shield Framework (Feb. 29, 2016), at <https://www.ftc.gov/news-events/press-releases/2016/02/statement-ftc-chairwoman-edith-ramirez-eu-us-privacy-shield-0>.

⁵³ Privacy Shield, *supra* note 1, at 28 (EU-U.S. Privacy Shield Principles).

⁵⁴ *Id.* at 72–73 (Letter from FTC Chairwoman Edith Ramirez to EU Commissioner Vera Jourova). *See also* EC Feb. 2 Press Release, *supra* note 1.

⁵⁵ Privacy Shield, *supra* note 1, at 71 (Letter from FTC Chairwoman Edith Ramirez to EU Commissioner Vera Jourova). *See also* Dep’t of Commerce Fact Sheet, *supra* note 1.

⁵⁶ Privacy Shield, *supra* note 1, at 39 (EU-U.S. Privacy Shield Principles).

⁵⁷ *Id.* at 24.

⁵⁸ *Id.* at 41.

⁵⁹ *Id.* at 40. *See also id.* (Annex I: Arbitral Model).

⁶⁰ *Id.* at 49 (Annex I: Arbitral Model).

⁶¹ *Id.*

⁶² *Id.* at 105 (Letter from Director of National Intelligence General Counsel Robert Litt to U.S. Dep’t of Commerce Counselor Justin Antonipillai and Int’l Trade Adm’n Deputy Assistant Sec’y Ted Dean).

⁶³ *Id.* at 124–28 (Letter from Deputy Assistant Attorney General Bruce Swartz to U.S. Dep’t of Commerce Counselor Justin Antonipillai and Int’l Trade Adm’n Deputy Assistant Sec’y Ted Dean).

⁶⁴ *Id.* at 57 (EU-U.S. Privacy Shield Framework Mechanism Regarding Signals Intelligence). *See also* Department of Commerce Fact Sheet, *supra* note 1; EC Feb. 2 Press Release, *supra* note 1. The Department of State has cited Section 4(d) of Presidential Policy Directive 28—directing the Secretary of State to designate a senior official to “serve as point of contact for foreign governments who wish to raise concerns regarding signals intelligence activities conducted by the United States”—as the basis for the creation of the Ombudsperson. Privacy Shield, *supra* note 1, at 55 (EU-US Privacy Shield Framework Mechanism Regarding Signals Intelligence).

of contact for foreign governments with concerns about U.S. signal intelligence activities—as the Ombudsperson.⁶⁵

Officials and commentators are divided as to whether the EU-U.S. Privacy Shield will survive the scrutiny of the CJEU in light of the *Schrems* ruling. U.S. Commerce Secretary Penny Pritzker stated, “We are confident that we have met the requirements of the [CJEU] ruling,” further noting that the agreement “will allow the digital economy in the European Union and United States to grow, which is so critical to jobs and economic security.”⁶⁶ Perhaps unsurprisingly, Schrems himself disagrees: “A couple of letters by the outgoing Obama administration is by no means a legal basis to guarantee the fundamental rights of 500 million European users in the long run.”⁶⁷ According to press reports, several consumer groups have indicated they plan to file complaints with European data protection authorities to challenge the new agreement.⁶⁸

INTERNATIONAL ORGANIZATIONS

After Lengthy Delay, Congress Approves IMF Governance Reforms that Empower Emerging Market and Developing Countries

In 2010, the United States pressed for a package of governance reforms to the International Monetary Fund (IMF) that would change the IMF’s quota system and executive board composition.¹ Five years later, in December 2015, the U.S. Congress finally approved those reforms. Although the IMF and other states welcomed this development, they also expressed disappointment and frustration about the long delay.²

The IMF Executive Board approved the proposed reforms in December 2010. Dominique Strauss-Kahn, then the IMF’s managing director, explained that the reforms would effect “the most fundamental governance overhaul in the Fund’s 65-year history and the biggest ever shift of influence in favor of emerging market and developing countries to recognize their growing

⁶⁵ *Id.* at 54 (Letter from Sec’y of State John Kerry to EU Commissioner Vera Jourova (Feb. 22, 2016)).

⁶⁶ Ellen Nakashima & Andrea Peterson, *European and US Negotiators Agree on New “Safe Harbor” Data Deal*, WASH. POST (Feb. 2, 2016), at https://www.washingtonpost.com/world/national-security/european-and-us-negotiators-agree-on-new-safe-harbor-data-deal/2016/02/02/f576e706-c9e5-11e5-a7b2-5a2f824b02c9_story.html. See also Department of Commerce Press Release, Statement from U.S. Sec’y of Commerce Penny Pritzker on EU-U.S. Privacy Shield (Feb. 2, 2016), at <https://www.commerce.gov/news/press-releases/2016/02/statement-us-secretary-commerce-penny-pritzker-eu-us-privacy-shield>.

⁶⁷ Nakashima & Peterson, *supra* note 66. Scott, *supra* note 19.

⁶⁸ Scott, *supra* note 19.

¹ Int’l Monetary Fund Board of Governors Res. 66-2, Fourteenth General Review of Quotas and Reform of the Executive Board (Dec. 15, 2010), in IMF, SELECTED DECISIONS AND SELECTED DOCUMENTS OF THE INTERNATIONAL MONETARY FUND 14–18 (2014), at <http://www.imf.org/external/pubs/ft/sd/2013/123113.pdf> [hereinafter IMF Selected Decisions and Documents] (proposing amendments to Articles XII, XXI, and XXIX, and to Schedules A, D, E, and L of the IMF’s Articles of Agreements); *G-20: Fact Sheet on IMF Reform*, THE WHITE HOUSE (Nov. 12, 2010), at <https://www.whitehouse.gov/the-press-office/2010/11/12/g-20-fact-sheet-imf-reform>; Sewell Chan, *Debt Crisis Highlights I.M.F.’s Renewed Role*, N.Y. TIMES, Nov. 26, 2010, at B3 (“Under pressure from the United States, Europe has ceded two seats on the fund’s board. . . .”); see also Edwin M. Truman, *IMF Reform is Waiting on the United States*, PETERSON INST. INT’L ECON., Mar. 2014, at 1, available at <https://www.piie.com/publications/pb/pb14-9.pdf> (identifying the Obama administration as the “principal architect” of the reform package).

² See Jackie Calmes, *I.M.F. Breakthrough Is Seen to Bolster U.S. on World Stage*, N.Y. TIMES, Jan. 6, 2016, at B1.

role in the global economy.”³ According to Strauss-Kahn, these changes would “enhance the credibility and effectiveness of the Fund’s ongoing efforts towards greater global financial stability.”⁴ The reforms address two key aspects of the IMF governance: quotas and executive board seats.

Quotas. As IMF documents explain, “[a] member country’s quota determines its maximum financial commitment to the IMF, its voting power, and has a bearing on its access to IMF financing.”⁵ The IMF’s constitutive Articles of Agreement require that the quotas be reviewed at least every five years.⁶ The 2010 reforms both doubled the total quota shares and reallocated them among the IMF’s member states. The IMF explained that these changes would “result in a shift of more than 6 percent of quota shares to dynamic emerging market and developing countries and more than 6 percent from over-represented to under-represented countries, while protecting the quota shares and voting power of the poorest members.”⁷ Brazil, China, India, and Russia would each increase their quota share and, for the first time, would rank among the IMF’s ten largest contributors.⁸ In addition to doubling and reallocating quotas, the proposed reforms would reduce the size of commitments to the New Arrangements to Borrow (NAB) for some member states.⁹ In the end, the reforms would not significantly change the financial resources available to the IMF—but they would “reform[] its governance by redistributing voting power.”¹⁰ According to proponents of these reforms, these changes have additional benefits. They would enable the IMF to move more quickly during crises because NAB resources are more difficult to use than quota resources.¹¹ These changes would also reinforce “the legitimacy of the IMF as a quota-based institution, where many crucial aspects of the organization, including access to finances and voting power, are influenced by quota.”¹²

³ IMF Press Release, IMF Executive Board Approves Major Overhaul of Quotas and Governance, IMF Press Release No. 10/418, (Nov. 5, 2010) [hereinafter Press Release No. 10/418].

⁴ *Id.*

⁵ *Factsheet: IMF Quotas*, IMF (Jan. 27, 2016), at <http://www.imf.org/external/np/ext/facts/quotas.htm> [hereinafter *Factsheet: IMF Quotas*].

⁶ Articles of Agreement of the IMF, Art. III(4) sec. (a), 60 Stat. 1401, 2 UNTS 39 [hereinafter IMF Articles of Agreement]; *Fact Sheet: IMF Quotas*, *supra* note 5 (explaining that quota reviews allow the IMF to “assess the adequacy of quotas both in terms of members’ balance of payments financing needs and in terms of its own ability to help meet those needs” and to increase members’ quotas “to reflect changes in their relative positions in the world economy”).

⁷ Press Release No. 10/418, *supra* note 3.

⁸ *Id.*

⁹ *Id.* The Congressional Research Service explains: “In addition to its quota resources, the IMF maintains standing multilateral borrowing arrangements to temporarily supplement available quota resources and borrowing. The main borrowing arrangement, the New Arrangements to Borrow (NAB), is a set of credit arrangements between the IMF and 38 member countries that can provide about \$510 billion of supplementary resources to the IMF.” REBECCA M. NELSON & MARTIN A. WEISS, CONG. RESEARCH SERV., R42844, IMF REFORMS: ISSUES FOR CONGRESS 3 (2015).

¹⁰ Truman, *supra* note 1, at 2.

¹¹ NELSON & WEISS, *supra* note 9, at 4.

¹² *Id.*; see also Edwin M. Truman, *The Congress Should Support IMF Governance Reform to Help Stabilize the World Economy*, PETERSON INST. INT’L ECON., Mar. 2013, at 7, available at <http://www.piie.com/publications/pb/pb13-7.pdf> (“IMF use of borrowed resources involves a second layer of rules, which tends to undermine the basic governance structure of the institution.”).

Executive Board. The IMF's twenty-four-person Executive Board "is responsible for conducting the day-to-day business of the IMF."¹³ When the 2010 reforms were proposed, the states with the five largest quotas (France, Germany, Japan, the United Kingdom, and the United States) each appointed one executive director, and other members conducted an election to select the remaining nineteen executive directors.¹⁴ Even before the 2010 reforms, three other members with comparatively large voting shares (China, Russia, and Saudi Arabia) "elected" their own individual board members.¹⁵ Other member states organized themselves into groups, usually based on geographical or historical affinity, and elected a single board member to represent the group and cast votes on its behalf.¹⁶

The proposed amendment would eliminate the five appointed positions and create an all-elected board.¹⁷ This proposed amendment was coupled with a political commitment by IMF member states to reduce by two the number of executive directors representing advanced European countries, thereby allowing emerging and developing countries to control two additional seats on the board.¹⁸ (To do this, advanced European countries could consolidate and organize into fewer groups; in addition, groups that include both advanced European countries and others could select an executive director from an emerging economy or developing country.) The IMF explained that these changes to the executive board would make the board "more representative."¹⁹ These changes would not change much, if anything, for the United States. According to the Congressional Research Service, "[u]nder the reform, large shareholders like the United States could still represent a constituency of one country (themselves), but other countries could in theory elect to join a large member's constituency, subject to the rules of the Fund, which aim to maintain constituencies balanced in terms of voting power."²⁰

Under the IMF's Articles of Agreement, in order to become effective, quota changes must be approved by an eight-five percent majority of the total voting power.²¹ Proposed amendments must be approved first by the IMF's Board of Governors and then accepted by "three-fifths of the members, having eighty-five percent of the total voting power."²² The Board of

¹³ *IMF Executive Directors and Voting Power*, IMF, at <https://www.imf.org/external/np/sec/memdir/eds.aspx> (last updated Feb. 21, 2016).

¹⁴ Alexander Mountford, *The Formal Governance Structure of the International Monetary Fund*, IMF Doc. No. BP/08/01, at 11 (Mar. 2008) ("The election rules are quite complex but are intended to ensure a reasonable geographical balance in member countries' representation, and to facilitate the continuation of constituency arrangements that members have made among themselves and wish to preserve.").

¹⁵ *Id.*; see also NELSON & WEISS, *supra* note 9, at 8 n.17.

¹⁶ See MARK S. COPELOVITCH: *THE INTERNATIONAL MONETARY FUND IN THE GLOBAL ECONOMY* 45 (2010). For example, Austria, Belgium, Luxembourg, Turkey, and several central and eastern European countries had formed a group to elect a single executive director, who casts the combined votes on behalf of the "constituency" that elected him or her. *Id.* For some of these groups, the largest country traditionally held the executive director position, while for others, the seat rotates among countries in the group. *Id.*

¹⁷ Press Release No. 10/418, *supra* note 3.

¹⁸ IMF, Bd. Of Governors Resolution No. 66-2 (Dec. 15, 2010).

¹⁹ *Id.*

²⁰ NELSON & WEISS, *supra* note 9, at 9.

²¹ IMF Articles of Agreement, *supra* note 6, Art. III(3) sec. 2(c) ("An eight-five percent majority of the total voting power shall be required for any change in quotas."); see also *id.* Art. III(3) sec. 3 (certain decisions regarding payments when quotas are changed must be approved by a 70 percent majority of the total voting power).

²² *Id.* Art. XXVIII(a).

Governors approved the proposed amendment swiftly and by an overwhelming margin.²³ Because the United States casts just under 17 percent of the voting shares in the IMF,²⁴ however, neither the quota changes nor the amendment could enter into force unless and until the United States accepted them. And, under the statutory framework governing U.S. participation in the IMF, the United States cannot do so without congressional approval.²⁵ By contrast, the composition of the executive board is determined through a more informal process, and some steps towards realigning representation on the executive board were taken in November 2012.²⁶

The Obama administration did not immediately submit legislation to approve and implement the IMF reforms. Commentators have suggested several possible reasons for the delay, including election-year politics during 2012.²⁷ In addition, some legislators who opposed the IMF's involvement in European debt crises had introduced legislation that would repeal existing financial commitments to the IMF.²⁸ Starting in 2013, the administration included authorization and appropriation requests for the amendments in the budgets it submitted to Congress.²⁹ But Congress did not enact the relevant provisions immediately.³⁰ Congress came close to approving them in early 2014 as part of a bill to assist Ukraine, but that language was removed from the final version of the bill.³¹

In March 2015, Jacob Lew, the Secretary of the Treasury, testified before Congress about the importance of approving the reforms:

A well-resourced and effective IMF is indispensable to achieving our economic and national security interests, protecting the health of the U.S. economy, and enhancing the prosperity of America's workers. . . . The proposed reforms will put the IMF's finances on more stable footing over the long-term, help modernize the IMF's governance structure, and preserve America's strong leadership role in shaping the institution.

The Administration has included the required legislation in our budget request, and we are prepared to work with Congress to secure passage of these critical reforms as soon as

²³ IMF Press Release, IMF Board of Governors Approves Major Quota and Governance Reforms, IMF Press Release No. 10/477 (Dec. 16, 2010) ("When voting ended on December 15, 2010, Governors representing 95.32 percent of the total voting power had cast votes in favor of a Resolution on Quota and Reform of the Executive Board.")

²⁴ *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, INT'L MONETARY FUND (Apr. 18, 2016), at <https://www.imf.org/external/np/sec/memdir/members.aspx#1>.

²⁵ 22 U.S.C. § 286c (2012) ("Unless Congress by law authorizes such action, neither the President nor any person or agency shall on behalf of the United States (a) request or consent to any change in the quota of the United States . . . or (e) accept any amendment under article XXVIII of the Articles of Agreement of the Fund.")

²⁶ NELSON & WEISS, *supra* note 9, at 11–12.

²⁷ Truman, *supra* note 12, at 5–7.

²⁸ *Id.*; see also Jim DeMint, Editorial, *How the U.S. Can Help Europe: Just Say No*, WALL ST. J., Dec. 9, 2011, at A15.

²⁹ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2014 132 (2013); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2015 186 tbl. S-9 (2014); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2016 117 tbl. S-9 (2015).

³⁰ Ian Talley, *White House Pushes IMF Changes*, WALL ST. J., Dec. 28, 2013, at A4.

³¹ Ed O'Keefe, *Senate Ukraine Aid Bill Will Not Include IMF Changes*, WASH. POST (Mar. 25, 2014), at <https://www.washingtonpost.com/news/post-politics/wp/2014/03/25/reid-considering-dropping-imf-language-from-ukraine-aid-bill/>; see Ukraine Freedom Support Act of 2014, Pub. L. No. 113-272, 128 Stat. 2952.

possible. Specifically, the legislation increases the U.S. quota in the IMF and simultaneously reduces, by an equal amount, U.S. participation in the IMF's New Arrangements to Borrow (NAB). The legislation also includes an amendment to the IMF's Articles of Agreement that facilitates changes in the composition of the IMF Executive Board but preserves U.S. influence on the Board.

Our continued failure to approve the IMF quota and governance reforms is causing other countries, including some of our allies, to question our commitment to the IMF and other multilateral institutions. . . . Our international credibility and influence are being threatened.

As emerging economies have grown, they have gained greater voice in global economic policy. It is important that we recognize this enhanced role in multilateral institutions such as the IMF and encourage their commitment even as we maintain our leadership and veto position.

Implementation of the 2010 reforms is critical to reinforcing the central position of the IMF, especially as others are establishing new and parallel financial institutions. The IMF reforms will help convince emerging economies to remain anchored in the multilateral system that the United States helped design and continues to lead.

The U.S. is constantly pushing to accomplish important policy objectives through the IMF—from supporting Ukraine's financing needs to providing debt relief for countries affected by Ebola. But, because Congress has not yet enacted reform legislation, our leadership in the IMF is being undermined. For instance, the IMF has sought to bolster its precautionary resources by securing bilateral borrowing agreements with China, Germany, Korea, and others.

. . .

Let me be very clear: These reforms do not increase the current U.S. financial commitment to the IMF. Instead, they change the composition, but not the level, of our financial commitment. The U.S. quota increase will be matched by an equal and permanent reduction in U.S. financial participation in the NAB. We look forward to working with Congress on approaches to get legislation passed as soon as possible.³²

Congress finally approved the reforms in December 2015—but not without conditions.³³ First, Congress required that the U.S. member on the IMF Executive Board consult Congress before voting for an “exceptional access loan,”³⁴ a loan that exceeds normal IMF limits.³⁵ Second, Congress required the U.S. member on the IMF Executive Board “to urge the Executive Board of the Fund to repeal the systemic risk exemption,”³⁶ a rule that had been adopted in 2010 to allow the IMF to loan funds to Greece, Portugal, and Ireland notwithstanding their

³² *The Annual Testimony of the Secretary of the Treasury on the State of the International Financial System: Hearing before the H. Comm. on Financial Services*, 114th Cong. 76–77 (2015) (statement by Jacob Lew, Secretary of the Treasury).

³³ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 9, 129 Stat. 2242, 2828-34 (2015) (to be codified at 22 U.S.C. §§ 286e-2, 286ww, 286xx, 286o).

³⁴ *Id.*

³⁵ See IMF Press Release, IMF Executive Board Approves Exceptional Access Lending Framework Reforms, IMF Press Release No. 16/31 (Jan. 29, 2016).

³⁶ Consolidated Appropriations Act, 2016, § 9, 129 Stat. at 2828.

high debt burdens.³⁷ Finally, Congress imposed a condition on implementing the IMF reforms, prohibiting disbursement of the quota increase until the Secretary of the Treasury reported that “the United States has taken all necessary steps to secure repeal of the systemic risk exemption.”³⁸ On January 29, 2015, the IMF repealed the systemic risk exemption.³⁹

The IMF welcomed Congress’s approval, which allowed the amendment to finally enter into force.⁴⁰ But there was also sharp criticism of the five-year delay. The British Chancellor of the Exchequer—the counterpart to the U.S. Secretary of Treasury—stated: “It is a tragedy that an agreement reached across all the members of the IMF, including by the U.S. administration, is being blocked by one legislature in the world, the U.S. Congress.”⁴¹ China too expressed dissatisfaction: “The 2010 quota reform has been delayed for so long. IMF members are not simply disappointed but frustrated.”⁴²

Around the same time, China proceeded with launching the Asian Infrastructure Investment Bank (AIIB),⁴³ an institution designed to “address the daunting infrastructure needs in Asia.”⁴⁴ The United States initially opposed the AIIB and heavily lobbied its Asian and European allies not to join, claiming that the AIIB would undercut both the World Bank and the Asian Development Bank—two institutions dominated by the United States and Japan.⁴⁵ By the end of March 2015, however, it became clear that many U.S. allies, including France, Germany, Italy, South Korea, and the United Kingdom, would join the AIIB.⁴⁶ At that point, Lew struck a more positive tone:

We have made clear to China that the United States stands ready to welcome new additions to the international development architecture, including the Asian Infrastructure Investment Bank, provided that these institutions complement existing international financial

³⁷ Calmes, *supra* note 2; Ian Talley, *How Congress Finally Passed IMF Governance Overhauls, Five Years After the Deal Was Signed*, WALL ST. J. (Jan. 4, 2016), at <http://blogs.wsj.com/economics/2016/01/04/how-congress-finally-passed-imf-governance-overhauls-five-years-after-the-deal-was-signed/> (“Critics say the IMF’s so-called ‘systemic exemption’ loophole, which allowed the fund to green-light an unprecedented amount of money to Greece in 2010 despite clear signs the country’s debt was unsustainable, fuels irresponsible borrowing by countries and feckless risk-taking by markets.”).

³⁸ Consolidated Appropriations Act, 2016, § 9, 129 Stat. at 2828.

³⁹ Press Release No. 16/31, *supra* note 35.

⁴⁰ IMF Press Release, IMF Managing Director Christine Lagarde Welcomes U.S. Congressional Approval of the 2010 Quota and Governance Reforms, IMF Press Release No. 15/573 (Dec. 18, 2015) (“The United States Congress approval of these reforms is a welcome and crucial step forward that will strengthen the IMF in its role of supporting global financial stability. The reforms significantly increase the IMF’s core resources, enabling us to respond to crises more effectively, and also improve the IMF’s governance by better reflecting the increasing role of dynamic emerging and developing countries in the global economy. A more representative, modern IMF will be even better equipped to meet the needs of all its 188 member countries in the 21st century.”) (statement of IMF Managing Director Christine Lagarde).

⁴¹ Jonathan Spicer, *Osborne Calls U.S. Congress’s China Stance a “Tragedy,”* REUTERS (Dec. 7, 2015), at <http://uk.reuters.com/article/uk-britain-osborne-idUKKBN0TQ2BL20151207>.

⁴² An Lu, *China’s Zhou Says IMF Members Frustrated with Quota Reform Delay*, XINHUANET (Apr. 17, 2015), at http://news.xinhuanet.com/english/2015-04/18/c_134160977.htm (statement of China’s Central Bank Governor Zhou Xiaochuan).

⁴³ Jane Perlez, *China Creates a World Bank of Its Own, and the U.S. Balks*, N.Y. TIMES, Dec. 4, 2015, at A1.

⁴⁴ *What is the AIIB?*, THE ASIAN INFRASTRUCTURE INVESTMENT BANK, at <http://euweb.aiib.org/html/about-us/introduction/aiib/?show=0> (last visited Apr. 25, 2016).

⁴⁵ Jane Perlez, *U.S. Opposing China’s Answer to World Bank*, N.Y. TIMES, Oct. 9, 2014, at A1.

⁴⁶ Andrew Higgins & David E. Sanger, *3 European Powers Say They Will Join China-Led Bank*, N.Y. TIMES, Mar. 17, 2015, at A4.

institutions and that they share the international community's strong commitment to genuine multilateral decision making and ever-improving lending standards and safeguards. The standards and safeguards are designed to foster sustainable development by curbing corruption, preventing environmental damage, and ensuring protection of both laborers and affected communities.⁴⁷

When Congress did finally approve the IMF reforms, Lew attributed Congress's action, in part, to the rise of the AIIB, "which was poised to fill a vacuum left by the United States" had Congress delayed any further.⁴⁸

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

United States Joins Consensus on Paris Climate Agreement

On December 12, 2015, 196 nations agreed to the terms of the Paris Agreement, a treaty that aims to limit increases in global average temperature to "well below 2° Celsius above pre-industrial levels."¹ The agreement adopts a "bottom-up" framework, meaning that all parties independently determine how much they will reduce their greenhouse gas emissions. While the commitments themselves are not legally binding, the Agreement does impose a legal obligation on parties to report their commitments and steps taken towards implementation; these reports are subject to monitoring and verification.² The agreement also creates a framework for evaluating progress towards meeting the treaty's goal and for revising parties' commitments every five years. U.S. Secretary of State John Kerry praised the agreement for its ambition, flexibility (because it "allow[s] different countries to do what they're able to do, reflecting their national capacity and their economies, [and] their capabilities"), and "unprecedented level of transparency."³ UN Secretary-General Ban Ki-moon described the Agreement as "a triumph for people, the planet, and for multilateralism."⁴

The negotiations that led to the Paris Agreement took place at the 21st Conference of the Parties (COP) to the 1992 UN Framework Convention on Climate Change (UNFCCC).⁵ Until the Paris Agreement, the parties to the UNFCCC failed to reach a universal, binding agreement to reduce quantified greenhouse gas emissions. The 1997 Kyoto Protocol bound

⁴⁷ U.S. Dep't of Treasury Press Release, Remarks of Secretary Lew at the Asia Society Northern California on the International Economic Architecture and the Importance of Aiming High (Mar. 31, 2015), at <https://www.treasury.gov/press-center/press-releases/Pages/jl10014.aspx>.

⁴⁸ Calmes, *supra* note 2.

¹ Paris Agreement, *in* United Nations Framework Convention on Climate Change [UNFCCC], Conference of the Parties, Rep. on its Twenty-First Sess. [hereinafter COP Report No. 21], Annex, Art. 2, UN Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) (advance version) [hereinafter Paris Agreement].

² *Id.* Arts. 4, 13.

³ U.S. Dep't of State Press Release, John Kerry, U.S. Secretary of State, Press Availability, (Dec. 12, 2015), at <http://www.state.gov/secretary/remarks/2015/12/250590.htm>.

⁴ United Nations Press Release, Paris Climate Change Agreement "A Triumph for People, Planet" Secretary-General Tells General Assembly (Dec. 15, 2015), at <http://www.un.org/press/en/2015/sgsm17417.doc.htm>.

⁵ United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38 (1992), 1771 UNTS 107 [hereinafter the UNFCCC]. The Convention does not impose legally binding limits on parties' emissions, but establishes the ultimate objective of achieving "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." *Id.* Art. 2. For a more detailed account of the developments leading to the Paris Agreement, see Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AJIL 288 (2016).

developed-state parties to compulsory targets and timetables for reducing emissions,⁶ but notably, the United States did not ratify it.⁷ A major reason for the United States' nonparticipation was the dichotomous way the Protocol treated developing and developed states; it imposed binding, quantified obligations to reduce greenhouse gas emissions only on the latter. Some U.S. government officials specifically objected to the lack of obligations on China to justify rejecting the Kyoto Protocol.⁸ Given this history, the likelihood of a universal agreement in Paris greatly increased following a November 2014 joint announcement in which the United States and China indicated their respective emission reduction targets in anticipation of the Paris negotiations.⁹ These emission targets would constitute the two states' "Intended Nationally Determined Contributions" (INDCs), discussed in detail below.

In December 2014, the parties to the UNFCCC met for the 20th COP in Lima, Peru, where they elaborated the elements of the anticipated universal climate change agreement.¹⁰ Over the next year, 187 parties submitted INDCs outlining the steps they would take to combat climate change,¹¹ indicating significant support from the global community leading up to the Paris negotiations.¹²

By the time 150 heads of state gathered in Paris on November 30, 2015, the areas of agreement and contention had become evident. The submission of INDCs by a substantial majority of the parties illustrated the widespread buy-in of the "bottom up" approach under the new regime. There was disagreement, however, as to whether the INDCs would be incorporated into the Agreement as legally binding obligations. The United States insisted that domestic targets not carry the force of law (for reasons discussed below), while the European Union and many small island nations pushed for binding INDCs.¹³ One thing was clear: by inviting countries to define their own mitigation measures, the Paris Agreement eschewed the strict binary

⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 UNTS 162) [hereinafter Kyoto Protocol].

⁷ E.g., Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 195, 197 (2015); Sean D. Murphy, *Contemporary Practice of the United States*, 95 AJIL 647 (2001).

⁸ Daugirdas & Mortenson, *supra* note 7, at 197.

⁹ In this joint announcement, President Barack Obama announced a new target to cut net greenhouse gas emissions 26–28% below 2005 levels by 2025, and Chinese President Xi Jinping announced targets to peak CO₂ emissions around 2030 and to increase the non-fossil fuel share of all energy to around 20% by 2030. The White House Press Release, U.S.-China Joint Announcement on Climate Change (Nov. 11, 2014), at <http://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>; see also UN Press Release, Commending Joint Announcement by China, United States for Post-2020 Action on Climate Change, Secretary-General Urges All Countries to Follow Lead (Nov. 11, 2014), at <http://www.un.org/press/en/2014/sgsm16333.doc.htm> (statement by UN Secretary-General Ban Ki-moon that with the joint announcement by China and the United States and other international commitments, "a strong foundation has been laid and momentum is building towards a meaningful climate agreement in 2015").

¹⁰ UNFCCC Press Release, Lima Call for Climate Action Puts World on Track to Paris 2015 (Dec. 14, 2014), at <http://newsroom.unfccc.int/lima/lima-call-for-climate-action-puts-world-on-track-to-paris-2015/>.

¹¹ As of December 15, 2015, 160 INDCs had been submitted, reflecting 187 countries (including the European Union member states). *Comparison of INDCs*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, at <http://www.c2es.org/indc-comparison> (last updated Dec. 21, 2015); *INDCs as Communicated by Parties*, UNFCCC, <http://www4.unfccc.int/submissions/INDC/Submission%20Pages/submissions.aspx> (last visited Mar. 1, 2016).

¹² See *Live at State with Special Envoy for Climate Change Todd Stern on COP21 in Paris*, U.S. DEP'T OF STATE (Nov. 24, 2015), at <http://www.state.gov/r/pa/ime/249970.htm> [hereinafter *Todd Stern*] ("Nobody would go through the blood, sweat, and tears that it takes to put together one of these targets if they didn't think the agreement was going to happen and if they weren't fundamentally bought in to an agreement happening.")

¹³ See *id.* (stating that "[t]he thing that would not be legally binding . . . is the targets themselves"); Fiona Harvey, *Paris Climate Change Agreement: The World's Greatest Diplomatic Success*, THE GUARDIAN (Dec. 14, 2015), at

differentiation between developing and developed countries that characterized the Kyoto Protocol.¹⁴ Nevertheless, many developing countries, including China, favored preserving some version of the dichotomy so as to accord different climate-protection responsibilities to different countries based their level of development.¹⁵

Transparency also proved to be a controversial issue. The United States pressed for requirements that governments monitor, verify, and report their emissions reductions to an international body of experts.¹⁶ Some commentators have suggested that the U.S. firm stance on transparency was due in part to a November 2015 report that China had been underreporting aggregate emissions from its coal-fired power plants.¹⁷ Some developing nations resisted these transparency proposals, reportedly considering them “intrusive and a potential violation of sovereignty.”¹⁸

The parties also disputed the appropriate level of ambition for reducing global warming and the appropriate means for meeting this worldwide goal. The Copenhagen Accord of 2009 first “recogniz[ed] the scientific view that the increase in global temperature should be below two degrees Celsius.”¹⁹ According to a UN report, the first 119 INDCs submitted (which represented 75 percent of the parties and 86 percent of global greenhouse gas emissions) would not be sufficient to meet this goal.²⁰ Nevertheless, China, the European Union, the United States, and numerous island countries supported a more ambitious goal of limiting global temperature increases to 1.5 degrees.²¹ Saudi Arabia and some other oil-producing countries in the Middle East opposed this target as impractical.²² Moreover, the parties disagreed about how to reach

<http://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations>; see also *infra* note 71 and accompanying text.

¹⁴ See Daugirdas & Mortenson, *supra* note 7, at 197; Todd Stern, *supra* note 12 (“[W]e need to move this agreement from the old-style, backward-looking bifurcation between two distinct categories into a world which is forward-looking, where there is differentiation across the range of countries.”).

¹⁵ See, e.g., Zhang Chun, *What is China's Position at Paris Climate Talks?*, CHINA DIALOGUE (Nov. 30, 2015), at <https://www.chinadialogue.net/article/show/single/en/8356-What-is-China-s-position-at-Paris-climate-talks> (interview with Chinese climate envoy Xie Zhenhua).

¹⁶ See Todd Stern, *supra* note 12 (explaining the monitoring, reporting, and verification procedures endorsed by the United States).

¹⁷ See Chris Buckley, *China Burns Much More Coal Than Reported, Complicating Climate Talks*, N.Y. TIMES, Nov. 3, 2015, at A1.

¹⁸ Coral Davenport, *Trust and Money at Core of Crucial Paris Talks on Climate Change*, N.Y. TIMES, Dec. 6, 2015, at A7.

¹⁹ Copenhagen Accord, (Dec. 18, 2009), in UNFCCC, Conference of the Parties, Rep. on its Fifteenth Sess., Addendum, at 5, UN Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010).

²⁰ Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions, in COP Report No. 21, UN Doc. FCCC/CP/2015/7, para. 8, 204 (Oct. 30, 2015) (finding that aggregate emissions resulting from implementation of INDCs communicated by October 1, 2015 “do not fall within the range of least-cost 2° C scenarios”); see also *Climate Scoreboard*, CLIMATE INTERACTIVE, at <https://www.climateinteractive.org/tools/scoreboard/> (last visited Mar. 1, 2016) (estimating a global temperature increase of 3.5 degrees Celsius above pre-industrial levels if all INDCs communicated before the conclusion of the Paris Agreement are implemented without further action).

²¹ Robinson Meyer, *A Reader's Guide to the Paris Agreement*, ATLANTIC (Dec. 16, 2015), at <http://www.theatlantic.com/science/archive/2015/12/a-readers-guide-to-the-paris-agreement/420345/>; John Vidal & Fiona Harvey, *Paris Climate Talks: Vulnerable Countries Demand 1.5C Warming Limit*, GUARDIAN (Nov. 30, 2015), at <http://www.theguardian.com/global-development/2015/nov/30/paris-climate-talks-vulnerable-countries-demand-15c-warming-limit>.

²² See, e.g., Suzanne Goldenberg, *Saudi Arabia Accused of Trying to Wreck Paris Climate Deal*, GUARDIAN (Dec. 8, 2015), at <http://www.theguardian.com/environment/2015/dec/08/saudi-arabia-accused-of-trying-to-wreck-the-paris-climate-deal>.

any numerical target. Vulnerable island nations called for “decarbonization”—or the complete elimination of greenhouse gas emissions—in the second half of the century, but Saudi Arabia resisted.²³

Clear divides between developed and developing nations also emerged around financial aspects of the anticipated agreement. Prior to the Paris negotiations, Christina Figueres, the executive secretary of the UN Framework Convention on Climate Change, described climate finance—the issue of who will pay to combat and adapt to climate change—as the “most crucial component” needing greater clarity.²⁴ She identified mutual “lack of trust” as the root of the disagreement: developing countries questioned whether developed countries would deliver on commitments to provide climate financing to developing states, while developed countries questioned the ways that the recipients would spend such funds.²⁵ According to reports, proposals from the developing country negotiating block (comprised of the G77 and China) sharply differed from those presented by developed countries, specifically with regard to the source, amount, and progression of climate finance.²⁶

In addition to climate finance, developed and developing countries disagreed on the issue of “loss and damage.” Loss and damage refers to the long-term adverse effects of climate change, including those that cannot be adequately addressed through adaptation or risk management strategies.²⁷ Developing countries, especially vulnerable island nations, wanted to hold developed countries liable for the loss and damage the former sustained as a result of climate change, the logic being that developed countries, like the United States, are responsible for the bulk of emissions to date.²⁸ From the U.S. perspective, providing compensation for loss and damage opened the door to ongoing liability for climate change reparations—liability the United States was not willing to accept.²⁹

Despite these disagreements, all 196 nations consented to the final text of the Agreement on December 12, 2015. To balance competing demands for binding and non-binding commitments, the final Agreement included both mandatory and non-mandatory provisions.³⁰ As explained in greater detail below, the United States sought to limit the legal obligations in the Paris Agreement in part to avoid the need for ex post approval by the

²³ Meyer, *supra* note 21.

²⁴ “Lack of Trust” on Climate Finance, Figueres Warns Before Paris Negotiations, BLOOMBERG NEWS (July 1, 2015), at <http://www.bna.com/lack-trust-climate-n17179928952/> (interview with Christina Figueres at the UN High Level Event on Climate Change in July 2015).

²⁵ *Id.*

²⁶ See Ed King, *Life or Death: G77 Demands Climate Finance Guarantee*, CLIMATE HOME (Oct. 22, 2015), at <http://www.climatechangenews.com/2015/10/22/life-or-death-g77-demands-climate-finance-guarantee/>.

²⁷ Decision 2/CP.19 (Nov. 11–23, 2015), in COP Report No. 19, UN Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2014).

²⁸ See Chris Mooney, *The Key, Tricky Details That Will Determine Whether the Paris Climate Meeting Succeeds*, WASH. POST (Dec. 1, 2015), at <https://www.washingtonpost.com/news/energy-environment/wp/2015/12/01/these-are-the-key-tricky-details-that-will-determine-whether-the-paris-climate-meeting-succeeds/>.

²⁹ U.S. Dep’t of State Press Release, COP21 Press Availability with Special Envoy Todd Stern (Dec. 2, 2015), at <http://go.usa.gov/cBmFd> (“We’ve also made it clear that we are not at all supportive of and would not accept the notion of liability and compensation being part of that.”).

³⁰ For a more detailed analysis of these provisions, see Bodansky, *supra* note 5.

Senate or Congress as a whole. Separately, the parties to the UNFCCC also adopted a non-binding decision (Paris Decision) that addresses some key contested issues.³¹

Article 3 of the Paris Agreement addresses each party's nationally determined contribution (NDC):³² "all Parties are to undertake and communicate ambitious efforts . . . with the view to achieving the purpose of this Agreement as set out in Article 2."³³ Article 2 states that the Agreement is meant to enhance the implementation and objective of the UNFCCC, including by "[h]olding the increase in the global average temperature to well below 2° C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5° C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."³⁴

Article 4 establishes uniform procedures that govern the NDCs; it also preserves some degree of differentiation, as follows:

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. . . .
3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.
4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.³⁵

This framework evidently satisfied China's desire for differentiation as well as the United States' desire for a forward-looking approach that does not rigidly classify countries as developed or developing.³⁶

The Agreement also reflects a balancing of preferences with respect to transparency. Article 4 requires that NDCs be recorded in a public registry,³⁷ which some commentators see as a mechanism for public shaming to motivate compliance.³⁸ Article 13 sets out further reporting requirements; it reads in part:

³¹ Decision 1/CP.21 (Nov. 30–Dec. 11, 2015), in COP Report No. 21, UN Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter Paris Decision].

³² The Paris Decision provides that INDCs communicated before joining the Paris Agreement will be treated as NDCs for purposes of the Paris Agreement unless the party submitting the INDC decides otherwise. *Id.*, para. 22.

³³ Paris Agreement, *supra* note 1, Art. 3.

³⁴ *Id.* Art. 2(1)(a).

³⁵ *Id.* Art. 4.

³⁶ Although the Agreement does use the terms "developed country" and "developing country" to establish different obligations for parties based on their differing levels of development, it does not define either phrase or classify countries accordingly, like in the Kyoto Protocol. Compare Paris Agreement, *supra* note 1, with Kyoto Protocol, *supra* note 6.

³⁷ Paris Agreement, *supra* note 1, Art. 4(12).

³⁸ See, e.g., Jessica F. Green, *Wondering What's Different About the Paris Climate Change Negotiations? Here's What You Need to Know*, WASH. POST (Dec. 1, 2015), at <https://www.washingtonpost.com/news/monkey-cage/wp/2015/12/01/wondering-whats-different-about-the-paris-climate-change-negotiations-heres-what-you-need-to-know/>.

7. Each Party shall regularly provide the following information:

- (a) A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared using good practice methodologies . . . ;
- (b) Information necessary to track progress made in implementing and achieving its nationally determined contribution.³⁹

This transparency framework is required to “be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty . . . ”⁴⁰ Article 15 further establishes a verification mechanism to “facilitate implementation of and promote compliance with” the Agreement.⁴¹ It requires that the mechanism “consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. [And it] shall pay particular attention to the respective national capabilities and circumstances of the Parties.”⁴²

The Agreement also includes provisions for reviewing and revising NDCs over time. Under Article 4, each party is required to communicate its nationally determined contribution every five years.⁴³ Furthermore, Article 14 establishes “global stocktakes,” where the parties “take stock of the implementation of the Agreement to assess the collective progress towards achieving the purpose of th[e] Agreement and its long-term goals.”⁴⁴ These stocktakes are scheduled to begin in 2023 and continue every five years thereafter unless otherwise decided by the COP.⁴⁵

The Agreement builds in flexibility with respect to how the parties reach their individual emissions-reduction targets. Article 4(1) sets forth emission reduction objectives that apply to all parties. It states in relevant part:

Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.⁴⁶

This provision indicates that parties are expected to begin to reduce domestic emissions (i.e., peak), but it does not mandate “decarbonization,” or greenhouse gas emissions neutrality. Rather, it allows parties to balance emissions and removals by carbon sinks, such as new forests, which draw carbon dioxide from the atmosphere. While the Agreement does not mention carbon pricing, it leaves room for the development of carbon markets. Article 6(4) establishes a mechanism similar to the Kyoto Protocol’s Clean Development Mechanism, which generates tradable emission offsets.⁴⁷ And Article 6(2) allows parties to voluntarily cooperate in meeting

³⁹ Paris Agreement, *supra* note 1, Art. 13(7).

⁴⁰ *Id.* Art. 13(3).

⁴¹ *Id.* Art. 15(1).

⁴² *Id.* Art. 15(2).

⁴³ *Id.* Art. 4(9).

⁴⁴ *Id.* Art. 14(1).

⁴⁵ *Id.* Art. 14(2).

⁴⁶ *Id.* Art. 4(1).

⁴⁷ Compare *id.* Art. 6(4), with Kyoto Protocol, *supra* note 6, Art. 12.

their targets through the use of “internationally transferred mitigation outcomes” so long as they avoid “double counting.”⁴⁸

The Agreement does not provide any specific figures regarding climate finance, due in part to the United States’ need to avoid the inclusion of new binding financial commitments.⁴⁹ Instead, Article 9 states that “[d]eveloped country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the [UNFCCC].”⁵⁰ It encourages other parties—presumably, wealthier developing countries—“to provide such support voluntarily.”⁵¹ Developed countries are also called upon to “take the lead in mobilizing climate finance from a wide variety of sources” in a way that “progress[es] beyond previous efforts.”⁵² The climate finance provisions invite funding from a “wide variety of sources, instruments and channels”; require biennial communications of developed countries’ projected levels of future financing; encourage financial resources that “aim to achieve a balance between adaptation and mitigation”; and preserve existing financial mechanisms that allow for effective technology transfer.⁵³

Despite the relatively few binding provisions on climate finance, there was a surge of financial activity by public and private actors during COP 21. In the first days of the conference, the U.S. government announced a contribution of over \$51 million to the Least Developed Countries Fund and \$30 million to regional climate risk insurance initiatives in the Pacific, Central America, and Africa.⁵⁴ President Barack Obama also helped launch Mission Innovation, an initiative under which “twenty countries, representing around 80 percent of global clean energy research and development (R&D) funding,” committed to double their R&D budgets over five years.⁵⁵ Bill Gates led a coalition of twenty-eight private investors in a pledge to support early-stage energy technologies in countries that joined Mission Innovation.⁵⁶ A number of U.S. states, mayors, businesses, and universities made additional commitments to help combat climate change in their respective domains.⁵⁷ Obama predicted that this combined commitment “has the potential to unleash investment and innovation in clean energy at a scale we have never seen before.”⁵⁸

⁴⁸ Paris Agreement, *supra* note 1, Art. 6(2).

⁴⁹ See Press Release, *supra* note 3 (noting that “having binding agreements with respect to . . . finance” would “trigger[] a different kind of agreement”); Nitin Sethi, *US Threatens to Walk Out of Paris Pact Over Financial Obligations*, BUS. STANDARD (India) (Dec. 11, 2015), at http://www.business-standard.com/article/current-affairs/us-threatens-to-walk-out-of-paris-pact-over-financial-obligations-115121100913_1.html (quoting Kerry as saying that “legally binding with respect to finance is a killer for the agreement” and describing this statement as a “veiled threat that the agreement could fail if the US was pushed for financial obligations”).

⁵⁰ Paris Agreement, *supra* note 1, Art. 9(1).

⁵¹ *Id.* Art. 9(2).

⁵² *Id.* Art. 9(3).

⁵³ *Id.* Arts. 9(3)–9(5).

⁵⁴ U.S. Dep’t of State Press Release, Joint Statement on Donors’ Pledge of \$248M USD to Least Developed Countries Fund to Support Climate Change Adaptation (Nov. 30, 2015), at <http://go.usa.gov/cKVE2>; U.S. Dep’t of State Press Release, U.S. Climate Risk Insurance Announcement (Dec. 1, 2015), at <http://go.usa.gov/cZQ4B>.

⁵⁵ See The White House Press Release, U.S. Leadership and the Historic Paris Agreement to Combat Climate Change (Dec. 12, 2015), at <https://www.whitehouse.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ The White House Press Release, Statement by the President on the Paris Climate Agreement (Dec. 12, 2015), at <https://www.whitehouse.gov/the-press-office/2015/12/12/statement-president-paris-climate-agreement>.

With respect to “loss and damage,” the Agreement again reflects a balancing of developed and developing countries’ interests. Article 8 acknowledges the “importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change” and establishes new oversight for the existing Warsaw International Mechanism for Loss and Damage.⁵⁹ However, the Paris Decision explicitly states that “Article 8 of the Agreement does not involve or provide a basis for any liability or compensation.”

For the Obama administration, a key goal in the negotiations was to ensure that the president would be able to bind the United States without seeking approval from the Senate. In other words, as a matter of U.S. law, the administration sought an executive agreement rather than an Article II treaty given the near-certainty that Senate approval would not be forthcoming.⁶⁰

Aware of the administration’s plan to avoid triggering congressional advice and consent requirements, members of Congress preemptively objected to the Agreement and challenged the President’s authority to ratify it singlehandedly. In November 2015, some Senators introduced “Sense of the Senate” and “Sense of Congress” resolutions, insisting that the president obtain the Senate’s advice and consent with respect to any agreement coming out of COP 21 and warning that Congress would refuse climate-change related funding otherwise.⁶¹ The House of Representatives and Senate also approved two resolutions to block domestic climate change regulations that were promulgated by the Environmental Protection Agency (EPA) under the Clean Air Act.⁶² The House passed the measures on the second day of COP 21, ostensibly to undermine the President’s bargaining position.⁶³ However, the administration continued to negotiate the Agreement under the assumption that Obama would veto any legislation undermining the Clean Air Act.⁶⁴ (He did so on December 18, 2015.⁶⁵)

As the Paris negotiations were just about to conclude, the United States objected to language in the final draft that stated: “Developed country Parties *shall* continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties

⁵⁹ Paris Agreement, *supra* note 1, Arts. 8(1)–8(2).

⁶⁰ Karoun Demirjian & Steven Mufson, *Trick or Treaty? The Legal Question Hanging Over the Paris Climate Change Conference*, WASH. POST (Nov. 30, 2015), at <https://www.washingtonpost.com/news/powerpost/wp/2015/11/30/trick-or-treaty-the-legal-question-hanging-over-the-paris-climate-change-conference/>.

⁶¹ S. Res. 329, 114th Cong. (2015); S. Con. Res. 25, 114th Cong. (2015).

⁶² S.J. Res. 23, 114th Cong. (2015); S.J. Res. 24, 114th Cong. (2015).

⁶³ In a statement, Senator James M. Inhofe (R-Okla.) said: “The message could not be more clear that Republicans and Democrats in both the U.S. Senate and U.S. House do not support the president’s climate agenda, and the international community should take note.” Valerie Richardson, *Republicans Move to Undermine Obama on Paris Climate Deal*, WASH. TIMES (Dec. 7, 2015), at <http://www.washingtontimes.com/news/2015/dec/7/republicans-move-to-undermine-obama-on-paris-clima/>.

⁶⁴ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY: S.J. RES. 23 – DISAPPROVING EPA RULE ON GREENHOUSE GAS EMISSIONS FROM NEW, MODIFIED, AND RECONSTRUCTED ELECTRIC UTILITY GENERATING UNITS (Nov. 17, 2015), available at https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/sapsjr24s_20151117.pdf; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY: S.J. RES. 23 – DISAPPROVING EPA RULE ON CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING UNITS (Nov. 17, 2015), available at https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/sapsjr23s_20151117.pdf.

⁶⁵ The White House Press Release, Memorandum of Disapproval on S.J. Res. 23 (Dec. 19, 2015), at <http://www.whitehouse.gov/the-press-office/2015/12/19/memorandum-disapproval-sj-res-23>; The White House Press Release, Memorandum of Disapproval on S.J. Res. 24 (Dec. 18, 2015), at <https://www.whitehouse.gov/the-press-office/2015/12/19/memorandum-disapproval-sj-res-24>.

should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.”⁶⁶ The problem for the United States was the “shall” in the first sentence. The “shall” in this provision would create an international legal obligation on developed country parties to adopt economy-wide emission reduction targets and would introduce a distinction between the obligations of developed- and developing-country obligations—something the United States had strived to avoid.⁶⁷ Eventually the inclusion of “shall” instead of “should” was explained as a typographical error—and the revised version of the agreement was adopted.⁶⁸ When asked about the apparent error, Kerry confirmed that the “shall” posed a serious problem for the United States:

Laurent Fabius [then the French foreign minister] said point-blank that it was a mistake. And he doesn't know where it took place, but the bottom line is that when I looked at that, I said, “We cannot do this and we will not do this. And either it changes or President Obama and the United States will not be able to support this agreement.” And we made it crystal clear that every text up until this particular one had a different wording. So it wasn't hard for them to realize that somebody had made a mistake, and they accepted responsibility for it.⁶⁹

In response to a separate press question about whether “the emissions were not made legally binding because that would have made this a treaty and it wouldn't have gotten through the Senate,” a senior administration official first explained that the United States wasn't alone in preferring nonbinding language:

I don't remember exactly when the proposal that we started to follow was first announced. But New Zealand had the idea of what is, in effect, a hybrid kind of legal form where a number of elements would be legally binding, including essentially the whole accountability system, the requirement to put in targets or ratchet them to be—to report on them and be reviewed on them, and various rules for counting emissions and so forth would be legally binding, but the targets themselves would not be. So that was the basic structure of the—of what I'm referring to as the hybrid that New Zealand put forward.

And we thought that that made sense for reasons of broad participation in this agreement, certainly including the United States but by no means only the United States. There are many countries—the most vocal outside of us probably India—but the reality is there would be many developing countries who would balk at having to do legally binding targets for themselves. They might be perfectly happy to ask for legally binding targets from developed countries, but we were not going to go back into a Kyoto structure of binding target commitments for developed countries but not for developing. We're past that.

⁶⁶ Adoption of the Paris Agreement, Proposal of the President, Draft Decision /CP.21, Annex, Art. 4, UN Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015) (emphasis added). See Marty Lederman, *The Constitutionally Critical, Last-Minute Correction to the Paris Climate Change Accord*, BALKANIZATION (Dec. 13, 2015), at <http://balkin.blogspot.com/2015/12/the-last-minute-correction-to-paris.html>; Daniel Bodansky, *Reflections on the Paris Conference*, OPINIO JURIS (Dec. 15, 2015), at <http://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference>.

⁶⁷ One of the United States' top priorities was eliminating binary distinctions between the obligations of developed and developing states. See Bodansky, *supra* note 5.

⁶⁸ Nitin Sethi, *How the Pact Was Won with a “Typo” Tweak*, BUSINESS STANDARD (Dec. 14, 2015), at http://www.business-standard.com/article/current-affairs/when-a-typo-saved-the-climate-change-summit-from-the-brink-of-collapse-115121300690_1.html.

⁶⁹ U.S. Dep't of State Press Release, Press Availability, John Kerry, Secretary of State (Dec. 12, 2015), at <http://www.state.gov/secretary/remarks/2015/12/250590.htm>.

That's the backwards-looking world. It didn't work. That's not where we were going. So the notion of the targets not being binding was really a fundamental part of our approach from early on, and obviously something quite useful for us as well.

In terms of congressional approval, this agreement does not require submission to the Senate because of the way it is structured. The targets are not binding; the elements that are binding are consistent with already approved previous agreements. So it would not be—I mean, I don't want to speak in a definitive way, but it's certainly not—I would just say that it's not required. What actions are taken or not taken is a separate question, but it's not required.⁷⁰

In response to a follow-up question, another senior administration official explained:

[T]his agreement does not require ratification by the Senate. And the reason for that is the hybrid structure that [Senior Administration Official One] mentioned. And so the structure is really one of an executive agreement. And we have numerous executive agreements across—in the climate and energy area, but frankly, across all areas of multilateral engagement, and those agreements include binding provisions for reporting and review and otherwise. We have a long history of that and it's part of the executive authority that the U.S. exercises in foreign policy. And so we will implement this agreement in a manner that's consistent with that. And the hybrid structure is very important and very useful.⁷¹

In closing, this administration official said: “Congress plays an important role in executive agreements in terms of receiving information and being briefed, and I assume that—and expect that we will engage in a lot of that going forward. But we feel very confident that, as with the range of executive agreements that exist and have been effectively in place for years and years, that we can move forward with this agreement within existing legal authority.”⁷²

The Paris Agreement opened for signature on April 22, 2016.⁷³ It will enter into force thirty days after the date on which at least fifty-five parties to the UNFCCC, accounting in the aggregate for at least 55 percent of total greenhouse gas emissions, deposit instruments of ratification, acceptance, approval, or accession.⁷⁴ On March 31, 2016, Obama and Chinese President Xi Jinping announced that “the United States and China will sign the Paris Agreement on April 22nd and take their respective domestic steps in order to join the Agreement as early as possible this year.”⁷⁵ In a subsequent briefing, a State Department official elaborated that, for the United States, that the process involves “a standard State Department exercise . . . for authorizing an executive agreement.”⁷⁶ As of April 29, 2016, there are 177 signatories to the Paris Agreement, including the United States and China.⁷⁷ Sixteen states, together accounting for

⁷⁰ U.S. Dep't of State Press Release, Background Briefing on the Paris Climate Agreement (Dec. 12, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/12/250592.htm>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Paris Agreement, *supra* note 1, Art. 20.

⁷⁴ *Id.* Art. 21.

⁷⁵ The White House Press Release, Office of the Press Secretary, U.S.-China Joint Presidential Statement on Climate Change (Mar. 31, 2016), at <https://www.whitehouse.gov/the-press-office/2016/03/31/us-china-joint-presidential-statement-climate-change>.

⁷⁶ U.S. Dep't of State Press Release, Senior State Department Official on the Paris Agreement Signing Ceremony (Apr. 20, 2016), at <http://www.state.gov/r/pa/prs/ps/2016/04/256415.htm>.

⁷⁷ Paris Agreement, *Status of Ratification*, UN FRAMEWORK CONVENTION ON CLIMATE CHANGE, at http://unfccc.int/paris_agreement/items/9444.php (last visited May 9, 2016).

0.03% of total global greenhouse gas emissions, have already deposited their instruments of ratification, acceptance, or approval.⁷⁸

Once the Paris Agreement enters into force, it will be up to the parties to implement their legal and political commitments. As Ban Ki-moon recently said, “our task is not over. In fact, it has just begun. In 2016, we must go from words to deeds.”⁷⁹ Obama was hopeful about the implementation of the Agreement. Immediately following the adoption of the Paris Agreement, he declared that “this moment can be a turning point for the world.”⁸⁰

Roadblocks have already materialized in the United States, however. In early February, the Supreme Court halted the implementation of the Environmental Protection Agency’s Clean Power Plan, pending the judicial resolution of legal challenges regarding the scope of the EPA’s authority.⁸¹ The EPA has described the Clean Power Plan as one of its most ambitious and achievable regulatory efforts to curb greenhouse gas emissions under the Clean Air Act.⁸² In response to the stay, the White House released a statement affirming the “strong legal and technical foundation” on which the Clean Power Plan is based and asserting that “the Administration will continue to take aggressive steps to make forward progress to reduce carbon emissions.”⁸³

INTERNATIONAL ECONOMIC LAW

United States and Eleven Other Nations Conclude Trans-Pacific Partnership

On October 5, 2015, trade officials from the United States and eleven other nations¹ concluded negotiations on the Trans-Pacific Partnership (TPP),² six years after President Barack Obama first announced his intention to begin working towards such a trade Agreement.³ The parties to the Agreement represent 800 million people⁴ and nearly 40 percent of global GDP.⁵

⁷⁸ *Id.*

⁷⁹ UN Press Release, No Time to Delay Implementation of Paris Climate Agreement, Secretary-General Says at Briefing to Member States on Upcoming Signing Ceremony (Feb. 16, 2015), at <http://www.un.org/press/en/2016/sgsm17547.doc.htm>.

⁸⁰ The White House Press Release, Statement by the President on the Paris Climate Agreement (Dec. 12, 2015), at <https://www.whitehouse.gov/the-press-office/2015/12/12/statement-president-paris-climate-agreement>.

⁸¹ *Basin Electric Power Cooperative v. U.S. Environmental Protection Agency*, No. 15A776, *stay granted*, 2016 WL 502654 (U.S. Feb. 10, 2016).

⁸² Janet McCabe, *The Final Clean Power Plan: More Ambitious, More Achievable for States*, EPA CONNECT (Aug. 3, 2015), at <https://blog.epa.gov/blog/2015/08/the-final-clean-power-plan-more-ambitious-more-achievable-for-states/>.

⁸³ The White House Press Release, Press Secretary Josh Earnest on the Supreme Court’s Decision to Stay the Clean Power Plan (Feb. 9, 2016), at <https://www.whitehouse.gov/the-press-office/2016/02/09/press-secretary-josh-earnest-supreme-courts-decision-stay-clean-power>.

¹ The twelve nations that negotiated the Trans-Pacific Partnership include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. *Overview of the Trans-Pacific Partnership*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/tpp/overview-of-the-TPP> (last visited Nov. 29, 2015) [hereinafter *Overview of the TPP*].

² Statement on the Trans-Pacific Partnership, 2015 DAILY COMP. PRES. DOC. 696 (Oct. 5, 2015) [hereinafter TPP Statement].

³ *Overview of the TPP*, *supra* note 1.

⁴ Joint Statement—Trans-Pacific Partnership Leaders Statement, 2015 DAILY COMP. PRES. DOC. 818 (Nov. 18, 2015).

⁵ U.S. Dep’t of State Press Release, Successful Conclusion of Trans-Pacific Partnership Negotiations (Oct. 5, 2015), at <http://www.state.gov/secretary/remarks/2015/10/247870.htm>.

The Agreement will enter into force when ratified by all twelve parties, pursuant to provisions for domestic approval if and as required by their respective domestic legal frameworks.⁶

In the United States, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 sets out the steps for securing congressional approval and any necessary implementing legislation.⁷ Consistent with that statute's requirement that he serve notice at least ninety days in advance of signing a trade agreement, Obama notified Congress of his intention to sign the TPP on November 5, 2015.⁸ On February 3, 2016, the United States formally signed the TPP.⁹ The Bipartisan Congressional Trade Priorities and Accountability Act of 2015 now provides a fast track structure for congressional review of the agreement,¹⁰ limiting time for debate,¹¹ and prohibiting amendments to implementing legislation once proposed.¹² Since a number of influential national politicians have expressed dissatisfaction with the TPP, however, it remains uncertain whether Congress will approve it.¹³ United States Trade Representative Michael Froman has announced plans to seek approval in early 2016, "consult[ing] with

⁶ Trans-Pacific Partnership, Art. 30.5.1, Oct. 5, 2015, at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [hereinafter TPP]. If all twelve original signatories do not ratify the treaty within two years from the date of signing, the TPP may still enter into force if at least six original signatories ratify the treaty and those signatories account for at least 85 percent of the original signatories' combined GDP in 2013. *Id.* Arts. 30.5.2, 30.5.3. This means that the TPP cannot enter into force unless ratified by both the United States and Japan. Ankit Panda, *Here's What Needs to Happen in Order for the Trans-Pacific Partnership to Become Binding*, THE DIPLOMAT (Oct. 8, 2015), at <http://thediplomat.com/2016/02/tpp-the-ratification-race-is-on/>.

⁷ Tim Reif, *The Path Forward on the Trans-Pacific Partnership*, THE WHITE HOUSE (Nov. 5, 2015), at <https://www.whitehouse.gov/blog/2015/11/05/path-forward-trans-pacific-partnership>.

⁸ Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 19 U.S.C.A. § 4205(a)(1) (Westlaw through Pub. L. No. 114-61 (excluding Pub. L. Nos. 114-54, 114-59, 114-60)); Notice of Intention to Enter into the Trans-Pacific Partnership Agreement, 80 Fed. Reg. 69,559 (Nov. 9, 2015).

⁹ The White House Press Release, Statement by the President on the Signing of the Trans-Pacific Partnership (Feb. 3, 2016), at <https://www.whitehouse.gov/the-press-office/2016/02/03/statement-president-signing-trans-pacific-partnership>.

¹⁰ 19 U.S.C.A. § 4202(b)(3) (Westlaw through Pub. L. No. 114-61 (excluding Pub. L. Nos. 114-52, 114-54, 114-59, 114-60)); 19 U.S.C.A. § 2191 (Westlaw through Pub. L. No. 114-61 (excluding Pub. L. Nos. 114-54, 114-59, 114-60)). This structure for congressional review played an important diplomatic role in facilitating the conclusion of the TPP since some states refused to negotiate various aspects of the agreement until satisfied that U.S. congressional review would not create opportunity for further revisions. See Jonathon Weisman, *Trade Authority Bill Wins Final Approval in the Senate*, N.Y. TIMES, June 24, 2015, at B1.

¹¹ 19 U.S.C.A. § 2191(f), (g) (Westlaw through Pub. L. No. 114-61 (excluding Pub. L. Nos. 114-54, 114-59, 114-60)).

¹² *Id.* § 2191(d).

¹³ See, e.g., Senator Bernie Sanders: *The Trans-Pacific Trade (TPP) Agreement Must be Defeated*, SENATOR BERNIE SANDERS, at <http://www.sanders.senate.gov/download/the-trans-pacific-trade-tpp-agreement-must-be-defeated-?inline=file> (last visited Nov. 29, 2015) ("[The TPP] is part of a global race to the bottom to boost the profits of large corporations and Wall Street by outsourcing jobs; undercutting worker rights; dismantling labor, environmental, health, food safety and financial laws; and allowing corporations to challenge our laws in international tribunals rather than our own court system."); Hillary Clinton Statement on *Trans-Pacific Partnership*, HILLARY CLINTON, at <https://www.hillaryclinton.com/p/briefing/statements/2015/10/07/trans-pacific-partnership/> (last visited Nov. 29, 2015) ("Based on what I know so far, I cannot support this agreement."); Press Release, Mark Pocan, U.S. Rep., Pocan: Release of Trans-Pacific Partnership Text Confirms Our Fears about Trade Deal (Nov. 5, 2015), at <https://pocan.house.gov/media-center/press-releases/pocan-release-of-trans-pacific-partnership-text-confirms-our-fears-about> ("In the end the TPP was worse than we thought it would be.") [hereinafter Pocan Statement]; Krista Hughes, *White House May Have to Renegotiate Trade Pact—Senator*, REUTERS (Nov. 6, 2015), at <http://www.reuters.com/article/2015/11/06/us-trade-tpp-hatch-idUSKCN0SV1XV20151106#OGUWGVPhB3QoG7IG.97> (quoting Sen. Orrin Hatch (R-UT) as saying, "I understand that renegotiation may be difficult, particularly with so many parties involved, but at the end of the day, the alternative to renegotiation may be no TPP at all"); Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 5, 2015, 1:46 PM), at <https://twitter.com/realdonaldtrump/status/651136309029834752> ("TPP is a terrible deal.").

Congress about the most appropriate time to bring a vote.”¹⁴ But as of February 11, 2016, Speaker Paul Ryan of the U.S. House of Representatives argued that there is not enough support in Congress to justify bringing the agreement to a vote.¹⁵

As a substantive matter, the TPP consists of thirty chapters, annexes, and bilateral side agreements covering topics ranging from labor, environment, and intellectual property to investment, regulatory coherence, and technical barriers to trade.¹⁶ In addition to the traditional areas covered by free trade agreements, the TPP also includes chapters explicitly addressing the Internet and the digital economy, the participation of state owned enterprises in international trade, and the participation of small and medium sized businesses in international trade.¹⁷ Among the more politically controversial provisions are the labor chapter, the Investor State Dispute Settlement (ISDS) mechanism, the (absence of) currency manipulation provisions, and the protections for intellectual property in pharmaceutical drugs.

The labor chapter requires each party to incorporate the rights to freedom of association and collective bargaining, the elimination of forced labor, the “effective abolition” of child labor, and the elimination of employment discrimination into its statutes, regulations, and practice.¹⁸ The labor chapter also requires parties to adopt statutes regulating work conditions, including the minimum wage.¹⁹ But the TPP does not go into specifics about the content of these laws, and it provides that a violation is not established unless the alleged violator has failed to adopt a statute or a regulation in a manner that affects trade or investment between the parties.²⁰ To impose more particularized obligations on some parties, the United States has also signed bilateral “labor consistency” agreements with Brunei,²¹ Malaysia,²² and Vietnam.²³ These agreements require specific amendments to each state’s laws and provide for technical assistance from the United States to the counterparties as needed; they are each enforceable through the TPP dispute settlement mechanism.

Critics of the labor chapter have two primary concerns. First, some argue that the TPP labor commitments are “vague” and do not effectively address the lack of acceptable labor standards in signatory states.²⁴ Second, others worry that the effectiveness of the labor chapter is too dependent on whether the next administration will bring enforcement actions,²⁵ citing the lack

¹⁴ Krista Hughes, *White House to Work with Congress on TPP Timing*, REUTERS (Nov. 12, 2015), at <http://www.reuters.com/article/2015/11/12/us-trade-tpp-usa-idUSKCN0T12JR20151112>.

¹⁵ Jonathan Ernst, *House Speaker Ryan: Not Enough Support for TPP Vote*, REUTERS (Feb. 11, 2016), at <http://www.reuters.com/article/us-trade-tpp-usa-house-idUSKCN0VK1W1>.

¹⁶ TPP, *supra* note 6.

¹⁷ *Summary of the Trans-Pacific Partnership Agreement*, OFF. OF THE U.S. TRADE REPRESENTATIVE, at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> (last visited Nov. 29, 2015).

¹⁸ TPP, *supra* note 6, Art. 19.3.1

¹⁹ *Id.* Art. 19.3.2.

²⁰ *Id.* Art. 19.3.1, n.4.

²¹ *Id.* ch. 19, U.S.-BN Labor Consistency Plan.

²² *Id.* ch. 19, U.S.-MY Labor Consistency Plan.

²³ *Id.* ch. 19, U.S.-VN Plan for Enhancement of Trade and Labor Relations.

²⁴ *Trans-Pacific Partnership Free Trade Agreement*, AFL-CIO, at <http://www.aflcio.org/Issues/Trade/Trans-Pacific-Partnership-Free-Trade-Agreement-TPP> (last visited Feb. 19, 2015); Pocan Statement, *supra* note 13.

²⁵ STAFF OF SEN. ELIZABETH WARREN, *BROKEN PROMISES: DECADES OF FAILURE TO ENFORCE LABOR STANDARDS IN FREE TRADE AGREEMENTS 2* (2015), available at <http://www.warren.senate.gov/files/documents/BrokenPromises.pdf>; *Trans-Pacific Partnership Free Trade Agreement*, AFL-CIO, at <http://www.aflcio.org/Issues/Trade/Trans-Pacific-Partnership-Free-Trade-Agreement-TPP> (last visited Feb. 19, 2015).

of enforcement of other free trade agreements in the past.²⁶ At least one scholar has also noted that U.S. companies with supply chains outside of the TPP countries may see their competitiveness suffer both in domestic and global markets as a result of the agreement.²⁷ Obama has not responded directly to these concerns, maintaining that the TPP “includes the strongest commitments on labor and the environment of any trade agreement in history, and [that] those commitments are enforceable, unlike in past agreements.”²⁸ For his part, Ambassador Michael Froman emphasizes that the labor consistency agreements will bring the most egregious violators into compliance with international standards.²⁹

As for the ISDS provision, it mirrors some fifty agreements to which the United States is already a party³⁰ in providing a procedure by which investors can bring a claim against a state party before an international arbitral tribunal for violations of the investment chapter.³¹ At least partly because of concerns that ISDS may chill legitimate regulation for environmental, health, and other purposes,³² the TPP investment chapter builds on recent U.S. treaty practice by including a broadly worded exceptions provision that allows parties to regulate investment to ensure that it is pursued “in a manner sensitive to environmental, health, or other regulatory objectives.”³³ The investment chapter also contains a provision “reaffirm[ing] the importance” of encouraging enterprises within a party’s territory to voluntarily incorporate codes of corporate social responsibility.³⁴ Both the exceptions provision and the corporate social responsibility provision are subject to ISDS, although the agreement also explicitly permits parties to exempt tobacco control measures from ISDS.³⁵ In response to concerns about ISDS transparency and its effects on sovereign regulatory authority,³⁶ U.S. trade officials have emphasized what they describe as the agreement’s safeguards for transparency—including the publication of tribunal documents and the opportunity for non-state actors to submit amicus briefs—and

²⁶ U.S. Gov’t Accountability Off., GAO-15-160, *Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed* 48 (2014) (stating that the U.S. DOL and USTR “have not systematically implemented all key elements of monitoring and enforcement with regard to [free trade agreement] labor provisions” in the past).

²⁷ Rachel Brewster, *News Tip: Trans-Pacific Partnership Could Penalize East Coast Businesses, Expert Says*, DUKE-TODAY (Oct. 5, 2015), at <https://today.duke.edu/2015/10/tip-pacific-trade-sh>.

²⁸ Statement on the TPP, *supra* note 2.

²⁹ “With [Vietnam, Malaysia, and Brunei], we have worked very closely and very collaboratively on specific actions to be taken that will help bring their systems into compliance with international labor standards, and including cooperative efforts around capacity building and other measures.” Ambassador Froman, Office of the U.S. Trade Rep., *Trans-Pacific Partnership Atlanta Ministerial Closing Press Conference*, (Oct. 5, 2015), at <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2015/october/transcript-trans-pacific>.

³⁰ *The Facts on Investor-State Dispute Settlement*, TRADEWINDS, at <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors> (last updated Mar. 2014).

³¹ TPP, *supra* note 6, Art. 9.18–9.29.

³² See, e.g., *Trans-Pacific Partnership*, SIERRA CLUB, at <http://www.sierraclub.org/trade/trans-pacific-partnership> (last visited Nov. 30, 2015) (noting that corporations have launched over 600 cases against 100 governments under other free trade agreements); *Investor-State Attacks: Empowering Foreign Corporations to Bypass our Courts, Challenge Basic Protections*, PUBLIC CITIZEN, at <http://www.citizen.org/investorcases> (last visited Nov. 30, 2015).

³³ TPP, *supra* note 6, Art. 9.15.

³⁴ *Id.* Art. 9.17.

³⁵ *Id.* Art. 29.5.

³⁶ See, e.g., Elizabeth Warren, *Opinion, The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), at http://www.warren.senate.gov/?p=op_ed&cid=747.

have noted that the tribunal created by the TPP cannot overturn regulations, but can only authorize monetary awards.³⁷

One development in the parallel negotiations between the United States and the European Union on a Transatlantic Trade and Investment Partnership (TTIP) may also become relevant. The European Union now aims to eliminate traditional ISDS from the TTIP and replace it with an “investment court.”³⁸ The European Union has successfully negotiated the inclusion of provisions creating precisely such an investment court in recent agreements with both Vietnam³⁹ and Canada⁴⁰—both of which are parties to the TPP. It is unclear whether this will have any impact on ratification of the TPP, either by the United States or by other states.

Additional criticism from U.S. lawmakers has focused on the TPP’s failure to include restrictions on currency manipulation.⁴¹ While the TPP parties issued a side declaration on monetary policy, the TPP itself does not include any provisions restricting that practice.⁴² Obama characterized the agreement as “a set of principles in terms of how you measure and what constitutes currency manipulation.”⁴³ He noted that “it is not an enforceable provision in the same way that . . . labor standards or environmental standards will be” but he advised to “keep in mind that when it comes to setting up these trade rules internationally, our goal is constantly to raise the bar, and you’re never going to get 100 percent of what you want right away.”⁴⁴ The USTR emphasized that the non-binding nature of the agreement means that “nothing in the Joint Declaration or TPP gives foreign countries the power to challenge [U.S.] monetary policy.”⁴⁵

There has also been controversy over a portion of the intellectual property chapter relating to pharmaceutical products. The TPP would give drug companies between five and eight years of exclusive access to their data before they are required to release it to facilitate the development of lower priced alternatives and generics.⁴⁶ This appears to conflict with current federal law,

³⁷ *Investor-State Dispute Settlement*, OFF. U.S. TRADE REPRESENTATIVE, at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> (last visited Nov. 30, 2015).

³⁸ European Commission, Report on Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), EC Doc. SWD(2015) 3 final (Jan. 13, 2015).

³⁹ EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016, European Commission (Feb. 1, 2016), at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

⁴⁰ Comprehensive Economic and Trade Agreement between Canada and the European Union: Legally Reviewed Text, Art 8.27, European Commission (Feb. 29, 2016), at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

⁴¹ Vicki Needham, *Nearly 160 House Lawmakers Warn Obama on Currency Provision*, THE HILL (Sept. 25, 2015), at <http://thehill.com/policy/finance/255013-nearly-160-house-lawmakers-sign-currency-manipulation-letter>; Anne Gearan & David Nakamura, *Hillary Clinton Comes Out Against Obama’s Pacific Trade Deal*, WASH. POST (Oct. 7, 2015), at <https://www.washingtonpost.com/news/post-politics/wp/2015/10/07/hillary-clinton-comes-out-against-obamas-pacific-trade-deal/>; *Trans-Pacific Partnership*, AAPC, at <http://americanautocouncil.org/TPP> (last visited Nov. 30, 2015).

⁴² Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partner Countries, U.S. Dep’t Treasury (Nov. 5, 2015), available at https://www.treasury.gov/initiatives/Documents/TPP_Currency_November%202015.pdf.

⁴³ Kai Ryssdal, *The Full Interview: President Obama Defends the TPP*, MARKETPLACE (Oct. 6, 2015), at <http://www.marketplace.org/2015/10/06/economy/president-obama-talks-trade/full-interview-president-obama-defends-tpp>.

⁴⁴ *Id.*

⁴⁵ *Trans-Pacific Partnership: Frequently Asked Questions*, OFFICE OF THE U.S. TRADE REP. (Nov. 5, 2015), at <https://medium.com/the-trans-pacific-partnership/frequently-asked-questions-on-the-trans-pacific-partnership-eddc8d87ac73#.ryi3qi7rp>.

⁴⁶ TPP, *supra* note 6, Art. 18.50.

which guarantees pharmaceutical companies twelve years of exclusive access to this data.⁴⁷ As such, this provision could prove especially troublesome in the Senate, where Senator Orrin Hatch of Utah—Chairman of the Finance Committee—has strongly objected to this provision and called for renegotiation of the agreement.⁴⁸

If the U.S. Congress approves and implements the agreement, the TPP may significantly affect trade in the Pacific region. Froman has argued that “U.S. leadership in writing the rules of the road for trade in the Asia-Pacific region is critical” and that “[o]ther countries, such as China, are already moving forward with deals.”⁴⁹ Southeast Asian countries also appear eager to reduce their economic dependence on China, especially given China’s recent assertion of territorial claims in the South China Sea.⁵⁰ Major General Le Van Cuong of Vietnam called the TPP a “political and security deal” that “has more value for Vietnam than buying 10 submarines.”⁵¹ Obama echoed this sentiment, saying that “TPP is more than just a trade pact; it also has important strategic and geopolitical benefits.”⁵² Also broadening the potential reach of the TPP, non-partner nations such as Thailand are expressing interest in joining the TPP.⁵³ Thailand’s economic czar, Somkid Jatusripitak, stated that the country is “highly interested in joining the TPP,” at least in part because its economic competitors Malaysia and Vietnam are both parties to the TPP.⁵⁴

⁴⁷ 42 U.S.C. § 262(k)(7).

⁴⁸ Jackie Calmes, *Utah Senator, Crucial Ally to the Pacific Rim Trade Deal, Is Now Its Main Hurdle*, N.Y. TIMES, Nov. 12, 2015, at A16; Carolyn Y. Johnson, *How the Controversy over Drug Prices Could Take Down Obama’s Trade Deal*, WASH. POST (Oct. 9, 2015), at <https://www.washingtonpost.com/news/wonk/wp/2015/10/09/how-the-controversy-over-drug-prices-could-take-down-obamas-massive-trade-deal/>.

⁴⁹ Off. U.S. Trade Representative Press Release, Statement by Ambassador Froman on the Release of the Trans-Pacific Partnership Text (Nov. 5, 2015), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/november/statement-ambassador-froman>.

⁵⁰ Simon Denyer, *Vietnam Hopes Trade Deal Will Tip Balance Towards U.S., Away from China*, WASH. POST (Dec. 8, 2015), at https://www.washingtonpost.com/world/asia_pacific/vietnam-hopes-trade-deal-will-tip-balance-toward-us-away-from-china/2015/12/04/b6e3749e-9783-11e5-aca6-1ae3be6f06d2_story.html.

⁵¹ *Id.*

⁵² Michael D. Shear, *Refugees Must Not Be Turned Away, Obama Says*, N.Y. TIMES, Nov. 21, 2015, at A6.

⁵³ Kiyoshi Takenaka, *Thailand Says “Highly Likely” It Will Seek TPP Membership*, REUTERS (Nov. 27, 2015), at <http://www.reuters.com/article/us-trade-tpp-thailand-idUSKBN0TG0HO20151127>.

⁵⁴ *Id.*