

2016

Contemporary Practice of the United States Relating to International Law

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Recommended Citation

Daugirdas, Kristina, co-editor. "Contemporary Practice of the United States Relating to International Law." J. D. Mortenson, co-editor. *Am. J. Int'l L.* 110, no. 1 (2016): 116-29.

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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 and France Sign Agreement to Compensate Holocaust Victims

On December 8, 2014, the United States and France signed an agreement to compensate Holocaust victims who were deported from France during World War II.¹ Between 1941 and 1944, the French railroad company Société Nationale des Chemins de Fer Français (SNCF) transported 76,000 individuals to Nazi concentration camps.² The U.S.-France agreement is expected to provide compensation to several thousand survivors of deportation and their families who are U.S. citizens or nationals of other countries.³

As recounted by Stuart Eizenstat, the Special Adviser for Holocaust Issues, the French government initially proposed “a unilateral program to mend the holes in their existing French program for those deported during World War II and their spouses and, in certain cases, their children.”⁴ France first established a compensation program in 1946; that program provides pensions to French nationals who were victims of anti-Semitic persecution in France.⁵ However, because only French citizens are eligible, the program excludes Holocaust victims who are nationals of the United States, Canada, Israel, and other countries.⁶ In 2000, France established a new program to compensate individuals of all nationalities who were “minor[s] at the time of the deportation and lost either one or both parents, who were deported and died during the Holocaust.”⁷ More than one thousand U.S. nationals have received compensation through this program.⁸

The U.S.-France agreement follows unsuccessful efforts to hold SNCF responsible for its contributions to the Holocaust in U.S. courts. In *Abrams v. SNCF*, twelve Holocaust victims sued SNCF and alleged that the railroad company knowingly transported civilians to Nazi death camps.⁹ In November 2004, the Second Circuit ruled against the plaintiffs. The Second Circuit held that SNCF was immune from suit under the Foreign Sovereign Immunities Act (FSIA) because it was an “agency or instrumentality” of France and affirmed the district court’s holding that none of the FSIA’s exceptions to immunity applied.¹⁰ In a similar lawsuit, *Freund v. SNCF*, a different group of Holocaust survivors and their heirs and beneficiaries sued SNCF

¹ Press Release, U.S. Dep’t of State, Joint Statement on the Establishment of a Compensation Fund for Holocaust Victims Deported from France (Dec. 8, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/12/234822.htm> [hereinafter Joint Statement on Compensation Fund]; Agreement between the Government of the United States of America and the Government of the French Republic on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are not Covered by French Programs, U.S.-Fr., Dec. 8, 2014, at <http://www.state.gov/documents/organization/249135.pdf> [hereinafter U.S.-France Agreement].

² See Press Release, U.S. Dep’t of State, Signing Ceremony for the U.S.-France Agreement on Holocaust Deportation From France (Dec. 8, 2014), at <http://www.state.gov/p/eur/rls/rm/2014/dec/234917.htm> [hereinafter Signing Ceremony]; Maïa de la Baume, *French Railway Formally Apologizes to Holocaust Victims*, N.Y. TIMES, Jan. 25, 2011, at A6.

³ Signing Ceremony, *supra* note 2.

⁴ *Id.*

⁵ Joint Statement on Compensation Fund, *supra* note 1.

⁶ Signing Ceremony, *supra* note 2.

⁷ *Id.*

⁸ *Id.*

⁹ *Abrams v. Société Nationale des Chemins de Fer Français*, 389 F.3d 61, 62 (2d Cir. 2004).

¹⁰ *Id.* at 63; see also *Abrams v. Société Nationale des Chemins de Fer Français*, 175 F.Supp.2d 423, 433 (E.D.N.Y. 2001).

to obtain compensation for property that they alleged SNCF had confiscated prior to deporting them to concentration camps.¹¹ The Second Circuit affirmed dismissal of the case because the plaintiffs failed to specifically allege that SNCF maintained possession of the stolen goods, which was required on the Court's reading of the FSIA's taking clause.¹²

During this time period, local, state, and national legislatures introduced measures relating to Holocaust claims against SNCF. In 2011, Maryland enacted a law that required a subsidiary of SNCF to disclose information about its collaboration with German authorities during World War II in order to compete for a contract to operate Maryland commuter rail lines.¹³ In April 2014, New York City council members introduced legislation that would have prohibited New York City from conducting business with companies that profited from the Holocaust but that had not provided reparations to victims, including the SNCF.¹⁴ At the national level, Senator Chuck Schumer and Representative Carolyn Maloney repeatedly introduced legislation that would have granted jurisdiction to U.S. courts to hear claims against SNCF for its actions during World War II that caused injury or death.¹⁵

On April 9, 2014, State Department Spokesperson Jen Psaki announced that the United States and France had begun "discussions of compensation for victims of deportations by rail from France to Nazi labor and death camps as well as for victims' families."¹⁶ The announcement urged state lawmakers, including legislators in New York and Maryland, to refrain from pursuing independent restitution measures because they presented obstacles to the bilateral negotiations.¹⁷ On December 5, 2014, the United States and France announced that they had reached an agreement to compensate victims of the Holocaust who were deported from France.¹⁸ SNCF did not participate in the negotiations; according to press reports, the French foreign ministry explained that "[i]t is the responsibility of French authorities to assume the consequences."¹⁹

Under the agreement, France pledged to transfer to the U.S. government a lump sum payment of \$60 million that the United States would distribute to eligible claimants.²⁰ The agreement provides compensation to three groups of persons: survivors of deportation, the spouses

¹¹ *Freund v. Société Nationale des Chemins de Fer Français*, 391 F. App'x 939, 940 (2d Cir. 2010).

¹² *Id.* at 940–41; 28 U.S.C. § 1605(a)(3) (2015).

¹³ Katherine Shaver, *O'Malley to Sign Bill Requiring Railway to Disclose WWII Past*, BALTIMORE SUN, May 19, 2011, at http://articles.baltimoresun.com/2011-05-19/news/bs-md-marc-trains-20110519_1_holocaust-victims-sncf-trains-holocaust-survivor-groups.

¹⁴ Press Release, Benjamin J. Kallos, New York City Councilmember, Malloney, Levine, and Kallos Fight for Holocaust Reparations for Survivors (Apr. 28, 2014), at <http://www.benkallos.com/press-release/maloney-levine-kallos-fight-holocaust-reparations-survivors>.

¹⁵ S. 634, 112th Cong. (2011); H.R. 1193, 112th Cong. (2011); S. 1393, 113th Cong. (2013); H.R. 1505, 113th Cong. (2013).

¹⁶ Press Release, Dep't of State, Negotiations With France Concerning Compensation for Victims of Deportation and Their Families by the French National Railway Company (SNCF) During the Holocaust (Apr. 9, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/04/224621.htm>.

¹⁷ *Id.* Two months earlier, Maryland state legislators introduced a bill to disqualify a firm whose majority stakeholder is SNCF from bidding on a \$4 billion contract. *U.S. Lawmakers Take Aim at French Rail for Holocaust Role*, FRANCE 24, Feb. 6, 2014, at <http://www.france24.com/en/20140205-usa-lawmakers-push-disqualify-french-rail-sncf-holocaust-role>.

¹⁸ Press Release, Dep't of State, U.S.-France Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are Not Covered by French Programs (Dec. 5, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/12/234709.htm>.

¹⁹ *France to Pay \$60m into Compensation Fund for U.S. Victims of Holocaust*, THE GUARDIAN, Nov. 3, 2015, at <http://www.theguardian.com/world/2015/nov/03/france-60m-compensates-fund-us-holocaust-victims>.

²⁰ U.S.-France Agreement, *supra* note 1, art. 4(1).

of survivors, and the heirs of survivors or their spouses.²¹ Claimants are not eligible if they are French citizens or if they are citizens of a nation that has concluded a bilateral compensation agreement with France—Belgium, Poland, the United Kingdom, and the former Czechoslovakia.²² Nor are claimants eligible if they qualify for a separate French compensation program for individuals whose parents died because of deportation or if they have received compensation from another state for Holocaust deportation.²³ Notably, unlike traditional claim resolution agreements, the U.S.-France agreement does not limit compensation to eligible U.S. citizens. Unless they are excluded pursuant to the provisions above, non-U.S. nationals are eligible for compensation under the program.²⁴

The agreement provides:

Upon payment of the [\$60 million sum], the Government of the United States of America:

1. . . . [C]onfirms its recognition in connection with any Holocaust deportation claims of:

- (i) the sovereign immunity of France and the property of France; and
- (ii) the diplomatic, consular, or official immunity of French officials, employees, and agents and the property of each,

as such sovereign, diplomatic, consular, and official immunities are normally recognized within the United States legal system for other foreign states, their agencies, instrumentalities, officials, employees, and agents, and the property of each.

2. Shall secure, with the assistance of the Government of the French Republic if need be, at the earliest possible date, the termination of any pending suits or future suits that may be filed in any court at any level of the United States legal system against France concerning any Holocaust deportation claim.

3. Shall, in a timely manner, and consistent with its constitutional structure, undertake all actions necessary to achieve the objectives of this Agreement, which include an enduring legal peace, at the federal, state, and local levels of government in the United States of America and shall avoid any action that:

- a. Contradicts the terms of the Agreement, and in particular challenges the sovereign immunity of France concerning any Holocaust deportation claim; or
- b. Stands as an obstacle to the accomplishment and execution of the Agreement.

4. Shall require, before making any distribution payment to an eligible recipient under this Agreement, that the recipient execute a writing following the form of the Annex attached to this Agreement, including (i) a waiver of all the recipient's rights to assert claims for compensatory or other relief in any forum against France concerning the Holocaust deportation or pension programs related thereto; (ii) a declaration that the recipient has not received, and will not claim, any payment under French programs or an international agreement concluded by the Government of the French Republic relating to Holocaust

²¹ *Id.* Art. 2(1).

²² *Id.* Art. 3(1–2); Press Release, Dep't of State, Joint Statement Between the United States and France Regarding the Entry into Force of a Bilateral Agreement on the Establishment of Compensation Fund for Holocaust Victims Deported From France (Nov. 3, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/11/249122.htm> [hereinafter Joint Statement on U.S.-France Agreement].

²³ U.S.-France Agreement, *supra* note 1, Art. 3(3–4).

²⁴ Joint Statement on U.S.-France Agreement, *supra* note 22.

deportation; and (iii) a declaration that the recipient has not received any payment under any other State's compensation program or under the compensation program of any foreign institution relating specifically to Holocaust deportation.²⁵

The annex to the agreement contains a form that each claimant must sign prior to receiving compensation. The form provides that claimants agree to "release and forever discharge France and any French national (including natural and juridical persons) from any liability of any kind for all claims relating to Holocaust deportation."²⁶ The form additionally requires recipients to waive any claims against the United States related to Holocaust deportation.²⁷ The agreement does not waive the rights of individuals who do not participate in the compensation program, although it does confirm that, with respect to deportation claims, France is entitled to the same immunities that the U.S. legal system recognizes for other states; the agreement also requires the United States to secure the termination of any lawsuits against France concerning deportation claims.

The agreement entered into force on November 1, 2015.²⁸ Its entry into force followed approval by the French Parliament.²⁹ On the United States side, the agreement is a sole executive agreement. In a joint statement, the United States and France described the agreement as "another measure of justice to help those who suffered the harms of one of history's darkest eras, and another example of the close U.S.-France partnership that characterizes our relationship."³⁰ The U.S. Department of State began accepting applications from claimants on November 2, 2015.³¹

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

United States Conducts Naval Operation Within Twelve Nautical Miles of Spratly Islands in the South China Sea, Prompting Protests from China

On October 26, 2015, the guided missile destroyer USS *Lassen* undertook a "freedom of navigation" operation in the South China Sea, an area that has been beset by conflicting territorial and maritime claims.¹ The operation comes amidst growing tensions between the United States and China about China's activities in the South China Sea. China has asserted maritime claims to certain islands and waters in the South China Sea since the 1950s, but in the view of the U.S., those claims appear inconsistent with the international law of the sea.²

²⁵ U.S.-France Agreement, *supra* note 1, Art. 5.

²⁶ *Id.* Annex.

²⁷ *Id.*

²⁸ Joint Statement on U.S.-France Agreement, *supra* note 22.

²⁹ Press Release, Carolyn B. Maloney, U.S. Congresswoman, Maloney Applauds French Parliament Approval of Historic Compensation for Holocaust Victims Deported on SNCF Trains (July 9, 2015), at <https://maloney.house.gov/media-center/press-releases/maloney-applauds-french-parliament-approval-of-historic-compensation-for>.

³⁰ Joint Statement on U.S.-France Agreement, *supra* note 22.

³¹ *Commencement of Holocaust Deportation Claims Program Under U.S.-France Agreement*, U.S. DEP'T OF STATE, at <http://www.state.gov/p/eur/rt/hlcst/deportationclaims/index.htm> (last visited Jan. 15, 2016).

¹ See Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 667 (2015); 108 AJIL 529 (2014); 108 AJIL 331 (2014).

² See generally OFFICE OF OCEAN & POLAR AFFAIRS, U.S. DEP'T OF STATE, LIMITS IN THE SEAS: NO. 143, CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA (2014).

More recently, China began undertaking massive land reclamation projects in the Spratly Islands.³ The United States has consistently opposed these actions, citing concerns about regional destabilization and potential militarization of the artificial features.⁴ China, in turn, has blamed the United States for “pushing the militarization” by conducting military exercises in the South China Sea.⁵

Accompanied by two maritime surveillance aircraft, the *Lassen* came within twelve nautical miles of Subi Reef, one of the artificial features that China has built among the Spratly Islands.⁶ In response to the *Lassen*'s entry within the twelve-mile zone, a Chinese naval missile destroyer and patrol vessel followed the ship and sent warnings.⁷ A U.S. defense official later testified that the operation—the first of its kind to be conducted within twelve nautical miles of any of the Chinese-built features since 2012⁸—was completed “without incident.”⁹

Chinese officials immediately criticized the maneuver. Chinese Foreign Ministry Spokesperson Lu Kang described the *Lassen*'s passage near the reef as “illegal []” and further asserted that the operation “threatened China’s sovereignty and security interests, put the personnel and facilities on the islands and reefs at risk and endangered regional peace and stability.”¹⁰ Vice Foreign Minister Zhang Yesui echoed Lu’s statements regarding the operation’s illegality and “expresse[d] [China’s] strong dissatisfaction and opposition” to the “serious provocation.”¹¹

Following the operation, Zhang summoned the U.S. Ambassador to China to discuss the incident,¹² and senior Chinese officials met with their U.S. counterparts to urge the United

³ See generally Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 667 (2015).

⁴ See *id.*; see also The President’s News Conference with President Xi Jinping of China, 2015 DAILY COMP. PRES. DOC. 647 (Sept. 25, 2015) [hereinafter News Conference].

⁵ Javier C. Hernández, *China Blames U.S. Military Actions for Tensions in the South China Sea*, N.Y. TIMES, July 30, 2015, at A9.

⁶ Helene Cooper, *Challenging Chinese Claims, U.S. Sends Warship Near Artificial Island Chain*, N.Y. TIMES, Oct. 27, 2015, at A7; Michael J. Green, Bonnie S. Glaser & Gregory B. Poling, *The U.S. Asserts Freedom of Navigation in the South China Sea*, CTR. FOR STRATEGIC & INT’L STUDIES (Oct. 27, 2015), at <http://csis.org/publication/us-asserts-freedom-navigation-south-china-sea>.

⁷ Press Release, China Ministry of Nat’l Def., Defense Ministry’s Regular Press Conference on (Oct. 29, 2015), at http://eng.mod.gov.cn/Press/2015-10/29/content_4626549.htm [hereinafter Oct. 29 Press Conference].

⁸ *Maritime Security Strategy in the Asia-Pacific Region: Hearing Before the S. Comm. on Armed Servs.*, 114th Cong. 22 (Sept. 17, 2015) (statement of Assistant Sec’y of Defense for Asian & Pac. Sec. Affairs, U.S. Dep’t of Defense, Ambassador David B. Shear).

⁹ Simon Denyer, *China Says U.S. Naval Destroyer Sailing Close to Chinese-Built Island Damages Peace and Stability*, WASH. POST, Oct. 27, 2015, at https://www.washingtonpost.com/world/china-says-us-naval-destroyer-sailing-close-to-chinese-built-island-damages-peace-and-stability/2015/10/27/25b254b4-7c7a-11e5-beba-927fd8634498_story.html.

¹⁰ Press Release, China Ministry of Foreign Aff., Foreign Ministry Spokesperson Lu Kang’s Remarks on USS *Lassen*’s Entry into Waters near Relevant Islands and Reefs of China’s Nansha Islands (Oct. 27, 2015), at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1309567.shtml [hereinafter Lu Remarks].

¹¹ Press Release, China Ministry of Foreign Aff., Vice Foreign Minister Zhang Yesui Makes Stern Representations to US over US Naval Vessel’s Entry into Waters near Relevant Islands and Reefs of China’s Nansha Islands (Oct. 27, 2015), at http://www.fmprc.gov.cn/mfa_eng/wjbxw/t1310069.shtml [hereinafter Zhang Representations].

¹² *Id.*

States to prevent “similar incident[s] from happening again.”¹³ Both Zhang and Lu stated that China would “take all necessary measures” to respond appropriately to this action and any other “deliberate provocation[s].”¹⁴ In addition, the commander of the Chinese Navy, Admiral Wu Shengli, asserted during a conversation with U.S. Chief of Naval Operations Admiral John Richardson that such “dangerous, provocative acts” could lead to “a seriously pressing situation between frontline forces from both sides on the sea and in the air, or even a minor incident that sparks war.”¹⁵

Administration officials initially made few statements regarding the operation. White House and State Department officials declined to comment on initial reports,¹⁶ instead directing media to address questions to the Department of Defense.¹⁷ Secretary of Defense Ashton Carter confirmed that media reports of the operation were accurate, but would not “say more than that.”¹⁸ White House Principal Deputy Press Secretary Eric Schultz stated only that “the operation . . . was the result of a rigorous interagency process designed to produce options for [U.S.] leadership to ensure” protection of “the rights, freedoms, and lawful uses of the sea and airspace guaranteed to all nations under international law.”¹⁹ This limited response was the result, administration officials said, of White House instructions to refrain from more specific public comment.²⁰

The *Lassen* operation’s significance for the U.S. position on China’s South China Sea claims was not immediately clear. Carter stated that the *Lassen* “conducted a freedom of navigation operation, in accordance with international law.”²¹ Such operations can serve

¹³ Oct. 29 Press Conference, *supra* note 7 (noting meetings between U.S. officials and officers of the Foreign Affairs Office of China’s Ministry of National Defense and Chinese Defense Attaché in Washington, D.C.).

¹⁴ Zhang Representations, *supra* note 11; Lu Remarks, *supra* note 10.

¹⁵ Ben Blanchard & Andrea Shalal, *China Naval Chief Says Minor Incident Could Spark War in South China Sea*, REUTERS (Oct. 30, 2015), at <http://www.reuters.com/article/2015/10/30/us-southchinasea-usa-china-navy-idUSKCN0SO05320151030#YaqXzvMHxkeCQxYJ.97>.

¹⁶ See White House Daily Press Briefing by Press Secretary Josh Earnest (Oct. 26, 2015), at <https://www.whitehouse.gov/the-press-office/2015/10/26/daily-press-briefing-press-secretary-josh-earnest-102615> [hereinafter Earnest Briefing]; U.S. Dep’t of State Daily Press Briefing (Oct. 26, 2015), at <http://www.state.gov/r/pa/prs/dpb/2015/10/248743.htm>; U.S. Dep’t of State Daily Press Briefing (Oct. 27, 2015), at <http://www.state.gov/r/pa/prs/dpb/2015/10/248870.htm> [hereinafter Oct. 27 State Department Briefing]; Press Briefing, The White House, Press Gaggle by Principal Deputy Press Secretary Eric Schultz en route Chicago, IL, 10/27/2015 (Oct. 27, 2015), at <https://www.whitehouse.gov/the-press-office/2015/10/27/press-gaggle-principal-deputy-press-secretary-eric-schultz-en-route>.

¹⁷ See Earnest Briefing, *supra* note 16; Oct. 27 State Department Briefing, *supra* note 16.

¹⁸ *United States Military Strategy in the Middle East: Hearing Before the S. Comm. on Armed Servs.*, 114th Cong. 116 (Oct. 27, 2015), at <http://www.armed-services.senate.gov/imo/media/doc/15-81%20-%202010-27-15.pdf>.

¹⁹ Press Briefing, The White House, Press Gaggle Aboard Air Force One en route Andrews AFB, 10/28/15 (Oct. 28, 2015), at <https://www.whitehouse.gov/the-press-office/2015/10/28/press-gaggle-aboard-air-force-one-en-route-andrews-afb-102815>.

²⁰ See Helene Cooper & Jane Perlez, *White House Moves to Reassure Allies with South China Sea Patrol, but Quietly*, N.Y. TIMES, Oct. 27, 2015, at A7.

²¹ Ash Carter, Sec’y of Defense, Remarks on “Strategic and Operational Innovation at a Time of Transition and Turbulence” at the Reagan National Defense Forum (Nov. 7, 2015) [hereinafter Carter Remarks] available at <http://www.defense.gov/News/Speeches/Speech-View/Article/628146/remarks-on-strategic-and-operational-innovation-at-a-time-of-transition-and-tur>; see also Adm. Harry B. Harris, Jr., Commander, U.S. Pac. Command, Speech at Stanford Center – Peking University, Beijing China (Nov. 3, 2015) (noting the “routine” nature of U.S. freedom of navigation operations in the South China Sea) [hereinafter Harris, Jr. Speech] available at <http://www.pacom.mil/Media/Speeches/Testimony/tabid/6706/Article/627100/admiral-harris-speech-at-stanford-center-peking-university-beijing-china.aspx>.

as one means of challenging maritime claims with which the United States disagrees.²² According to a press report, on the other hand, an unnamed U.S. navy source indicated that “the warship took steps to indicate it was making a lawful innocent passage with no warlike intent. The ship’s fire control radars were turned off and it flew no helicopters.”²³ This alternate framing of the operation was potentially significant, since the UN Convention on the Law of the Sea permits vessels to transit in “innocent passage” through the territorial seas of other states.²⁴ As a result, some commentators suggested that by proceeding in innocent passage the United States implicitly recognized China’s claim to a territorial sea around its artificial island on Subi Reef.²⁵

At least partially in response to uncertainty about the precise characterization on the *Lassen* operation, Pentagon Spokesman Captain Jeff Davis denied that the patrol had been conducted as an innocent passage,²⁶ and another U.S. official suggested the operational restrictions on the *Lassen*’s “freedom of navigation” operation had been adopted for policy reasons, so as not to “inflare the situation” with China.²⁷

In light of these conflicting remarks, Senator John McCain wrote to Carter requesting that the Department of Defense “publicly clarify . . . the legal intent behind th[e] operation and any future operations of a similar nature.”²⁸ In response, Carter reiterated that the *Lassen* had conducted a “freedom of navigation” operation (FONOP).²⁹ He further stated:

[T]he operation did not challenge any country’s claims of sovereignty over land features, as that is not the purpose or function of a FONOP. Rather, this FONOP challenged attempts by claimants to restrict navigation rights and freedoms around features they claim, including policies by some claimants requiring prior permission or notification of transits within territorial seas. . . .³⁰

The FONOP involved a continuous and expeditious transit that is consistent with both the right of innocent passage, which only applies in a territorial sea, and with the high seas freedom of navigation that applies beyond any territorial sea. With respect to Subi Reef, the

²² Green et al., *supra* note 6.

²³ Christopher P. Cavas, *Navy Chiefs Talk, New Details on Destroyer’s Passage*, DEFENSE NEWS (Oct. 31, 2015, 10:58 AM), at <http://www.defensenews.com/story/defense/2015/10/31/navy-china-richardson-wu-destroyer-lassen-south-china-sea-innocent-passage/74881704/>.

²⁴ United Nations Convention on the Law of the Sea art. 17, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

²⁵ Julian Ku, *The US Navy’s “Innocent Passage” in the South China Sea May Have Actually Strengthened China’s Sketchy Territorial Claims*, LAWFARE (Nov. 4, 2015, 11:10 AM), at <https://www.lawfareblog.com/us-navys-innocent-passage-south-china-sea-may-have-actually-strengthened-chinas-sketchy-territorial>.

²⁶ Andrea Shalal & David Brunnstrom, *U.S. Patrol Sought to Avoid Provocation, Not Reinforce China Island Claim: Officials*, REUTERS (Nov. 7, 2015), at <http://www.reuters.com/article/2015/11/07/us-southchinasea-usa-passage-idUSKCN0SV2QK20151107#PBU1bvBhjvtEJmc1.97>.

²⁷ *Id.*

²⁸ Letter from Senator John McCain, Chairman, S. Comm. Armed Servs., to Ashton B. Carter, U.S. Sec’y of Defense (Nov. 9, 2015), *available at* <http://news.usni.org/2015/11/10/document-letter-from-sen-john-mccain-to-secdef-carter-on-u-s-south-china-sea-freedom-of-navigation-operation>.

²⁹ Letter from Ash Carter, U.S. Sec’y of Defense, to John McCain, Chairman, S. Comm. Armed Servs., at 1 (Dec. 21, 2015), *available at* <http://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation> [hereinafter Carter Letter].

³⁰ [Editors’ note: The United States has contested requirements imposed by China, Taiwan, and Vietnam requiring notification and/or prior consent in the South China Sea. See DEP’T OF DEFENSE REPRESENTATIVE FOR OCEAN POLICY AFFAIRS, MARITIME CLAIMS REFERENCE MANUAL (2014), at http://www.jag.navy.mil/organization/code_10_mcrm.htm (describing requirements for notice and/or prior permission for transit by foreign vessels through territorial waters claimed by China, Taiwan, and Vietnam).]

claimants have not clarified whether they believe a territorial sea surrounds it, but one thing is clear: under the law of the sea, China's land reclamation cannot create a legal entitlement to a territorial sea, and does not change our legal ability to navigate near it in this manner. We believe that Subi Reef, before China turned it into an artificial island, was a low-tide elevation and that it therefore cannot generate its own entitlement to a territorial sea. However, if it is located within 12 nautical miles of another geographic feature that is entitled to a territorial sea—as might be the case with Sandy Cay—then the low-water line on Subi Reef could be used as the baseline for measuring Sandy Cay's territorial sea. In other words, in those circumstances, Subi Reef could be surrounded by a 12-nautical-mile-territorial sea despite being submerged at high tide in its natural state. Given the factual uncertainty, we conducted the FONOP in a manner that is lawful under all possible scenarios to preserve U.S. options should the factual ambiguities be resolved, disputes settled, and clarity on maritime claims reached.³¹

At the recent Association of Southeast Asian Nations (ASEAN) Defense Ministers-Plus Meeting, Chinese Defense Minister Chang Wangquan told Carter that there is a “bottom line” to China's patience with the ongoing challenges to China's territorial claims.³² U.S. officials have nonetheless said that freedom of navigation operations will continue in the South China Sea. Discussing such operations, Carter stated: “We've done them before, all over the world. And we will do them again. We meant what we say. We will continue to fly, sail, and operate wherever international law allows.”³³ Another U.S. defense official said that the U.S. Navy plans to conduct patrols within twelve nautical miles of artificial features in the South China Sea about twice per quarter, a frequency intended to demonstrate the United States' determination “to regularly exercise [its] rights under international law.”³⁴ Indeed, the United States conducted a similar aerial operation recently, flying two B-52 strategic bombers near artificial features in the Spratly Islands.³⁵ Although the planes were contacted by Chinese ground controllers and continued their mission,³⁶ it is unclear whether the bombers passed within twelve nautical miles of any of the Chinese-built features.³⁷

³¹ Carter Letter, *supra* note 29, at 1–2.

³² See Yeganeh Torbati & Trinna Leong, *U.S., Japan Push for Inclusion of South China Sea in Defense Forum Statement*, REUTERS (Nov. 3, 2015), at <http://www.reuters.com/article/2015/11/03/us-asean-malaysia-idUSKCN0SS07F20151103#S0u5viBWJMstOCEI.97>.

³³ Carter Remarks, *supra* note 21; see also Harris, Jr. Speech, *supra* note 21 (“[O]ur military will continue to fly, sail, and operate whenever and wherever international law allows. The South China Sea is not—and will not—be an exception.”).

³⁴ Andrea Shalal & Idrees Ali, *U.S. Navy Plans Two or More Patrols in South China Sea per Quarter*, REUTERS (Nov. 2, 2015), at <http://www.reuters.com/article/2015/11/03/us-southchinasea-usa-navy-idUSKCN0SR28W20151103#Hwdw1e12xkvGC5Du.97>.

³⁵ Yeganeh Torbati & David Alexander, *U.S. Bombers Flew Near China-Built Islands in South China Sea: Pentagon*, REUTERS (Nov. 13, 2015, 5:51 AM), at <http://www.reuters.com/article/2015/11/13/us-southchinasea-usa-idUSKCN0T12G720151113#rBoQJ89CT8kQ8MIM.97>.

³⁶ Press Briefing, U.S. Dep't of Defense, Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room, (Nov. 12, 2015), at <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/628778/departement-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in>.

³⁷ Compare Torbati & Alexander, *supra* note 35 (citing statement by Pentagon spokesman Commander Bill Urban that the bombers did not fly within twelve nautical miles), with Kristina Wong, *US Flies B-52 Bombers near Disputed Islands Claimed by China*, HILL (Nov. 12, 2015, 2:17 PM), at <http://thehill.com/policy/defense/259958-us-flies-b-52-bombers-near-islands-claimed-by-china> (noting a statement by a U.S. official that bombers made one pass within twelve nautical miles of islands).

United States Pursues Bilateral and Multilateral Initiatives in and Around the Arctic

Climate change is bringing about significant changes to the Arctic region, where the United States faces economic, environmental, and military opportunities and challenges.¹ Since the United States assumed the chairmanship of the Arctic Council in April 2015, policymakers have focused more attention on the region.² In August, President Barack Obama became the first sitting president to visit the U.S. Arctic.³

During his visit, Obama addressed the Conference on Global Leadership in the Arctic: Cooperation, Innovation, Engagement and Resilience (GLACIER).⁴ Participants at the conference included representatives of Canada, China, Denmark, Finland, France, Germany, Iceland, India, Italy, Japan, the Republic of Korea, the Netherlands, Norway, Poland, Russia, Singapore, Spain, Sweden, the United Kingdom, and the European Union.⁵ At GLACIER's conclusion, most of the participants signed a joint statement acknowledging the impact of climate change in the Arctic and reiterating their commitment to combat climate change.⁶

Two significant developments in and around the Arctic concern international regulation of fishing. In July, the five states with land territory in the Arctic Circle—Canada, Denmark, Norway, Russia, and the United States—met in Oslo and adopted a nonbinding declaration setting out political commitments to restrict commercial fishing on the Arctic high seas until a sustainable management plan is in place.⁷ This portion of the Arctic Ocean includes the North Pole and is larger than Alaska and Texas combined.⁸ Although it is largely covered by icepack, the summer sea ice shrank to a record low in 2012, briefly turning about 40 percent of the area

¹ See, e.g., Thom Shanker, *Pentagon Releases Strategy for the Arctic*, N.Y. TIMES, Nov. 22, 2013, at A7; Steven Lee Meyers, *U.S. Is Playing Catch-Up With Russia in Scramble for the Arctic*, N.Y. TIMES, Aug. 29, 2015, at A1.

² John Kerry, U.S. Secretary of State, Remarks on Intervention at the Arctic Council Ministerial Meeting (Apr. 24, 2015), at <http://www.state.gov/secretary/remarks/2015/04/241098.htm>. *The Arctic Council: A Background*, ARCTIC COUNCIL, <http://www.arctic-council.org/index.php/en/about-us> (last visited Jan. 15, 2015) ("The Arctic Council is the leading intergovernmental forum promoting cooperation, coordination and interaction among the Arctic states."). See generally Brian R. Israel, *Review Essay: International Law and Governance in a Changing Arctic*, 108 AJIL 348 (2014).

³ *President Obama's Trip to Alaska*, THE WHITE HOUSE, at <https://www.whitehouse.gov/2015-alaska-trip> (last visited Jan. 25, 2015). See Press Release, The White House, Fact Sheet: President Obama Announces New Investments to Enhance Safety and Security in the Changing Arctic (Sept. 1, 2015), at <https://www.whitehouse.gov/the-press-office/2015/09/01/fact-sheet-president-obama-announces-new-investments-enhance-safety-and>.

⁴ Press Release, The White House, Remarks by the President at the GLACIER Conference—Anchorage, AK (Aug. 31, 2015), at <https://www.whitehouse.gov/the-press-office/2015/09/01/remarks-president-glacier-conference-anchorage-ak>.

⁵ Press Release, U.S. Dep't of State, John Kirby, Spokesperson, Secretary Kerry Travel to Anchorage, AK (Aug. 25, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/08/246327.htm>; Press Release, U.S. Dep't of State, The Conference on Global Leadership in the Arctic: Cooperation, Innovation, Engagement and Resilience (GLACIER) (July 23, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/07/245241.htm>.

⁶ Press Release, U.S. Dep't of State, Joint Statement on Climate Change and the Arctic (Aug. 31, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/08/246487.htm>.

⁷ Press Release, U.S. Dep't of State, Arctic Nations Sign Declaration to Prevent Unregulated Fishing in the Central Arctic Ocean (July 16, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/07/244969.htm> [hereinafter Arctic Nations Sign Declaration]; Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean, July 16, 2015, at <https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf>, [hereinafter Oslo Declaration].

⁸ Steven Lee Myers, *Sea Warming Leads to Ban on Fishing in the Arctic*, N.Y. TIMES, July 16, 2015, at A6.

into open water.⁹ According to press reports, tensions over Ukraine delayed the declaration for over a year.¹⁰ An excerpt of the declaration follows:

We recognize that until recently ice has generally covered the high seas portion of the central Arctic Ocean on a year-round basis, which has made fishing in those waters impossible to conduct. We acknowledge that, due to climate change resulting in changes in ice distribution and related environmental phenomena, the marine ecosystems of the Arctic Ocean are evolving and that the effects of these changes are poorly understood. We note that the Arctic ecosystems until now have been relatively unexposed to human activities. . . .

We are aware that fish stocks in the Arctic Ocean may occur both within areas under the fisheries jurisdiction of the coastal States and in the high seas portion of the central Arctic Ocean, including straddling fish stocks. We note further that the ice cover in the Arctic Ocean has been diminishing in recent years, including over some of the high seas portion of the central Arctic Ocean.

We recognize that, based on available scientific information, commercial fishing in the high seas of the central Arctic Ocean is unlikely to occur in the near future and, therefore, there is no need at present to establish any additional regional fisheries management organization for this area. Nevertheless, recalling the obligations of States under international law to cooperate with each other in the conservation and management of living marine resources in high seas areas, including the obligation to apply the precautionary approach, we share the view that it is desirable to implement appropriate interim measures to deter unregulated fishing in the future in the high seas portion of the central Arctic Ocean.

. . . .

We therefore intend to implement, in the single high seas portion of the central Arctic Ocean that is entirely surrounded by waters under the fisheries jurisdictions of Canada, the Kingdom of Denmark in respect of Greenland, the Kingdom of Norway, the Russian Federation and the United States of America, the following measures:

- We will authorize our vessels to conduct commercial fishing in this high seas area only pursuant to one or more regional or subregional fisheries management organizations or arrangements that are or may be established to manage such fishing in accordance with recognized international standards.
- We will establish a joint program of scientific research with the aim of improving understanding of the ecosystems of this area and promote cooperation with relevant scientific bodies
- We will promote compliance with these interim measures and with relevant international law, including by coordinating our monitoring, control and surveillance activities in this area.
- We will ensure that any non-commercial fishing in this area does not undermine the purpose of the interim measures, is based on scientific advice and is monitored, and that data obtained through any such fishing is shared.¹¹

⁹ Alister Doyle, *Russia, U.S. Agree Fishing Ban in Arctic as Sea Ice Melts*, REUTERS (July 16, 2015), at <http://www.reuters.com/article/us-russia-arctic-idUSKCN0PQ15N20150716>.

¹⁰ *Id.*; see also Myers, *supra* note 8.

¹¹ Oslo Declaration, *supra* note 7.

According to the State Department, the declaration

builds on U.S. action in 2009 to prohibit commercial fishing in its Exclusive Economic Zone north of the Bering Strait until better scientific information to support sound fisheries management is available. The United States initiated this five-state process consistent with congressional direction under Public Law 110-243, which calls for the United States to take steps with other Arctic nations to negotiate an agreement for managing fish stocks in the Arctic Ocean, as well as the Implementation Plan for the 2013 National Strategy for the Arctic Region, which commits the United States to prevent unregulated high seas fishing in the Arctic.¹²

In December, the United States hosted a meeting attended by delegations from the five states that adopted the Oslo Declaration, as well as China, the European Union, Iceland, Japan, and Korea, which addressed their common goal of preventing unregulated commercial fishing in the high seas area of the central Arctic Ocean.¹³ The United States presented a proposal for an international agreement there.¹⁴ Although the proposal was not negotiated at the meeting, participating states agreed to follow-up meetings to be held in the coming year.¹⁵

Separately, on September 11, 2015, the United States and Russia entered into a bilateral treaty “to combat illegal, unreported, and unregulated [IUU] fishing.”¹⁶ Alaskan crab fishers in the Bering Sea, which lies just south of the Arctic, strongly supported the agreement (which is not geographically limited).¹⁷ According to one estimate, illegally harvested Russian crab has cost Alaska Bering Sea fishermen up to \$560 million.¹⁸ The World Wildlife Fund had previously issued a research report highlighting the significance of the problem: “Official customs data from South Korea, Japan, China and the United States indicate that in 2013, these four countries (which account for nearly all of Russia’s official crab exports) imported 1.69 times as much live and frozen crab from Russia as official Russian harvest levels. Over the past decade, the level of overharvest due to illegal crab harvesting was two to four times the legal limit, causing grave concern about the sustainability of several Russian Far East crab species.”¹⁹

¹² Arctic Nations Sign Declaration, *supra* note 7. [Editors’ Note: Public Law No. 110-243, 122 Stat. 1569, June 3, 2008, provides, in part: “Now, therefore, be it [r]esolved by the Senate and House of Representatives of the United States of America in Congress assembled, [t]hat (1) the United States should initiate international discussions and take necessary steps with other Arctic nations to negotiate an agreement or agreements for managing migratory, transboundary, and straddling fish stocks in the Arctic Ocean and establishing a new international fisheries management organization or organizations for the region.” The 2013 National Strategy for the Arctic Region is available at https://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf.]

¹³ Press Release, U.S. Dep’t of State, Meeting on High Seas Fisheries in the Central Arctic Ocean: Chairman’s Statement (Dec. 3, 2015), at <http://www.state.gov/e/oes/rls/pr/250352.htm>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Press Release, U.S. Dep’t of State, United States and Russia Sign Agreement to Prevent Illegal Fishing (Sept. 11, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/09/246833.htm> [hereinafter U.S. and Russia Sign IUU Agreement]; Agreement between the Government of the United States of America and the Government of the Russian Federation on Cooperation for the Purposes of Preventing, Deterring and Eliminating Illegal, Unreported, and Unregulated Fishing, U.S.-Russ., Sept. 11, 2015 (entered into force Dec. 4, 2015), at <http://www.state.gov/documents/organization/250927.pdf> [hereinafter U.S.-Russia IUU Fishing Agreement].

¹⁷ DJ Summers, *US, Russia Sign Deal Aimed at Curbing Illegal Fishing*, ALASKA J. COMMERCE, Sept. 16, 2015, at <http://www.alaskajournal.com/business-and-finance/2015-09-16/us-russia-sign-deal-aimed-curbing-illegal-fishing>.

¹⁸ *Id.*

¹⁹ WORLD WILDLIFE FEDERATION, ILLEGAL RUSSIAN CRAB: AN INVESTIGATION OF TRADE FLOW 1 (2014).

The U.S. State Department explained that “[t]he agreement aims to improve coordination among the multiple government agencies in both countries that need to work together to address IUU fishing.”²⁰ According to press reports, in the past, the U.S. Coast Guard and its Russian equivalent “could not share data due to a touchy international relationship” and “[a]cquiring Russian information at all was problematic.”²¹ The treaty provides, in part, that “[i]n order to achieve the purposes of this Agreement, the Parties’ competent authorities shall”:

1. Cooperate in preventing, deterring, and eliminating IUU fishing²² and fishing-related activities, including the import into the territory of one Party’s state of fish that were harvested as a result of IUU fishing within waters under the jurisdiction of the other Party.
2. Cooperate in identifying suspect vessels and exchanging information about them, including through the compilation of a list of suspect vessels. . . .
3. Exchange information concerning:
 - (a) on the fifth day of every month:
 - i) the aggregate quantity and types of imported fish that originated from the other Party’s state;
 - ii) vessels of the Parties, as well as suspect vessels, that have unloaded fish that originated in one Party’s state in ports of the other Party’s state ;
 - iii) vessels of the Parties, as well as suspect vessels, that were denied entry into a port of either Party because it was established that they have engaged in or they are suspected of having engaged in IUU fishing or in fishing-related activities in support of IUU fishing ;
 - iv) violations by individuals and/or legal entities of one Party of the legislation of the other Party concerning fishing or fishing-related activities;
 - (b) within 10 days of the time of completion of inspections:
 - i) the results of any inspection of fishing-related activities that is conducted by the competent authorities of one Party in its port on a vessel under the other Party’s flag or whose owner is an individual or legal entity of the other Party; and
 - ii) the results of any inspection of fishing-related activities that is conducted by the competent authorities of one Party in its port on suspect vessels that delivered fish that originated in the other Party’s state;

²⁰ U.S. and Russia Sign IUU Agreement, *supra* note 16.

²¹ Summers, *supra* note 17.

²² [Editors’ note: Article 1(1)(a) defines “illegal, unreported and unregulated fishing” as “the activities set out in paragraph 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.” That document is available at <http://www.fao.org/docrep/003/y1224e/y1224e00.htm>.]

- (c) within the shortest possible time, with respect to the Parties' vessels, as well as suspect vessels, that are requesting entry to a port of either Party to unload fish, to include information about each vessel, the names of the ports to which such vessels are requesting entry, the dates of receipt of such requests and, if available, information about the origin of the fish aboard such vessels;

....

4. Within the framework of their legislation and international agreements to which both Parties are party, cooperate to the fullest extent possible in the investigation and adjudication of cases related to IUU fishing and fishing-related activities in support of IUU fishing.
5. Take necessary measures, in accordance with the Parties' legislation, with respect to fish that originate in one Party's state and that have been unloaded or are to be unloaded in a port of the other Party's state in cases where there is evidence that such fish were harvested as a result of IUU fishing or fishing-related activities in support of IUU fishing provided by the Party where the fish originated.
6. Participate in working consultations and other types of joint activities conducted by the Parties' competent authorities.²³

The treaty entered into force on December 4, 2015. Given the reportedly mixed results achieved by prior bilateral treaties on IUU fishing that Russia entered into with Japan and South Korea,²⁴ it remains to be seen how effectively this agreement will restrain IUU fishing.

²³ U.S.-Russia IUU Fishing Agreement, *supra* note 16.

²⁴ Summers, *supra* note 17.